

“I was only following orders!”

Is this an acceptable defense?



Nuremberg Trials. Defendants in their dock, circa 1945-1946. (in front row, from left to right): Hermann Göring, Rudolf Heß, Joachim von Ribbentrop, Wilhelm Keitel (in second row, from left to right): Karl Dönitz, Erich Raeder, Baldur von Schirach, Fritz Sauckel.

<https://commons.wikimedia.org/w/index.php?curid=12435756>.

Supporting Questions

1. How was the “superior orders” defense used prior to World War II?
2. How did German officers use the superior orders defense at their trials?
3. Did German military personnel have a “moral choice” available to them? Why did they choose to follow orders?
4. What are today’s laws about following orders in the military?

<i>“I was only following orders!” Is this an acceptable defense?</i>	
Standards and Practices	Michigan Social Studies Standards (2007): USHG 7.2.4 RESPONSES TO GENOCIDE - Investigate development and enactment of Hitler’s “final solution” policy, and the responses to genocide by the Allies, the U.S. government, international organizations, and individuals (e.g. liberation of concentration camps, Nuremberg war crimes tribunals, establishment of state of Israel).
Staging the Question	Discuss why it is necessary for soldiers to follow orders. Ask, “What if it is an illegal order?”

Supporting Question 1	Supporting Question 2	Supporting Question 3	Supporting Question 4
How was the “superior orders” defense used prior to World War II?	How did German officers use the superior orders defense at their trials?	Did German military personnel have a “moral choice” available to them? Why did they choose to follow orders?	What are today’s laws about following orders in the military?
Formative Performance Task	Formative Performance Task	Formative Performance Task	Formative Performance Task
Students complete a timeline illustrating how the standard for judging the superior orders defense changed over time.	Jigsaw Activity: Groups summarize readings then present their summaries to each other while listeners take notes.	Use a graphic organizer to compile evidence of what choices German military personnel had and why they chose to follow orders, then summarize findings.	Students write a summary of the current legal and military consensus on the acceptability of the superior orders defense.
Featured Sources	Featured Sources	Featured Sources	Featured Sources
<p>Source A: Excerpt of article describing the first international war crimes trial in 1474.</p> <p>Source B: 19th-century American and English cases.</p> <p>Source C: Excerpts from “Obedience of Orders and the Law of War.”</p>	<p>Source A: Summary of the trial of Wilhelm Keitel.</p> <p>Source B: Summary of the trial of Alfred Jodl.</p> <p>Source C: Summary of the trial of Rudolf Hoess.</p> <p>Source D: Excerpt from Adolf Eichmann’s final plea at his war crimes trial.</p>	<p>Source A: Ways soldiers could avoid carrying out orders to commit murder.</p> <p>Source B: Why they carried out orders to murder.</p> <p>Source C: Excerpt from “Reserve Police Battalion 101.”</p> <p>Source D: Excerpt of testimony by perpetrator.</p>	<p>Source A: The Nuremberg principles.</p> <p>Source B: Article 33 of the Rome Statute of the ICC, 1998.</p> <p>Source C: Article, “When can a soldier disobey an order?”</p> <p>Source D: Article, “Why German soldiers don’t have to obey orders.”</p>

Summative Performance Task	ARGUMENT “I was only following orders” an acceptable defense? Construct an argument (e.g., detailed outline, poster, essay) that discusses the compelling question using specific claims and relevant evidence from historical sources while acknowledging competing views.
	EXTENSION While the Rome Statute is clear that soldiers have an obligation to disobey a “manifestly unlawful” order, it does not state what makes an order “manifestly unlawful.” Work in teams to rewrite the Rome Statute so that it offers a clear statement of what makes an order “manifestly unlawful” so that it is less confusing to officers and soldiers.
Taking Informed Action	<p>UNDERSTAND Research a recent case in which someone accused of committing atrocities has used the superior orders defense: “Washington Breaks Out the ‘Just Following Orders’ Nazi Defense for CIA Director-Designate Gina Haspel,” <i>The Intercept</i>, 15 March 2018.</p> <p>ASSESS Evaluate the circumstances of the case and determine whether the “superior orders” defense is acceptable in this case.</p> <p>ACT Write an editorial response to the publisher expressing agreement or disagreement with the article’s argument. Use evidence from this inquiry to support your argument.</p>

Overview

Inquiry Description

Georgetown University law professor Gary D. Solis writes,

“I was only following orders!” This phrase has been used so often, in so many circumstances, that today it is its own parody. The legal, moral, and personal implications of those words are rooted in man’s wartime conduct, as well as being his appeal for understanding and absolution. It is a plea mouthed by both the relatively innocent junior soldier and the duplicitous battlefield murderer. Does the phrase merit serious legal consideration? Is it a legitimate defense to war crimes today? Was it ever a legitimate defense to war crimes?

This inquiry asks students to explore issues of individual responsibility and moral choice by investigating the compelling question, **“I was only following orders! Is this an acceptable defense?”** Students will consider Dr. Solis’s questions and more as they study the history of the “superior orders” defense from its first known use in 1474, through the Nuremberg trials following World War II, to its appearance in our own times. The final summative assignment then asks students to make an argument answering the Compelling Question and support it with evidence from their inquiry.

An extension activity asks students to take informed action by writing an editorial response to an article describing a recent use of the superior orders defense.

NOTE: This inquiry is expected to take four to six 60-minute class periods.

The inquiry time frame could expand if teachers think their students need additional instructional experiences (i.e., supporting questions, formative performance tasks, and featured sources). Teachers are encouraged to adapt the inquiry in order to meet the needs and interests of their particular students. Resources can also be modified as necessary to meet individualized education plans (IEPs) or Section 504 Plans for students with disabilities.

The Inquiry Design Model (IDM) Blueprint

IDM is a distinctive approach to creating instructional materials that honors teachers’ knowledge and expertise, avoids over-prescription, and focuses on the key elements envisioned in the C3 Inquiry Arc. Unique to the IDM is the blueprint based on these key C3 elements—a one-page presentation of the questions, tasks, and sources that define a curricular inquiry. The blueprint offers a visual snapshot of an entire inquiry such that the individual components and the relationship among the components can all be seen at once.

—[Swan, John Lee, and S.G. Grant, “The New York State Toolkit and the Inquiry Design Model: Anatomy of an Inquiry,” *Social Education* 79\(5\). \(2015\): 316–322.](#)

In addressing the compelling question **“I was only following orders! Is that an acceptable defense?”** students will work through a series of supporting questions, formative performance tasks, and featured sources in order to construct an argument with evidence.

Content Background

Much of this inquiry deals with issues of responsibility that arose during the Nuremberg war crimes trials following the Holocaust. Before teaching this inquiry, it is important that teachers and students have a strong grasp of the historical context surrounding it. Fortunately, there are many resources available to teachers that provide reliable historical information on these subjects. One excellent resource is the [Holocaust Encyclopedia](#) created by the [United States Holocaust Memorial Museum](#). For information on the Nuremberg trials, try the USHMM Holocaust Encyclopedia's series "[International War Crimes Tribunal.](#)" An excellent "classroom-ready" resource is titled [War Crimes Trials](#), provided by [Echoes & Reflections](#).

For an overview of the Holocaust itself, the [United States Holocaust Memorial Museum](#)'s 38-minute film "[The Path to Nazi Genocide,](#)" is another excellent resource.

Additional standards may be emphasized through this inquiry, including the following.

Michigan Social Studies Standards (2007):

WHG 7.2.3 WORLD WAR II - Analyze the causes, course, characteristics, and immediate consequences of World War II by ... explaining the Nazi ideology, policies, and consequences of the Holocaust or (Shoah).

C3 Inquiry standards (2013):

D2.His.3.9-12 - Use questions generated about individuals and groups to assess how the significance of their action changes over time and is shaped by the historical context.

D2.His.16.9-12 - Integrate evidence from multiple relevant historical sources and interpretations into a reasoned argument about the past.

D4.1.9-12 - Construct arguments using precise and knowledgeable claims, with evidence from multiple sources, while acknowledging counterclaims and evidentiary weaknesses.

The Superior Orders Defense

The superior orders defense is the claim by a person accused of [war crimes](#) that "he did what he did because he was ordered to do so by a superior officer (or by his Government) and that his refusal to obey the order would have brought dire consequences upon him." [Levie, 1991.](#)

This defense was first used in the what is considered history's first international war crimes tribunal: the 1474 trial of the knight Peter von Hagenbach, who claimed he ordered the rape and pillage of the German town of Breisach under orders from the Duke of Burgundy. On trial before an ad hoc tribunal of the Holy Roman Empire, von Hagenbach asked the court, "Is it not known that soldiers owe absolute obedience to their superiors?" Ruling that he had no responsibility to obey orders so obviously "against the laws of God and Man," the court found von Hagenbach guilty and sentenced him to be drawn and quartered.

Nearly a half-millennium later, Nazi commanders on trial before the International Military Tribunal (IMT) at Nuremberg following World War II also tried to claim they were "only following orders." Their plea was met with similar results. The IMT refused to consider the defense of superior orders citing Article 8 of its [charter](#): "The fact that the Defendant acted pursuant to order of his Government or of a superior shall not free him from responsibility." Ever since, this justification that "I was only following orders" has been popularly known as the "Nuremberg Defense."

As students will discover in this inquiry, while the war crimes tribunals of 1474 and 1945 may have agreed that

acting under orders is no defense for committing atrocities, this was not always the case in the intervening five centuries, nor is it always the case today.

Why teach the “soldier’s dilemma” of superior orders?

In her lecture “[What the rule of law should mean in civics education: from the ‘Following Orders’ defence to the classroom](#),” legal scholar Martha Minow makes a strong case for why we should teach middle and high school students the “soldier’s dilemma” of having to both obey orders and disobey illegal orders. While the issue may seem a world away from the lives of students, Minow argues, the obedience dilemma of soldiers is analogous to issues students face with peers and groups at school, and that they will face as adults.

Should the corporate lawyer follow the directions of the CEO even if that means breaking or sneaking around the law? Should morality trump the demands of economic or political competition? The pervasiveness of these issues makes the topic vital; the starkness of the soldier’s dilemma makes it a terrific avenue for thinking through what we should think about teaching young people about the rule of law ...Pondering the dilemma of the soldier who must, for her own safety, obey orders but also know when to disobey them, may prompt the kind of conflict that produces advances in personal moral development ...

The situation of the soldier needing to follow orders and also needing to resist unlawful ones would provide a valuable topic for instruction in the independent thinking crucial to preventing future atrocities, to strengthen democracies and to pursue human dignity.

A Note on Terminology

While this inquiry is about issues of responsibility and moral decision making, its main topic, the superior orders defense, is a complex issue of international and military law. As such, most of the writing about this topic is authored by legal scholars, judges, and lawyers. As an authentic exploration of this complex issue, many of the sources in this inquiry come from those legal scholars, judges, and lawyers. While these sources have been edited for brevity and clarity, their vocabulary and structure may still prove challenging for some students. It is recommended that teachers follow best practices for teaching challenging content by previewing key terms and concepts. To help teachers do this, we have provided a glossary of [Key Terms](#) for each of the Featured Sources.

Best Practices in Holocaust Education

An excellent resource for Holocaust pedagogy and content is [Echoes & Reflections](#) — a collaboration between the [ADL](#), the [USC Shoah Foundation](#), and [Yad Vashem](#). The Echoes & Reflections website provides teachers with a free, comprehensive Holocaust education curriculum using video testimony from survivors. Echoes & Reflections recommends the following best practices:

Pedagogical Principles for Effective Holocaust Education

In order for students to understand the importance of the Holocaust as a historical event and as part of our shared human story, it is critical for teachers to have a sound pedagogy for instruction. [Echoes & Reflections](#) recommends the following “[pedagogy-in-practice](#)” principles for teachers to apply to their planning and implementation of a comprehensive Holocaust education program, allowing students to study this complex topic in a meaningful way and to ultimately apply what they have learned to their daily lives.

1. Define terms

In addition to key terms like antisemitism, Holocaust, and genocide, review key terms and phrases necessary to fully understand the content being studied.

2. Provide background on the history of antisemitism

Ensure students understand the role that antisemitism played in allowing the Holocaust to occur.

3. Contextualize the history

Help students understand what happened before and after a specific event, who was involved, where the event took place, etc. This helps to reinforce the fact that the Holocaust wasn’t inevitable, but rather was the result of choices and decisions made by individuals, institutions, and nations over years.

4. Teach the human story

While connecting people and events to the larger story, educators should:

- Translate statistics into personal stories; use survivor and witness testimony whenever possible; emphasizing, however, that survivor voices are the exception.
- Highlight examples of how victims attempted to retain their humanity in the face of dehumanization (efforts to maintain identity and continuity of life, expression of values/beliefs, forms of resistance).
- Stress the “choiceless choices” of the victims with limited or no power to escape.
- Introduce victims’ prewar life/return to life to provide context for their choices, dilemmas, and actions.
- Focus on small and large decisions made by individuals who had the ability and the opportunity to choose between morally right and morally wrong decisions prior to, during, and after the Holocaust, including bystanders, collaborators, perpetrators, and rescuers.

5. Use primary source materials

Enrich students’ understanding of the Holocaust by providing an abundance of print and digital resources from a variety of perspectives.

6. Make the Holocaust relevant

Connect what students are learning to contemporary events, while distinguishing between the unique history of the Holocaust and what can be learned from its history and applied to our reality.

7. Encourage inquiry-based learning and critical thinking

Support students’ sharing of ideas and asking questions of themselves and others.

8. Foster empathy

Challenge students to understand people and their attitudes and actions in a historical context using sound approaches and strategies, refraining from the use of simulation activities.

9. Ensure a supportive learning environment

Guide students “safely in and safely out” of this study; use age-appropriate materials and always be mindful of the social and emotional needs of individual students.

For additional exploration of effective teaching approaches, please visit the Echoes & Reflections [Video Toolbox](#) and watch the 11-minute film “Teaching about the Holocaust in Today’s World.”

About the Creators

This inquiry was created by the education staff at the [Holocaust Memorial Center Zekelman Family Campus](#) in Farmington Hills, Michigan.

The Holocaust Memorial Center offers outstanding teacher professional development in Holocaust education. For information and registration, check out our one-day [Echoes & Reflections training sessions](#). Also, check out our week-long [Michigan Summer Seminar on Holocaust Education](#) and use the link to register.

Visit us by [scheduling a field trip](#) to the Holocaust Memorial Center.

If you have any questions regarding teaching this IDM to your students, or if you would like any guidance or assistance in teaching about the Holocaust, please contact the [education department at the Holocaust Memorial Center](#). The Holocaust is a complex and challenging topic to teach. The Holocaust Memorial Center has a team of education specialists that are here to support educators with the training and resources necessary to teach the Holocaust with confidence.

Staging the Compelling Question - Overview for the Teacher	
Compelling Question	"I was only following orders!" Is this an acceptable defense?
Featured Sources	<p>Featured Source A: Excerpt from Rogers, A. P. V. (1996) <i>Law on the battlefield</i> (Manchester and New York, Manchester University Press).</p> <p>Featured Source B: Scene from the film "A Few Good Men" (1992).</p>

To set the stage for students to explore the Compelling Question, ***"I was only following orders! Is this an acceptable defense?"***, begin by discussing the following prompt: "What would happen if we all decided not to follow orders?" Ask students to consider:

- What personal consequences might you face for disobedience at school? At home? At work? In public?
- What would be the effect on how the school functions? How would it affect behavior? How would it affect safety? What would be the effect on your ability to learn?
- What would be the effect on how you and your classmates get along? How would it affect how our community functions? Could it function? What are the potential consequences for public safety? How would it affect our ability to be a self-governing society?

Follow up by asking why it's necessary for people in the military to follow orders.

To illustrate the necessity of following orders in the military you can share the following Featured Sources.

Featured Source A is an excerpt from the book, "Law on the battlefield" in which British military legal scholar A.P.V. Rogers explains the life-and-death importance of obeying orders in the military.

Featured Source B is a clip from the 1992 film, "A Few Good Men" in which Jack Nicholson's character says, "We follow orders or people die." Show the clip from the beginning until the 1:05 mark, when the Navy prosecutor, played by Tom Cruise, replies, "Crystal."

After discussing the need for obedience in the military, pose the questions: "But what if it is an unlawful order?" and "What if the order is against your personal beliefs?"

Explain that this inquiry will explore the Compelling Question, ***"I was only following orders! Is this an acceptable defense?"***

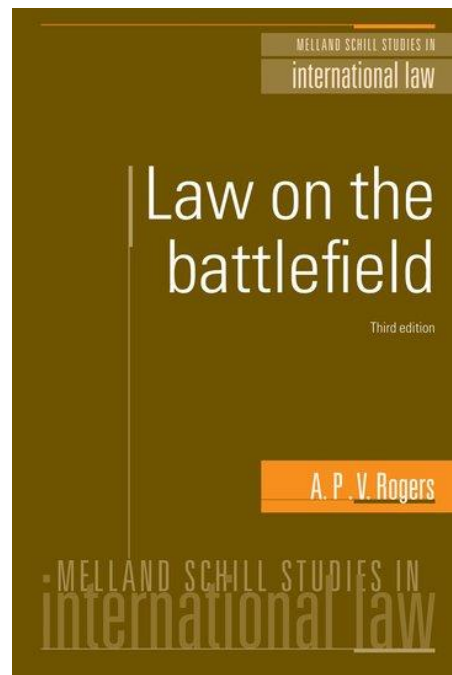
Name: _____ Date: _____

Staging the Compelling Question

Compelling Question	"I was only following orders!" Is this an acceptable defense?
Featured Source A	Excerpt from Rogers, A. P. V. (1996) <i>Law on the battlefield</i> (Manchester and New York, Manchester University Press), quoted in Minow, Martha. What the rule of law should mean in civics education: from the 'Following Orders' defence to the classroom, <i>Journal of Moral Education</i> Vol. 35, No. 2, June 2006, pp. 137–162.

"Military effectiveness depends on the prompt and unquestioning obedience of orders to such an extent that soldiers are prepared to put their lives at risk in executing those orders. During military operations decisions, actions and instructions often have to be instantaneous and do not allow time for discussion or attention by committees. It is vital to the cohesion and control of a military force in dangerous and intolerable circumstances that commanders should be able to give orders and expect their subordinates to carry them out."

—Rogers, A. P. V. (1996) *Law on the battlefield* (Manchester and New York, Manchester University Press)



Staging the Compelling Question - Overview for the Teacher

Compelling Question	“I was only following orders!” Is this an acceptable defense?
Featured Source B	Scene from the film “A Few Good Men” (1992). Accessed from: https://www.youtube.com/watch?v=nyKJeXDoqnw

In the first featured source, A.V.P. Taylor explained why military “commanders should be able to give orders and expect their subordinates to carry them out.” While Taylor’s explanation is clear, it is worded in the cold, precise language of a military academic. **Featured Source B** provides a much more vivid explanation that should be instantly clear to students in a way that Taylor’s quote might not. **Featured Source B** is a clip from the 1992 film, “A Few Good Men” in which Jack Nicholson’s character states emphatically, “We follow orders or people die.”

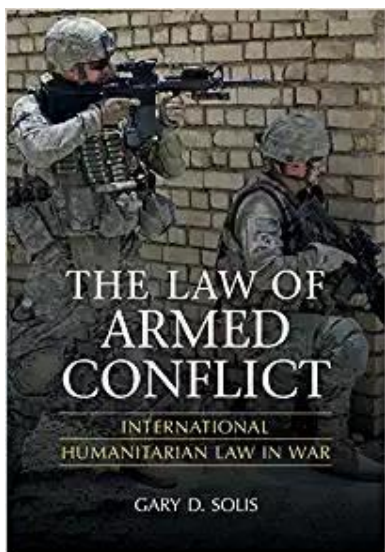
Show the clip from the beginning until the 1:05 mark, when the Navy prosecutor, played by Tom Cruise, replies, “Crystal.”

After discussing the need for obedience in the military, pose the questions: “But what if it is an unlawful order?” and “What if the order is against your personal beliefs?” Explain that this inquiry will explore the Compelling Question, **“I was only following orders!” Is this an acceptable defense?**



Supporting Question 1 - Overview for the Teacher

Supporting Question	How was the “superior orders” defense used prior to World War II?
Formative Performance Task	Use a graphic organizer to gather key facts of pre-WWII cases involving the superior orders defense.
Featured Sources	<p>Source A: Excerpt of article describing the first international war crimes trial in 1474.</p> <p>Source B: 19th-century American and English cases.</p> <p>Source C: Excerpts from “Obedience of Orders and the Law of War.”</p>



“Is the individual soldier immune from punishment because he carried out his duties pursuant to the orders of a superior? It was not until World War II,” writes Georgetown University law professor Gary D. Solis, “that the question of personal responsibility appeared resolved, bringing about significant change to this ancient defense.”

To answer the compelling question, “*I was only following orders!* Is this an acceptable defense?” students will need to understand what the **superior orders defense** is and how the standards for judging this “ancient defense” have changed over time. **Supporting Question 1** asks students “*How was the ‘superior orders’ defense used prior to World War II?*”

The **Formative Performance Task** calls on students to gather information on the evolution of the superior orders defense from its first known use in the 15th century through its appearance as a defense at the Nuremberg trials. As they study the Featured Sources, students use a graphic organizer to create a timeline that tracks how the standard for judging the superior orders defense changed over time.

Featured Source A is a Harvard Law Review article that describes the 15th-century trial of Peter von Hagenbach, considered history’s first international war crimes tribunal. Foreshadowing the Nuremberg trials nearly 500 years later, von Hagenbach used as his defense that he was simply following orders. The court rejected von Hagenbach’s defense and sentenced him to death.

Featured Source B is an excerpt from a 1944 pamphlet titled, “[What Shall Be Done with the War Criminals](#),” written by Harvard law professor Sheldon Glueck for the “[G.I. Roundtable Series](#),” published by the American Historical Association for the U.S. Army to help win the war and prepare for the transition to a postwar world. This excerpt from the section titled, “Are Superior Orders a Legitimate Defense,” describes three 19th-century cases—two American and one British—involving the superior orders defense. Upon analysis of these three cases, students will discover that, while the courts did not all reach the same verdict, in each case the same standard was applied to the superior orders defense: a soldier is protected by the superior orders defense, unless the orders are “so manifestly illegal that he must or ought to have known they were unlawful.”

Featured Source C is an excerpt from “[Obedience of Orders and the Law of War: Judicial Application in American Forums](#),” by Georgetown University law professor Gary D. Solis. In this excerpt, Solis describes the evolution of the military and legal standards for judging the superior orders defense from the late 19th-century through Nuremberg trials. Students will discover that while the standard applied by Imperial Germany [1871-1918] remained consistent in its rejection of the defense, American and British military law took a 30-year “legal detour” from this position, accepting the superior orders defense as an absolute shield from war crimes charges in the early decades of the 20th century, only to come full-circle to the “new old standard” of the late 19th-century found in Featured Source A.

Name: _____ Date: _____

Supporting Question 1

Featured Source

A

Excerpt from Grant, Linda, "Exhibit highlights the first international war crimes tribunal," *Harvard Law Review*, April 1, 2006.

Accessed from: <https://today.law.harvard.edu/exhibit-highlights-the-first-international-war-crimes-tribunal/>



Included in a recent Harvard Law School library exhibit, these illustrations from a 16th-century book show instruments of torture and a criminal on the way to execution during the late 1400s. This was the period when the first international criminal tribunal tried and convicted an individual for "violating the laws of God and man." Image credit: Gustav Freedman

The following is an excerpt from "Exhibit highlights the first international war crimes tribunal," written by Linda Grant, published in the *Harvard Law Review* on April 1, 2006.

As the marshal shouted "Let justice be done," Peter von Hagenbach was beheaded in 1474, after being tried and convicted by the first international criminal tribunal. Created by the Archduke of Austria, the tribunal consisted of 28 judges from different states in the Holy Roman Empire. Von Hagenbach, appointed governor by Charles the Bold, Duke of Burgundy, was told to keep order in Austria's territories on the upper Rhine. In fulfilling the duke's directive, von Hagenbach terrorized the population.

Charged with violation of "the laws of God and man," specifically murder, rape and perjury, among other crimes, von Hagenbach used as his defense that he was simply following orders. "Is it not known that soldiers owe absolute obedience to their superiors?" he asked.

By setting up a court to handle von Hagenbach's case, rather than holding a summary execution, the Archduke of Austria laid the groundwork for the Nuremberg Trials, the international criminal tribunals for the former Yugoslavia and Rwanda, and the International Criminal Court, says Professor Martha Minow.

"Von Hagenbach's defense, 'just following orders,' was raised by several defendants at the the Nuremberg Trials" ... said Minow.

Name: _____ Date: _____

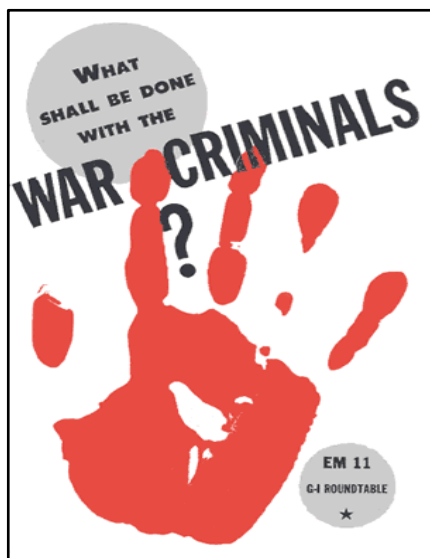
Supporting Question 1

Featured Source

B

Examples of 19th-century American and English cases involving the superior orders defense. Excerpted from AHA article, "Are Superior Orders a Legitimate Defense?" (1944).

Accessed from: [https://www.historians.org/about-aha-and-membership/aha-history-and-archives/gi-roundtable-series/pamphlets/em-11-what-shall-be-done-with-the-war-criminals-\(1944\)/are-superior-orders-a-legitimate-defense](https://www.historians.org/about-aha-and-membership/aha-history-and-archives/gi-roundtable-series/pamphlets/em-11-what-shall-be-done-with-the-war-criminals-(1944)/are-superior-orders-a-legitimate-defense)



The American View

A famous American case is that of [*Mitchell v. Harmony, 54 U.S. 13 How. 115 115 \(1851\)*](#), a civil suit growing out of the Mexican War [1846 - 1848]. An American Army officer in Mexico illegally seized the goods of a trader in occupied territory. When later sued for the price of the goods, he claimed to have acted under orders of a superior officer. The court refused to consider this plea. Chief Justice Taney of the United States Supreme Court declared: "It can never be maintained that a military officer can justify himself for doing an *unlawful* act by producing the order of his superior. The order may *palliate*, but it cannot justify" the deed.

In another well-known American case, [*United States v. John Jones, 36 Fed. Cas. 653 \(No. 15494\) \(C.C.D. Pa. 1813\)*](#), some members of the crew of an

American privateer were tried because, during the War of 1812, they stopped and searched a neutral Portuguese vessel on the high seas, assaulted the captain and crew, and stole valuables. They were held guilty of the act. With reference to the defense of Jones and the others that they had only obeyed their captain's orders, the justice said: "This doctrine [that the defendant is innocent because he was following orders], ... alarming and unfounded, is repugnant to reason, and to the positive law of the land. No military or civil officer can command an inferior to violate the laws of his country; nor will such command excuse, much less justify the act. Can it be for a moment pretended, that the general of an army, or the commander of a ship of war, can order one of his men to commit murder or felony? Certainly not."

The English View

A leading case in English legal history is that of [*Regina v. Smith, 17 Cape Reports 561 \(South Africa, 1900\) \(p. 130\)*](#). During the Boer War [1899 - 1902] a patrol of British soldiers, sent out on a dangerous mission, had an argument with a [South African] native who hesitated to find a bridle for them. Smith, one of the soldiers, under orders of his superiors, killed the [South African] native on the spot. After the war, a special court tried Smith for murder and acquitted him. The court said, "I think it is a safe rule to lay down that if a soldier believes he is doing his duty in obeying commands of his superior, and if the orders are not so manifestly illegal that he must or ought to have known they were unlawful, the private soldier would be protected by the orders of his superior officer."

Supporting Question 1 - Overview for the Teacher

Featured Source

C

Excerpt from Solis, Gary D. "Obedience of Orders and the Law of War: Judicial Application in American Forums." *American University International Law Review* 15, no. 2 (1999): 481-526.

Accessed from:

<https://digitalcommons.wcl.american.edu/cgi/viewcontent.cgi?referer=https://www.google.com/&httpsredir=1&article=1268&context=auilr>

Featured Source C is an excerpt from "[Obedience of Orders and the Law of War: Judicial Application in American Forums](#)," by Georgetown University law professor Gary D. Solis. In this excerpt, Solis describes the evolution of the military and legal standards for judging the superior orders defense from the late 19th-century through Nuremberg trials. Students will discover that while the standard applied by Imperial Germany [1871-1918] remained consistent in its rejection of the defense, American and British military law took a 30-year "legal detour" from this position, accepting the superior orders defense as an absolute shield from war crimes charges in the early decades of the 20th century, only to come full-circle to the "new old standard" of the late 19th-century found in Featured Source A.

In the first section, "**THE TWENTIETH CENTURY: AN EVOLVING STANDARD**," students will find that after centuries of consensus that superior orders provided no protection for war crimes, the United States and Great Britain's rules of warfare began to change.

In 1906, prominent British law professor and publicist, Lassa Oppenheim asserted that "If members of the armed forces commit violations by order of their government, they are not war criminals and cannot be punished by the enemy." Over the next decade, British and American military field manuals followed Oppenheim's pronouncement nearly word-for-word, "making a subordinate's obedience to orders a complete legal defense, setting aside American military and civilian case history of the past 110 years." As the second world war approached, the American field manual diverged even farther from centuries-old standard by stating in 1934 that a soldier is always exempt from prosecution for crimes committed under orders, and that there is no requirement that an order must be lawful in order to be obeyed.

In the second section, "**THE TWENTIETH CENTURY: AN EVOLVING STANDARD [Imperial Germany]**," students will be surprised to discover that while those they view as the "good guys" in World War II—Great Britain and the United States—were becoming more accepting of the superior orders defense, Imperial Germany remained steadfast in its rejection of it.

This excerpt provides brief overviews of two cases from the First World War in which German U-boat officers claimed they were not liable for committing war crimes because they were ordered to do so by superior officers. In the first case, the commander of a German U-boat was accused of sinking the British hospital ship *Dover Castle*, in violation of the rules of war. The court ruled since the U-boat commander believed that he was acting under lawful orders, he was not responsible for the sinking of the *Dover Castle*.

In the second example, German U-boat officers were tried for machine-gunning the survivors of the torpedoed hospital ship *Llandoverly Castle* as they floated helplessly in lifeboats or in the water. As in the *Dover Castle* case, the officers claimed they were not liable because they acted under superior orders. In this case, however, the court ruled that the officers were responsible because, though they acted under superior orders, shooting survivors was so manifestly contrary to the law, the officers must have known or should have known that they were committing war crimes.

Since the German high court reached different verdicts in these two cases—not guilty in *Dover Castle*; guilty in *Llandovery Castle*—students might mistakenly conclude that these two cases represent different interpretations of the superior orders defense. Therefore it is important to help students to recognize that while the verdicts differed, the *standard* they were based on is the same: “[T]he Imperial Court applied the more strict German military code’s standard, not the revised standard of the American and British victors. It was ironic in that the German standard was similar to the one ... which the American victors had [abandoned]. The German standard was that subordinates were liable for carrying out orders they knew to be illegal, or should have known to be illegal. Likewise, officers issuing orders that they knew, or should have known, to be illegal, were personally liable.”

In the third excerpt, “**WORLD WAR II: AN OLD NEW STANDARD**,” students will learn that by the end of World War II, the Great Britain and the United States had returned to the rejection of superior orders that they had abandoned decades earlier: “[t]he plea of superior orders shall not constitute a defense ... if the order was so manifestly contrary to the laws of war that a person of ordinary sense and understanding would know or should know ... that an order was illegal.”

Why the reversal? As the end of the war approached, the Allies were determined to hold Germans accountable for their crimes. Article 8 of the charter of the International Military Tribunal, created to punish war crimes, stated that “[t]he fact that the defendant acted pursuant to order of his Government or of a superior shall not free him from responsibility ...” The IMT intended to hold the Nazis criminally responsible for war crimes they committed, and for war crimes they ordered. Obedience to superior orders would be no shield...”

As Solis explains:

The IMT intended to hold the Nazis criminally responsible for war crimes they committed, and for war crimes they ordered. Obedience to superior orders would be no shield ...

In anticipation of the trial of the Nazis, the Allies had reverted their law regarding the superior orders defense to the pre-1914 standard, which had applied all along in German courts-martial ... The Anglo-American legal detour had lasted thirty years, but the IMT seemingly brought the soldiers’ legal defense full circle: a [war crime] pursuant to a superior’s manifestly illegal order remained a war crime.

Name: _____ Date: _____

Supporting Question 1

Featured Source

C

Excerpt from Solis, Gary D. "Obedience of Orders and the Law of War: Judicial Application in American Forums." *American University International Law Review* 15, no. 2 (1999): 481-526.

Accessed from:

<https://digitalcommons.wcl.american.edu/cgi/viewcontent.cgi?referer=https://www.google.com/&httpsredir=1&article=1268&context=auilr>

THE TWENTIETH CENTURY: AN EVOLVING STANDARD

... For the United States and Great Britain, the mid-Nineteenth Century standard remained fixed: an officer was criminally responsible for the issuance or execution of orders he knew, or should have known to be illegal. Subordinates, in turn, were *not* liable for illegal orders they carried out, unless the illegality of those orders was clear ...

In 1906, Lassa Oppenheim, a prominent British international law professor and publicist, postulated that obedience to superior orders constituted a complete and absolute defense to criminal prosecution. "If members of the armed forces commit violations by order of their Government, they are not war criminals and cannot be punished by the enemy ... In case members of forces commit violations ordered by their commanders, the members cannot be punished, for the commanders are alone responsible ..."

Oppenheim was instrumental in bringing about a sea change to the soldiers' obedience defense. There was no personal responsibility, Oppenheim held, when superiors ordered criminal acts. Oppenheim later wrote Great Britain's 1912 handbook on the rules of land warfare ... The new handbook incorporated Oppenheim's *dicta* that, for subordinates, obedience to orders constituted a complete defense to violations of the law of war ...

Looking to Great Britain's example ... in 1914 [the United States] published its first manual relating to the law of war ... [T]he *Rules of Land Warfare* read: "[I]ndividuals of the armed forces will not be punished for [war crimes if] they are committed under the orders or sanction of their government or commanders ..." With this paragraph, the United States' published policy joined Britain's revised manual in making a subordinate's obedience to orders a complete legal defense, setting aside American military and civilian case law of the previous 110 years ...

As World War II approached, the United States and United Kingdom continued to view superior orders as a complete defense to subordinate's war crimes. In the 1929 edition of her land warfare manual, the United Kingdom baldly stated:

... members of the armed forces who commit such violations of the recognized rules of warfare as are ordered by their Government or by their commander are not war criminals and cannot therefore be punished ...

In 1934, the United States published a new edition of the *Rules of Land Warfare* ... which ... did not vary from the original ... [A soldier] remained fully exempt from prosecution if the soldier committed the crime pursuant to the order of a superior. There was no [requirement] that the order must have been [lawful].

THE TWENTIETH CENTURY: AN EVOLVING STANDARD [Imperial Germany]

Curiously, Imperial Germany [1871 - 1918], where obedience was ... thought to be absolute, employed a different and less forgiving rule [than the United Kingdom and the United States]. Imperial courts punished subordinates if they executed an order knowing that it “related to an act which obviously aimed at a crime.” Such a ruling is comparable to ... the pre-1914 United States military standard ...

There were two ... notable [German] cases that involved the defense of superior orders. Lieutenant Karl Neumann, commander of a German submarine [during World War I], admitted that he had torpedoed and sunk the British hospital ship, *Dover Castle*, but pleaded that he did so only in obedience to orders issued by the Admiralty. Indeed, the German Government had asserted that the enemy was using hospital ships for military purposes, in violation of customary international law, and declared on March 19, 1917 that German submarines would attack hospital ships not complying with several German conditions. The Imperial Court held that Neumann believed the order to be [lawful] and therefore was not personally responsible for the sinking of the *Dover Castle* ... [T]he Court applied the German obedience to orders standard delineated in Section 47 of the German Military Penal Code, which stated that a subordinate acting in conformity with superior orders is liable to punishment only when he knows his orders [are illegal]. Applying the German standard, the Imperial Court acquitted Neumann.

A similar case, however, saw a different result and actually set a standard for obedience to orders. The Allies charged Lieutenants Ludwig Dithmar and Johann Boldt, of the submarine U-86, for the sinking of a Canadian hospital ship, the *Llandovery Castle*. At trial, the evidence revealed that, just after the sinking, Captain Helmuth Patzig sought to conceal the sinking of the hospital ship and ordered the two accused subordinates to help kill the survivors. Patzig and another officer machine-gunned the survivors in lifeboats in the water, assisted by Dithmar and Boldt who spotted targets and maintained a lookout. The officers sunk at least two lifeboats. The Imperial Court was unable to determine a precise number of casualties from the gunfire because many of the survivors drowned or were victims of shark attacks ...

[S]ince [Patzig] had taken refuge in the then-independent state of Danzig, he [could not be brought to trial]. Like Neumann in the *Dover Castle* case, Dithmar and Boldt pleaded “not guilty” on the basis of superior orders from the German naval high command. Also like Neumann, the Court found that Dithmar and Boldt were not guilty of sinking the hospital ship by reason of obedience to superior orders. The Imperial Court found them guilty as accessories to homicide, however, due to their help with machine-gunning of the survivors. In explaining its ruling, the Court stated:

According to the Military Penal Code, if the execution of an order ... involves ... a violation of law... , the superior officer issuing such an order is alone responsible. However, the subordinate obeying such an order is liable to punishment if it was known to him that the order ... involved the infringement of civil or military law.

[S]hooting survivors in the water was manifestly contrary to customary international law ... [T]he judges found that Dithmar and Boldt had knowledge or should have had knowledge that their actions were against the law of war ...

[T]he Imperial Court applied the more strict German military code’s standard, not the revised standard of the American and British victors. It was ironic in that the German standard was similar to the one ... which the American victors had [abandoned]. The German standard was that subordinates were liable for carrying out orders they knew to be illegal, or should have known to be illegal. Likewise, officers issuing orders that they knew, or should have known, to be illegal, were personally liable.

SQ1

Name: _____ Date: _____

Supporting Question 1:	How was the “superior orders” defense used prior to World War II?
Formative Performance Task:	Use the graphic organizer to gather key facts of pre-WWII cases involving the superior orders defense.

Featured Source A	Excerpt from Grant, Linda, “Exhibit highlights the first international war crimes tribunal,” <i>Harvard Law Review</i> , April 1, 2006.
In his defense, what question did Peter von Hagenbach ask the court?	
Why do you think the court rejected this defense?	

Featured Source B	Examples of 19th-century American and English cases involving the superior orders defense. Excerpted from AHA article, “Are Superior Orders a Legitimate Defense?” (1944).
<i>Mitchell v. Harmony</i>	<p>What was the court’s verdict in <i>Mitchell v. Harmony</i>? (circle one) Guilty / Not Guilty</p> <p>What did Chief Justice Taney of the U.S. Supreme Court declare in response to the the defendant’s claim that he was only following the orders of his superior officer? Use your own words to explain Taney’s reasoning.</p>
<i>The United States v. John Jones</i>	<p>What was the court’s verdict in <i>The United States v. John Jones</i>? Guilty / Not Guilty</p> <p>What did the justice (judge) say in response to the defense of Jones and the others that they had only obeyed their captain’s orders? Use your own words to explain the justice’s reasoning.</p>

<i>Regina v. Smith</i>	<p>What was the court’s verdict in <i>Regina v. Smith</i>? Guilty / Not Guilty</p> <p>According to the court’s statement, under what circumstances should a soldier not obey a superior’s order? Use your own words to explain the court’s reasoning.</p>
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Although they did not all come to the same verdict, the the courts in these three 19th-century cases used similar reasoning in making their decisions. Based on these three cases, what would you say was the 19th-century standard for judging cases involving the superior orders defense?

Featured Source C	<p>Excerpt from Solis, Gary D. "Obedience of Orders and the Law of War: Judicial Application in American Forums." <i>American University International Law Review</i> 15, no. 2 (1999): 481-526.</p>
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INSTRUCTIONS: Featured Source C describes how the standard for judging the superior orders defense changed over the course of the 20th century. Complete the timeline below to track this evolution.

THE TWENTIETH CENTURY: AN EVOLVING STANDARD [Imperial Germany]

Date:	Standard for the superior orders defense:
19th Century	British and American standard:
1906	Lassa Oppenheim (British):

<p>1912</p>	<p>British handbook on the rules of land warfare:</p>
<p>1914</p>	<p>The United States <i>Rules of Land Warfare</i>:</p>
<p>1929</p>	<p>US and UK standard:</p>
<p>1934</p>	<p>New edition of United States <i>Rules of Land Warfare</i>:</p>

THE TWENTIETH CENTURY: AN EVOLVING STANDARD [Imperial Germany]

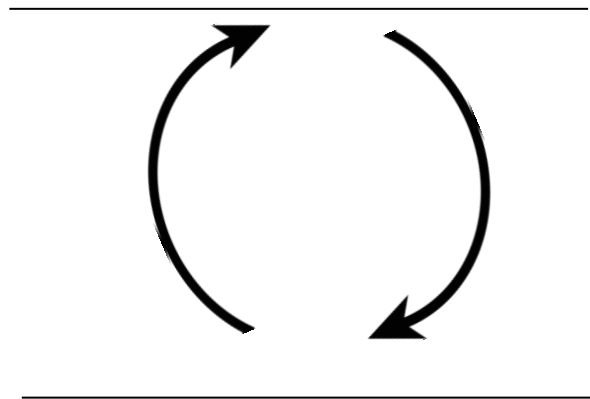
<p>1917</p>	<p><i>Dover Castle</i> case:</p>
<p>1921</p>	<p><i>Llandovery Castle</i> case:</p>

WORLD WAR II: AN OLD NEW STANDARD

<p>January 1944</p>	<p>United Nations War Crimes Commission:</p>
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<p>April 1944</p>	<p>United Kingdom’s military field manual:</p>
<p>1947</p>	<p>Article 8 of the IMT Charter:</p>

According to the article, “The Anglo-American legal detour had lasted thirty years, but the IMT seemingly brought the soldiers’ legal defense full circle.” To come “full circle” means to start in one place, go to a different place, then return to where you started. Label the diagram below to illustrate how the English and American legal standard came “full circle.” At the top, write the standard that they left in 1914 and returned to in 1947. At the bottom, write the standard they adopted during their 30-year “detour.”



Supporting Question 2 - Overview for the Teacher	
Supporting Question	How did German officers use the superior orders defense at their trials?
Formative Performance Task	Jigsaw Activity: Groups read German officer statements defending their decisions and actions. Groups summarize the readings then present their summaries to each other while listeners take notes.
Featured Sources	<p>Source A: Summary of the trial of Wilhelm Keitel.</p> <p>Source B: Summary of the trial of Alfred Jodl.</p> <p>Source C: Summary of the trial of Rudolf Hoess.</p> <p>Source D: Excerpt from Adolf Eichmann’s final plea at his war crimes trial.</p>

The most famous use of the superior orders defense is, without a doubt, the claim by Nazi leaders and military commanders that in committing the murder of two-thirds of the Jews of Europe, they had been following orders and were thereby innocent of war crimes. **Supporting Question 2** asks, *“How did German officers use the superior orders defense at their Trials?”*

The **Formative Performance Task** helps students answer this question by working collaboratively in a jigsaw activity to quickly gather information on the trials and verdicts of four war criminals.

Divide the class into four groups and assign each group one of the four Featured Sources. Each group should use the graphic organizer to collect information about the war criminal described in their assigned source. Once the teams have completed their graphic organizers, they should report their findings to their classmates, as their listeners take notes.

Students will discover that, applying the standard set by [Article 8 of the International Military Tribunal \(p. 288\)](#) (“The fact that the Defendant acted pursuant to order of his Government or of a superior shall not free him from responsibility”), the courts in all four cases rejected the pleas of the Nazi commanders, sentencing them to death by hanging.

Featured Sources A, B, and C are succinct summaries of the International Military Tribunal’s postwar trials of three Nazi military leaders: Wilhelm Keitel, Supreme Commander of the Wehrmacht; Alfred Jodl, Chief of Staff for war operations in the Wehrmacht; and Rudolf Hoess, commandant of Auschwitz. All three claimed they were only following orders.

Featured Source D is the final plea of Adolf Eichmann, one of the key organizers of the Holocaust. Unlike, Keitel, Jodl, and Hoess, Eichmann was not tried by the International Military Tribunal at Nuremberg. Having eluded the Allies at the end of World War II, Eichmann escaped to South America where he was captured by the Israeli intelligence services (the Mossad) in 1960. Like the others, Eichmann claimed that he was only following orders, even going so far to say that *he was a victim*. The Israeli court rejected Eichmann’s plea and sentenced him to death.



A large chart showing Nazi "Chain of Command" (in the background at left) was displayed during the afternoon of the third day of the Nuremberg War Crimes Trials in Germany. At the same session, Major Frank B. Wallis (standing at desk near center), a member of trial counsel and trial preparation legal staff, presents further items of the prosecution's case. Defendants Hermann Goering (first in box at left), Rudolph Hess, and Joachim von Ribbentrop are visible in the defendants' box. November 22, 1945.

<https://www.trumanlibrary.org/photographs/view.php?id=11286>

Name: _____ Date: _____

Supporting Question 2

Featured Source

A

Summary of the trial of Wilhelm Keitel, Chief of the Armed Forces High Command in Nazi Germany.

Accessed from: <https://trialinternational.org/latest-post/wilhelm-keitel/>

Wilhelm Keitel was named Supreme Commander of the Wehrmacht (German armed forces)... in 1938. Following Hitler's orders to the letter, he covered up the atrocities committed during the Russian campaign (Jewish massacres, execution of Red Army political commissioners...). After the failed attempt on Hitler's life, in July 1944, he allowed the execution of hundreds of officers of the German army to go ahead.

It was Keitel who signed the attack orders, or who was present at the meetings during which attacks were decided against Czechoslovakia, Denmark, Norway, Poland, The Netherlands, Greece, Yugoslavia and the USSR. Furthermore he signed numerous decrees authorising, for example, the execution of striking workers or the killing of captured underground fighters ...



Charged with counts 1 (concerted plan or conspiracy), 2 (crimes against peace), 3 (war crimes) and 4 (crimes against humanity), he pleaded not guilty.

Keitel's signature... appeared on the notorious decree "Nacht und Nebel" ("Night and Fog") passed on 7 December 1941, whereby civilians in the occupied territories, suspected of being in the resistance would only be tried if the death penalty was the probable outcome. Failing this they would be turned over to the Gestapo which had them disappear without trace in Germany ...

Faced with the evidence, Keitel did not deny the essential facts. However in his defence, he indicated that, as a soldier, he had only been following orders from his superiors and that he was not in a position to make decisions in his own right. The Tribunal did not follow this line of reasoning. In consideration of Article 8 of the Charter of the Tribunal [which states "The fact that the Defendant acted pursuant to order of his Government or of a superior shall not free him from responsibility, but may be considered in mitigation of punishment if the Tribunal determines that justice so requires."], the concept of "superior orders" was not admitted as excusing him from his criminal responsibility.

As a result, the Tribunal found Keitel guilty on all of the charges, and sentenced him to death on 1 October 1946. His appeal to the Control Council was rejected on 10 October 1946. Wilhelm Keitel was executed by hanging on 16 October 1946.

Name: _____ Date: _____

Supporting Question 2

Featured Source

B

Summary of the trial of Alfred Jodl, Chief of the Operations Staff of the Armed Forces High Command in Nazi Germany.

Accessed from: <https://trialinternational.org/latest-post/alfred-jodl/>

Alfred Jodl was born on 10 May 1890 in Bavaria into a family of army officers and embarked upon a military career ... Being a staunch supporter of the Nazi party, he was nominated, in 1939, to the position of Chief of Staff for war operations of the Oberkommando der Wehrmacht [High Command of the Armed Forces] ...

Jodl participated in the military planning and in the preparation of the Nazi conspiracy aimed at waging wars of aggression ... He authorised, directed and took part in acts constituting war crimes ... and in crimes against humanity ...

Charged with counts 1 (common plan or conspiracy), 2 (crimes against peace), 3 (war crimes) and 4 (crimes against humanity), he pleaded not guilty.



In his defence Jodl insisted on his military status and thus on the absolute duty wherever he was to carry out any orders received. He pointed out that whenever he gave out or signed orders, memorandums or letters, he did so in the name of Hitler and very often in place of Keitel [Supreme Commander of the Armed Forces]. Furthermore he tried to demonstrate in his defence that even if, as a matter of principle, he had to carry out orders received, he frequently tried to resist the more evil measures ordered, notably by delaying their implementation ...

According to the Tribunal, the participation in such crimes as those demonstrated had never been ... required of any soldier and Jodl could not therefore hide behind the “mythical” requirement of blind obedience of a soldier...

The Tribunal as a result, found Alfred Jodl guilty on all four counts and condemned him to death on 1 October 1946.

His appeal to the Control Council was rejected on 10 October 1946.

Alfred Jodl was executed by hanging on 16 October 1946.

Photo: <https://commons.wikimedia.org/wiki/File:Alfred-jodl-72-926.jpg>

Name: _____ Date: _____

Supporting Question 2

Featured Source

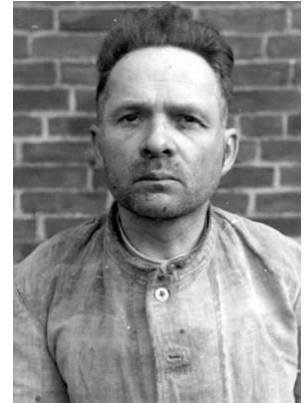
C

Summary of the trial of Rudolf Hoess, commandant of Auschwitz extermination camp.

Accessed from: <https://trialinternational.org/latest-post/rudolf-franz-ferdinand-hoess/>

In 1933 Rudolf Hoess joined the SS ... He was appointed commander in the concentration camp Auschwitz in 1940.

In the following years Rudolf Hoess established, according to the visions of Himmler [Commander of the SS], the biggest extermination facility for humans of all time. In March 1941 ... he contributed to the construction of the [extermination camp] Auschwitz-Birkenau. After [Himmler] informed him about the Final Solution of the Jewish Question, he ordered to construct four big crematoria with gas chambers and he used, for the first time, the gas Cyclone B [more commonly known by its German name, "Zyklon B"], a highly poisonous form of cyanhydric acid, to exterminate Jews, as he deemed the execution by gun to be ineffective and costly. The introduction of gas chambers in the showers in order to ensure gasification without a rebellion is also attributed to Rudolf Hoess.



On average death through gasification occurred after approximately three to ten minutes, whereupon Cyclone B caused severe pain ... It is estimated that up to 10,000 human beings were killed like this on a daily basis ...

After the end of WWII, Hoess [evaded arrest by using a false name]. In 1946 he was recognised and detained in Flensburg [Germany] by the British Military Police. After being tortured, he revealed his true identity ...

Under the British custody he was interrogated various times about the incidents in Auschwitz. He never denied that he had committed the criminal action that [he] was accused of but he claimed that he had merely executed orders ...

The trial started on 11 March 1947 in the auditorium of the Union of Polish Teachers in the district Powiśle in Warsaw. During the hearing [Hoess] repeated a couple of times that he merely had executed orders and justified his actions with the compulsion to obey orders. The highest Polish Public Court sentenced him to death to be hanged on 2 April 1947.

Rudolf Hoess was hanged in front of his former house in the concentration camp Auschwitz on 16 April 1947.

Photo: https://vi.wikipedia.org/wiki/T%E1%BA%ADp_tin:H%C3%B6ss,_Rudolf.jpg

Name: _____ Date: _____

Supporting Question 2

Featured Source

D

Excerpt from Adolf Eichmann's final statement at his war crimes trial in Jerusalem, 1961.

Accessed from: <http://remember.org/eichmann/ownwords>**About this source:**

Adolf Eichmann was one of the most pivotal actors in the implementation of the "Final Solution." Charged with managing and facilitating the mass deportation of Jews to ghettos and killing centers in the German-occupied East, he was among the major organizers of the Holocaust ... At war's end, Eichmann found himself in U.S. custody, but escaped in 1946... fleeing to Argentina. There he lived under a number of aliases ... In 1960, agents of the Israeli Security Service (Mossad) abducted Eichmann and brought him to Israel to stand trial ... In December 1961, Eichmann was found guilty of crimes against the Jewish people. He was hanged at midnight between May 31 and June 1, 1962. Jewish authorities cremated his remains and scattered his ashes in the sea beyond Israeli boundary waters.

—<https://encyclopedia.ushmm.org/content/en/article/adolf-eichmann>Photo: https://commons.wikimedia.org/wiki/File:Adolf_Eichmann_at_Trial1961.jpg

The following is an excerpt from Eichmann's final plea after receiving the court's verdict.

I have heard the Court's severe verdict of guilty. I see myself disappointed in my hopes for justice. I cannot recognize the verdict of guilty. I understand the demand for atonement for the crimes which were perpetrated against the Jews. The witnesses' statements here in the Court made my limbs go numb once again, just as they went numb when once, acting on orders, I had to look at the atrocities. It was my misfortune to become entangled in these atrocities. But these misdeeds did not happen according to my wishes. It was not my wish to slay people. The guilt for the mass murder is solely that of the political leaders.

I did try to leave my position, to leave for the front, for honest battle. But I was held fast in those dark duties. Once again I would stress that I am guilty of having been obedient, having subordinated myself to my official duties and the obligations of war service and my oath of allegiance and my oath of office, and in addition, once the war started, there was also martial law.

This obedience was not easy. And again, anyone who has to give orders and has to obey orders knows what one can demand of people. I did not persecute Jews with avidity and passion. That is what the government did. Nor could the persecution be carried out other than by a government ... I accuse the leaders of abusing my obedience. At that time obedience was demanded, just as in the future it will also be demanded of the subordinate. Obedience is commended as a virtue.

May I therefore ask that consideration be given to the fact that I obeyed, and not whom I obeyed.

I have already said that the top echelons, to which I did not belong, gave the orders, and they rightly, in my opinion, deserved punishment for the atrocities which were perpetrated on the victims on their orders. But the subordinates are now also victims. I am one of such victims.

SQ2

Name: _____ Date: _____

Supporting Question 2:	How did German officers use the superior orders defense at their trials?
Formative Performance Task:	Jigsaw Activity: Groups read German officer statements defending their decisions and actions. Groups summarize the readings then present their summaries to each other while listeners take notes.

INSTRUCTIONS: With your partner(s), carefully read the summary of your assigned trial. Use the chart below to record key facts.

Name of Defendant:	
Defendant's role in the Holocaust:	
Charges against the defendant:	
How the defendant pleaded:	
Explanation of defense:	
Tribunal's ruling:	
Verdict:	
Sentence:	

Supporting Question 3 - Overview for the Teacher	
Supporting Question	Did German military personnel have a “moral choice” available to them? Why did they choose to follow orders?
Formative Performance Task	Use a graphic organizer, compile evidence to determine what choices did German military personnel had and why they choose to follow orders. Summarize findings.
Featured Sources	<p>Source A: Ways soldiers could avoid carrying out orders to commit murder.</p> <p>Source B: Why they carried out orders to murder.</p> <p>Source C: Excerpt from “Reserve Police Battalion 101.”</p> <p>Source D: Excerpt of testimony by perpetrator Werner Schwenker.</p>

According to the Nuremberg tribunal, *“That a soldier was ordered to kill or torture in violation of the international law of war has never been recognized as a defense to such acts of brutality ... The true test, ... is not the existence of the order, but whether moral choice was in fact possible.”*

Was a moral choice in fact possible for the perpetrators of war crimes? Could they have chosen not to commit atrocities, or would they have been killed if they disobeyed the orders to commit war crimes?

One of the most common assumptions about the Holocaust is that if the perpetrators had refused to take part in mass killings, they would have been killed themselves. Students are given the opportunity to investigate the truth of this assumption as they answer **Supporting Question 3: “Did German military personnel have a ‘moral choice’ available to them? Why did they choose to follow orders?”**

To answer this question, students will complete the **Formative Performance Task** of using a graphic organizer to compile evidence of whether a moral choice was available to the perpetrators of the Holocaust. The SQ3 handout guides students through their analysis of the documents and asks students to summarize their findings by responding to the prompt: *“Based on the Featured Sources, did perpetrators have a ‘moral choice’ available to them? Use evidence from the sources to support your argument.”*

Featured Source A is an excerpt from the book, *The Eichmann Kommandos*, by Justice Michael Musmanno, the presiding judge at the Einsatzgruppen Trial in U.S. military court at Nuremberg. In this excerpt, Justice Musmanno recounts testimony from several Einsatzgruppen commanders who described the many ways that men who were “too soft” to participate in murder could be assigned to other duties. Contrary to the assumption that refusing to participate would result in instant execution for the soldier, one SS general testified, “I do not know a single case in which a man who refused to take part was shot.”

In **Featured Source B**, also from *The Eichmann Kommandos*, Musmanno explains the reasons why officers did not take the moral choices available to them: “Vanity, arrogance and greed were the vehicles in which the Nazi leaders travelled the highway of criminality and inhumanity.” Musmanno continues, “The Einsatzgruppen officers had an additional reason for preferring their assignments: it saved them from hazardous combat service.”

Featured Source C presents a passage from historian Christopher Browning’s *“Ordinary Men: Reserve Police Battalion 101 and the Final Solution in Poland.”* Browning describes an incident in which, on their first “killing

action” in Poland, an Einsatzgruppen commander presented his men with an extraordinary offer: anyone who was “not up to the task before them” could step out. Despite this offer, with very few exceptions, the men of Reserve Police Battalion 101 killed the Jews they had been told to kill. Years later, some men admitted that they hadn’t taken up their commander’s offer because they were afraid of looking cowardly in front of their comrades.

Featured Source D presents the testimony of war criminal Werner Schwenker, who explains that he obeyed orders not because he feared punishment—*“I knew of no case and still know of no case today where one of us was sentenced to death because he did not want to take part in the execution of Jews”*—but because he feared he would be seen as weak or “my chances of promotion would be spoilt.”

Name: _____ Date: _____

Supporting Question 3

Featured Source

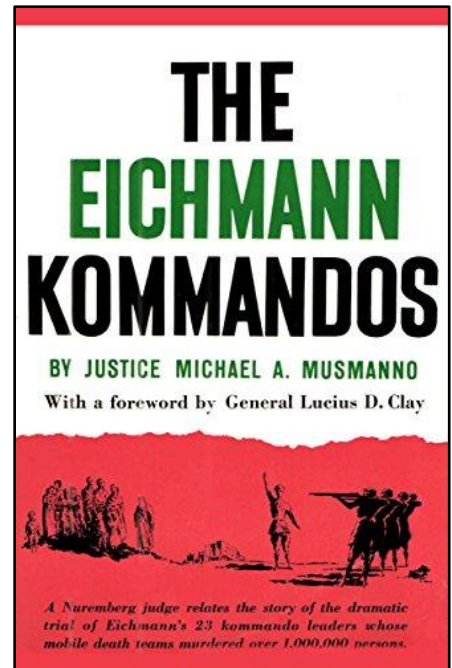
A

Excerpts on the ways that men in the Einsatzgruppen could avoid carrying out orders to commit murder. Musmanno, Michael A., *The Eichmann Kommandos*. Peter Davies, 1962.

Accessed from: https://archive.org/stream/in.ernet.dli.2015.149016/2015.149016.The-Eichmann-Kommandos_djvu.txt

General Walter Schellenberg who ... had frequent dealings with Eichmann in connection with the Einsatzgruppen ... told me: "The Nazi leaders couldn't be accused of great human sympathy, but they were men of efficiency, and if a man couldn't go along with this type of an order [to commit war crimes], then he [would] be sent back home. And many were sent back home." ... (pg. 123)

Albert Hartel, who served with the German Security Police in [the city of Kiev in the Ukraine region of the Soviet Union] ... testified that SS-General Thomas, commanding Einsatzgruppe C at the time, "passed on an order that all those people who could not ... carry out such orders, that is, people who were too soft, as he said, to carry out these orders, should be sent back to Germany or should be assigned to other tasks. Thus at the time a number of people, also commanders, were sent back by Thomas to [Germany] just because they were too soft to carry out orders" ... (pg. 229)



[T]hroughout the seven months' trial there was no evidence that a failure to obey the [order to murder Jews] precipitated any major penalty. On the contrary, several instances came to light showing that disobedience or evasion of the Fuhrer-Order invoked no grievous punishment.

[SS-Colonel Gustav Nosske] testified to the following episode. On duty in Germany he was assigned to [the city of] Dusseldorf, where his higher SS and Police Leader ordered him to round up all Jews and half-Jews in that area for executions. Nosske said that he protested against the order and that, finally, it was revoked, or at any rate not enforced. Nosske's protest was probably due mostly to the fact that many of the intended victims had one German parent. Nonetheless, his categorical refusal to obey the order demonstrated ... that a member of the German Armed Forces could protest against a superior order and not be shot in consequence ...

SS-General Erich von dem Bach Zelewski, whom I interviewed in Nuremberg after the war, told me that in all his years as a professional soldier he never heard that any German soldier had ever been shot for asking to be relieved of an assignment to shoot unoffending civilians. As recently as March 1961, he confirmed this statement before a Munich court, where he said: "I know people who did not want to take part in shootings and who did not do so. But I do not know a single case in which a man who refused to take part was shot." (pgs.232-233)

Name: _____ Date: _____

Supporting Question 3

Featured Source

B

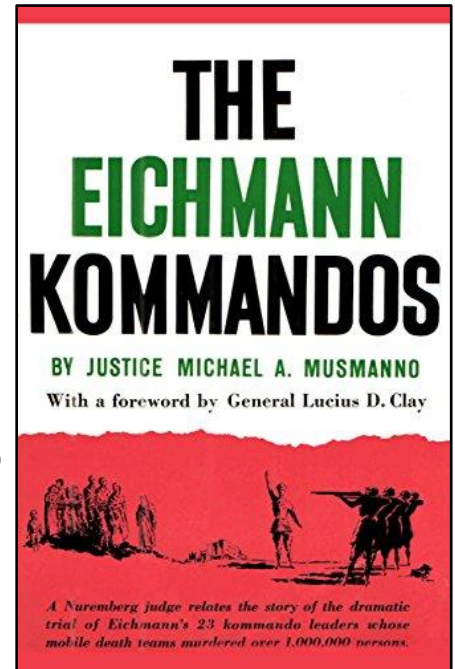
Excerpt on why the men of the Einsatzgruppen carried out their orders to commit murder. Musmanno, Michael A., *The Eichmann Kommandos*. Peter Davies, 1962.

Accessed from: https://archive.org/stream/in.ernet.dli.2015.149016/2015.149016.The-Eichmann-Kommandos_djvu.txt

Eichmann would not have had too much trouble in being released from his command post if he had really wanted to be released. All he would have had to do was to engage in a heart-to-heart talk with his superior Kaltenbrunner — who was his fellow-townsmen and had befriended him since his early days in the SS — and ask him for a transfer to another assignment, and it would have been done. But the fact is that, as Rudolf Hoess, the commandant of Auschwitz, said, Eichmann was obsessed with the desire to exterminate Jews.

In fulfilling Hitler's programme Eichmann and every Nazi official saw for himself increased authority, an easier and more lucrative post, a gaudier uniform, a bigger and shinier car, a longer strut and a more numerous group of underlings to tremble before his greatness. Vanity, arrogance and greed were the vehicles in which the Nazi leaders travelled the highway of criminality and inhumanity. Equipped with the goggles of glory and gore, they saw nothing wrong in mass murder, pillage, thievery, kidnapping, torture and diabolical instruction ...

The Einsatzgruppen officers had an additional reason for preferring their assignments: it saved them from hazardous combat service. In the front lines one faced an armed and aggressive opponent; in a foxhole one could expect any moment a fragmenting artillery shell. But on the Einsatzgruppen field there were no foxholes. There were only long ditches in front of which one's adversaries helplessly stood to await the fire which they could not return. (pgs.231-232)



Name: _____ Date: _____

Supporting Question 3

Featured Source

C

Excerpt from Facing History and Ourselves article, "Reserve Police Battalion 101."

Accessed from: <https://www.facinghistory.org/holocaust-and-human-behavior/chapter-9/reserve-police-battalion-101>

Inspection of Reserve Police Battalion 101 of the Nazi German Ordnungspolizei (Order Police) at Łódź (Litzmannstadt) in occupied Poland; late November of 1940 or spring 1941.

Image: <http://tinyurl.com/yf4watm>

What kind of person kills civilians, including old people and even babies, all day long? To find answers to such questions, historian Christopher Browning studied courtroom testimony made in the 1960s and 1970s by 210 men who served in the German Reserve Police Battalion 101 [under the command of the SS during the war] and were later charged with war crimes ...

The battalion's first killing mission took place on July 13, 1942. Browning reports:

Just as daylight was breaking, the men arrived at the village [of Jozefow, Poland] and assembled in a half-circle around Major Trapp, who proceeded to give a short speech. With choking voice and tears in his eyes, he visibly fought to control himself as he informed his men that they had received orders to perform a very unpleasant task. These orders were not to his liking either, but they came from above ... Trapp then explained to the men that the Jews in Jozefow would have to be rounded up, whereupon the young males were to be selected out for labor and the others shot.

Trapp then made an extraordinary offer to his battalion: if any of the older men among them did not feel up to the task that lay before him, he could step out. Trapp paused, and after some moments, one man stepped forward. The captain of 3rd company ... began to berate the man. The major told the captain to hold his tongue. Then ten or twelve other men stepped forward as well. They turned in their rifles and were told to await a further assignment from the major ...

[Years later,] a few who admitted that they had been given the choice and yet failed to opt out were quite blunt. One said that he had not wanted to be considered a coward by his comrades. Another—more aware of what truly required courage—said quite simply: “I was cowardly.” A few others also made the attempt to confront the question of choice but failed to find the words. It was a different time and place, as if they had been on another political planet, and the political vocabulary and values of the 1960s were helpless to explain the situation in which they found themselves in 1942. As one man admitted, it was not until years later that he began to consider that what he had done had not been right. He had not given it a thought at the time ...

Was the incident at Jozefow typical? Certainly not. I know of no other case in which a commander so openly invited and sanctioned the nonparticipation of his men in a killing action. But in the end the most important fact is not that the experience of Reserve Police Battalion 101 was untypical, but rather that Trapp’s extraordinary offer did not matter. Like any other unit, Reserve Police Battalion 101 killed the Jews they had been told to kill.

Name: _____ Date: _____

Supporting Question 3

Featured Source

D

Excerpt of testimony by perpetrator Werner Schwenker.

Accessed from: <http://www.70voices.org.uk/content/day39>

The majority of those who murdered Jews were regular German policemen, such as those shown in the photograph. After the war, many claimed that they would have been shot if they had refused to take part. However, this was not true. As the following post-war testimony from Werner Schwenker, a low-ranking detective who took part in the shooting of Jews in Kołomyja in Poland, makes clear, other factors influenced their decision to become murderers.

The reason I did not say to Leideritz [his senior officer] that I could not take part in these things was that I was afraid that Leideritz and others would think I was a coward. I was worried that I would be affected adversely in some way in the future if I allowed myself to be seen as too weak. I did not want Leideritz or other people to get the impression that I was not as hard as an SS man ought to have been ...



I carried out orders not because I was afraid I would be punished by death if I didn't. I knew of no case and still know of no case today where one of us was sentenced to death because he did not want to take part in the execution of Jews ... I thought that I ought not to say anything to Leideritz because I did not want to be seen in a bad light, and I thought that if I asked him to release me from having to take part in the executions it would be over for me as far as he was concerned and my chances of promotion would be spoilt or I would not be promoted at all.

Schwenker's testimony is one of many which reminds us that the perpetrators had choices and illustrates how eminently human motives, such as ambition and peer pressure, could lead someone to become a murderer.

Photo: German policemen in Poland, 1941; United States Holocaust Memorial Museum, courtesy of Michael O'Hara/Bernhardt Colberg. Testimony: Ernst Klee et al. (eds.), *"The Good Old Days": The Holocaust as Seen by Its Perpetrators and Bystanders* (Konecky & Konecky, (1991)

SQ3

Name: _____ Date: _____

Supporting Question 3:	Did German military personnel have a “moral choice” available to them? Why did they choose to follow orders??
Formative Performance Task:	Use a graphic organizer to compile evidence to determine what choices did German military personnel had and why they choose to follow orders. Summarize findings..

INSTRUCTIONS:

According to the Nuremberg tribunal, *“That a soldier was ordered to kill or torture in violation of the international law of war has never been recognized as a defense to such acts of brutality ... The true test, ... is not the existence of the order, but whether moral choice was in fact possible.”*

Was a moral choice in fact possible for the perpetrators of war crimes? Could they have chosen not to commit atrocities, or would they have been killed if they disobeyed orders?

Study the documents to determine whether moral choices were available to the Nazi perpetrators, what choices they made, and why.

Featured Source A	Excerpt on the ways that men in the Einsatzgruppen could avoid carrying out orders to commit murder. Musmanno, Michael A., <i>The Eichmann Kommandos</i> .
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According to General Walter Schellenberg, was a moral choice available to men who were ordered to murder?
What did Schellenberg say would happen to a man who “couldn’t go along with this type of an order”? Why?
According to Albert Hartel, what would happen to those who were “too soft” to carry out orders to murder?
What happened when S.S. Colonel Gustav Nosske objected to an order to murder Jews?
According to S.S.-General Erich von dem Bach Zelewski, how many men were killed for refusing to take part in shooting?

Featured Source B

Excerpt on why the men of the Einsatzgruppen carried out their orders to commit murder. Musmanno, Michael A., *The Eichmann Kommandos*.

According to Musmanno, was there a moral choice available to Eichmann?

How could Eichmann have been released from his role in the Holocaust?

According to Musmanno, why didn't Eichmann and every Nazi official refuse to fulfill Hitler's programme?

What was the "additional reason" that Einsatzgruppen officers preferred to keep their assignments as murderers?

Featured Source C

Excerpt from Facing History and Ourselves article, "Reserve Police Battalion 101."

What extraordinary offer did Major Trapp make for his battalion?

How did Major Trapp feel about the orders the battalion had received?

What statements support your conclusion?

According to their testimony years later, why didn't more men take Major Trapp's offer?

What other reasons may explain the soldiers' choice to kill the Jews they had been told to kill?

Featured Source D

Excerpt of testimony by perpetrator Werner Schwenker.

What did Werner Schwenker say he was afraid might happen to him if he refused to murder Jews?

According to Schwenker, how often were men sentenced to death for refusing to murder Jews?

Based on Schwenker's testimony, did perpetrators have a "moral choice" available to them? Explain.

SQ3: Summary

Name: _____ Date: _____

Supporting Question 3:	Did German military personnel have a “moral choice” available to them? Why did they choose to follow orders??
Formative Performance Task:	Use a graphic organizer, compile evidence to determine what choices did German military personnel had and why they choose to follow orders. Summarize findings..

Summary

Based on the Featured Sources, did perpetrators have a “moral choice” available to them? Use evidence from the sources to support your argument.

Supporting Question 4 - Overview for the Teacher

Supporting Question	What are today's laws about following orders in the military?
Formative Performance Task	Write a summary of the current legal and military consensus on the acceptability of the superior orders defense.
Featured Sources	<p>Source A: The Nuremberg principles.</p> <p>Source B: Article 33 of the Rome Statute of the International Criminal Court, 1998.</p> <p>Source C: Article, "When can a soldier disobey an order?"</p> <p>Source D: Article, "Why German soldiers don't have to obey orders."</p>

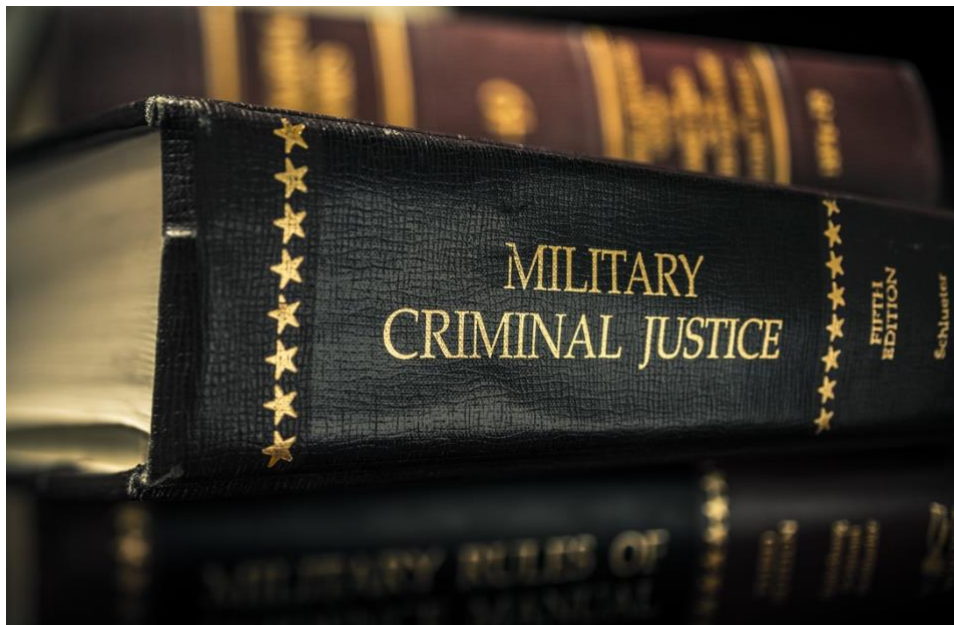


Image: <https://www.af.mil/About-Us/The-Book/Enlisted-Ranks/igphoto/2001043985/>

The final **Supporting Question** asks students, ***“What are today’s laws about following orders in the military?”***

Students will answer this question by completing the **Formative Performance Task** of writing a summary of the current legal and military consensus on the acceptability of the superior orders defense. This final Formative Performance Task is intentionally less structured than the preceding three. Having practiced the skills of gathering and summarizing relevant evidence with the help of guiding questions and graphic organizers, students are now asked to practice these skills on their own.

Featured Source A is the “Principles of International Law Recognized in the Charter of the Nuremberg Tribunal and in the Judgment of the Tribunal, 1950.” By now, students should recognize two key principles they have encountered in varying forms in the previous Featured Sources:

Principle III

The fact that a person who committed an act which constitutes a crime under international law acted as Head of State or responsible Government official does not relieve him from responsibility under international law.

Principle IV

The fact that a person acted pursuant to order of his Government or of a superior does not relieve him from responsibility under international law, provided a moral choice was in fact possible to him.

Featured Source B is Article 33 of the 1998 Rome Statute of the International Criminal Court. The Rome Statute is the treaty that established the International Criminal Court. It established four principal international crimes: [genocide](#), [crimes against humanity](#), [war crimes](#), and the [crime of aggression](#). The ICC has authority to investigate and prosecute these crimes in cases where states are unable or unwilling to do so themselves. Article 33 specifically rejects the superior orders defense *unless*:

- a. The person was under a legal obligation to obey orders of the Government or the superior in question;
- b. The person did not know that the order was unlawful; and
- c. The order was not manifestly unlawful.

The key word in the above passage is “**and**.” Superior orders is only a defense if the conditions in a., b., **AND** c. are met.

NOTE: Article 33 of the Rome Statute contains the terms “genocide” and “crimes against humanity.” For the statute’s definition of these terms, see [Appendix A](#).

Featured Source C is an article titled, “When Can a Soldier Disobey an Order?” in which former military prosecutor and current U.S. Army Judge Advocate John Ford explains the circumstances under which a member of the American armed forces is permitted and, in fact, *obligated* to disobey a superior order. Ford provides examples from American history, including the massacre at My Lai in Vietnam and the torture of detainees at Abu Ghraib prison in Iraq. Ford explains that the Nuremberg standard—that a soldier must disobey manifestly illegal order—is the standard the U.S. service members must follow.

NOTE: The second-to-last paragraph of Featured Source C contains the following description of the abuses at Abu Ghraib:

Further, most of what went on at Abu Ghraib went far beyond anything authorized in any memo or order. Guards urinated on detainees, forced them to simulate oral sex on each other, forced them to remove their clothes and lie naked in piles together, and sodomized them with broomsticks. There were even instances of U.S. soldiers raping female inmates.

While this description is accurate without being graphic, it may be difficult or problematic for some students. As always, teachers should use their discretion and follow best practices when presenting sensitive historical content such as this. Teachers may want to edit this passage by rewording or inserting ellipses in a way that provides a less explicit description without changing the author’s point. If, on the other hand, teachers choose to present the article as written, they should be prepared to answer students’ questions about the content.

Featured Source D is a History.com article titled, “Why German Soldiers Don’t Have to Obey Orders,” in which journalist Erin Blakemore writes that “the brutal legacy of two world wars and the Holocaust explains Germany’s reticence to make its soldiers obey orders no matter what.” This reticence, Blakemore explains, has led to a duty to disobey not just an unlawful order (as in the Nuremberg principles and American military law) but any order that “is not ‘of any use for service,’ or cannot reasonably be executed. In fact, if the order denies human dignity to the armed forces member or the order’s target.”

Name: _____ Date: _____

Supporting Question 4

Featured Source

A

Principles of International Law Recognized in the Charter of the Nüremberg Tribunal and in the Judgment of the Tribunal, 1950.

Accessed from: <https://bit.ly/2MDN2sP>



View of a packed courtroom at the Palace of Justice, Nuremberg, Germany, during the war crimes trials, circa November 1945. Image: <https://www.trumanlibrary.org/photographs/printRecord.php?id=11273>

Principles of International Law Recognized in the Charter of the Nüremberg Tribunal and in the Judgment of the Tribunal, 1950.**Principle I**

Any person who commits an act which constitutes a crime under international law is responsible therefor and liable to punishment.

Principle II

The fact that internal law does not impose a penalty for an act which constitutes a crime under international law does not relieve the person who committed the act from responsibility under international law.

Principle III

The fact that a person who committed an act which constitutes a crime under international law acted as Head of State or responsible Government official does not relieve him from responsibility under international law.

Principle IV

The fact that a person acted pursuant to order of his Government or of a superior does not relieve him from responsibility under international law, provided a moral choice was in fact possible to him.

Principle V

Any person charged with a crime under international law has the right to a fair trial on the facts and law.

Principle VI

The crimes hereinafter set out are punishable as crimes under international law:

- a) Crimes against peace:
 - i) Planning, preparation, initiation or waging of a war of aggression or a war in violation of international treaties, agreements or assurances;
 - ii) Participation in a common plan or conspiracy for the accomplishment of any of the acts mentioned under (i).
- b) War crimes:

Violations of the laws or customs of war include, but are not limited to, murder, ill-treatment or deportation to slave-labour or for any other purpose of civilian population of or in occupied territory, murder or ill-treatment of prisoners of war, of persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns, or villages, or devastation not justified by military necessity.
- c) Crimes against humanity:

Murder, extermination, enslavement, deportation and other inhumane acts done against any civilian population, or persecutions on political, racial or religious grounds, when such acts are done or such persecutions are carried on in execution of or in connexion with any crime against peace or any war crime.

Principle VII

Complicity in the commission of a crime against peace, a war crime, or a crime against humanity as set forth in Principle VI is a crime under international law.

A person, any person involved in the military or head of state can be charged with a war crime and held responsible before criminal court.

Name: _____ Date: _____

Supporting Question 4

Featured Source

B

Article 33 of the Rome Statute of the International Criminal Court, 1998.

Accessed from: https://www.icc-cpi.int/nr/rdonlyres/ea9aeff7-5752-4f84-be94-0a655eb30e16/0/rome_statute_english.pdf (p. 21)Image: <https://www.icc-cpi.int/Pages/item.aspx?name=ma229>**Article 33****Superior orders and prescription of law**

1. The fact that a crime within the jurisdiction of the Court has been committed by a person pursuant to an order of a Government or of a superior, whether military or civilian, shall not relieve that person of criminal responsibility unless:
 - a. The person was under a legal obligation to obey orders of the Government or the superior in question;
 - b. The person did not know that the order was unlawful; and
 - c. The order was not manifestly unlawful.
2. For the purposes of this article, orders to commit genocide or crimes against humanity are manifestly unlawful.

A person, any person involved in the military or head of state can be charged with a war crime and held responsible before criminal court. Any orders of genocide or crimes against humanity are illegal and unlawful.

Name: _____ Date: _____

Supporting Question 4

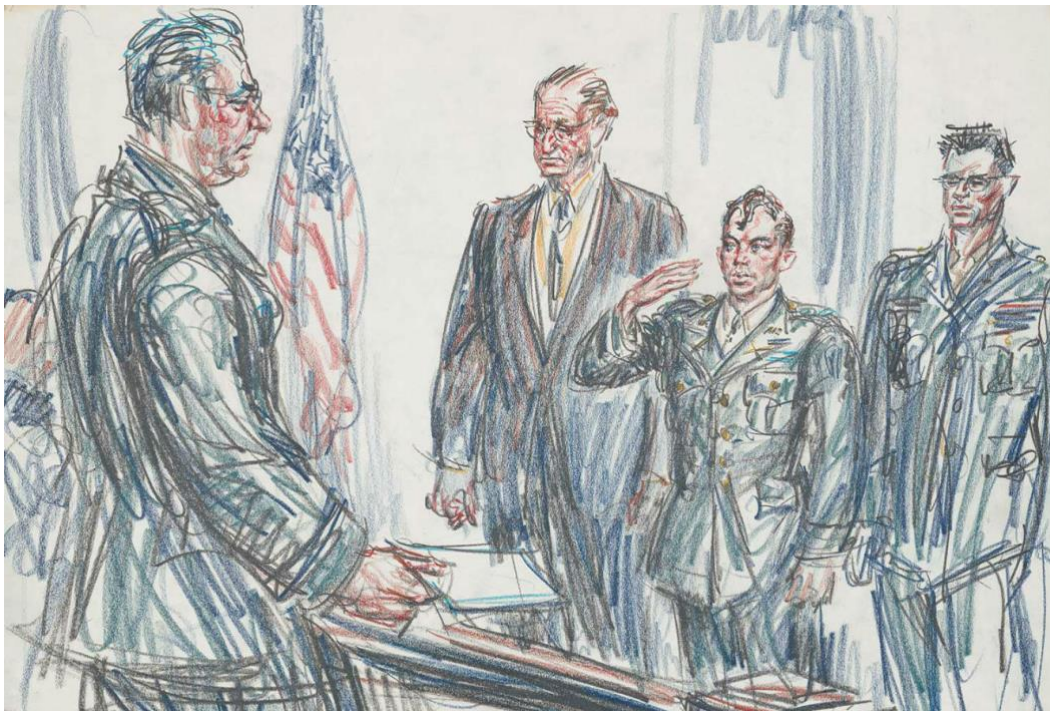
Featured Source

C

Ford, John. "When can a soldier disobey an order?" *War on the Rocks*.
<https://warontherocks.com/2017/07/when-can-a-soldier-disobey-an-order/>. July 24,
 2017. Accessed 5 October 2018.

WHEN CAN A SOLDIER DISOBEY AN ORDER?

JOHN FORD



In March 1968, a U.S. infantry platoon under the command of 2nd Lt. William "Rusty" Calley conducted a raid of a hamlet called My Lai in Quang Ngai Province of South Vietnam. After taking the hamlet, Calley ordered his men to round up the remaining civilians, herd them into a ditch, and gun them down. Somewhere between 350 and 500 civilians were killed on Calley's instruction.

Calley was court-martialed for his actions and charged with 22 counts of murder. At his trial, he testified that his company commander, Capt. Ernest Medina, had ordered him to kill "every living thing" in My Lai, telling him there were no civilians there, only Viet Cong. When Calley radioed back to Medina that the platoon had rounded up a large number of unarmed civilians, he claimed Medina told him to "waste them." Essentially, Calley defended gunning down hundreds of civilians by saying he was just following orders from his superiors (It should be noted that Medina denied giving these orders).

But Calley was unable to hide behind this defense. Every military officer swears an oath upon commissioning. That oath is not to obey all orders. It is to "preserve, protect, and defend the Constitution of the United States against all enemies, foreign and domestic." It is simply wrong to say Calley had an obligation to follow any order

no matter what. His first obligation was to obey the law, and the law prohibits the deliberate killing of unarmed civilians.

But it's not enough to assert that soldiers must follow all lawful orders and disobey unlawful ones. Not every case is clear-cut. Soldiers taking orders in combat must act quickly and don't always have time to calmly deliberate on every decision. Asking soldiers to make fine legal distinctions in combat or else face court-martial is akin to asking them to sail between [Scylla and Charybdis](#).

This tension is resolved by rules contained in the [Manual for Courts Martial](#). The manual is an executive order that augments the Uniform Code of Military Justice by setting forth procedural rules and providing guidance based on case law for interpreting the code. Rule 916(d) of the Manual for Courts Martial says:

It is a defense to any offense that the accused was acting pursuant to orders unless the accused knew the orders to be unlawful or a person of ordinary sense and understanding would have known the orders to be unlawful.

Calley was convicted under this rule. [The court found that](#) "whether Calley was the most ignorant person in the United States Army in Vietnam or the most intelligent," he would have to have known that it was illegal to slaughter civilians who were "demonstrably unable to defend themselves" and that the order was "palpably illegal." The court noted that, "For 100 years, it has been a settled rule of American law that even in war the summary killing of an enemy who has submitted ... is murder."

So the order Calley tried to use as a shield against criminal liability — the order to slaughter civilians — was so clearly illegal that any reasonable person would have known it was illegal ...

As My Lai shows ... there are cases where an order would clearly violate the law. An order to torture a detainee would be one. Every soldier is trained to know that torture is illegal. The [U.N. Convention Against Torture](#), to which the United States is a party, prohibits cruel, inhumane, or degrading treatment of detainees. [Army Field Manual 2-22.3](#), which governs human intelligence collection, also bans torture. It permits 19 types of interrogation techniques, none of which could be considered torture, and two of which require special authorization to use. Under the [McCain amendment to the 2006 National Defense Authorization Act](#), no Department of Defense employee may use any interrogation technique not authorized under the Army Field Manual. Torture is also explicitly prohibited by [DoD Directive 3115.09](#).

It would be palpably illegal to give an order to torture a prisoner. There is no defensible legal argument that interrogation techniques such as waterboarding are permitted. No soldier, sailor, or airman would be in a position to plead ignorance of the law. Any member of the military who received such an order would not just be allowed to disobey it — they would be required to do so. Otherwise, they would face the threat of criminal charges under Article 92 of the UCMJ, for dereliction of duty in failing to follow lawful regulations and for cruelty and maltreatment, and Article 134, for general misconduct to the prejudice of good order and discipline. The officer would also be at risk of being charged for conduct unbecoming under Article 133.

This is exactly what happened after the conditions at [Abu Ghraib prison were made public](#) in 2004. The lurid details of widespread abuse of prisoners, including sexual abuse and humiliation, are by now well-known. Eleven soldiers were found guilty of various charges at court-martial for their involvement in prisoner abuse. Two senior officers who had overseen the prison, Lt. Col. Steven Jordan and Col. Thomas Pappas, also faced disciplinary action for their dereliction in supervising the facility.

Some of the soldiers involved in the abuse tried to assert superior orders as a defense, though none were successful. It was true that Lt. Gen. Ricardo Sanchez, the commander of U.S. forces in Iraq, [had authorized the use of dogs, sleep deprivation, and extreme temperature exposure](#) as interrogation techniques. None of these were permitted by the Army Field Manual in place at the time, [FM 34-52](#). They should not have been authorized and Sanchez's memo was an illegal order, though he ultimately faced no disciplinary action for it. Because the soldiers involved in the scandal were assigned to detainee operations, they would have been expected to know what techniques were and were not authorized by the manual. The only way they could defend themselves from the charge of dereliction in knowingly failing to follow the rules would be to admit they committed the crime of dereliction by not bothering to learn the rules.

Further, most of [what went on at Abu Ghraib](#) went far beyond anything authorized in any memo or order. Guards urinated on detainees, forced them to simulate oral sex on each other, forced them to remove their clothes and lie naked in piles together, and sodomized them with broomsticks. There were even instances of U.S. soldiers raping female inmates. None of this was authorized at any level, nor could it have been authorized. Any soldier who was ordered to do any of this should have immediately understood that the order was illegal and would have been obligated to disobey and report the abuse ...

The military is a hierarchical organization. Some degree of obedience to the orders of superior officers is required for the organization to function. But those who serve in the U.S. military are not automatons, and they are not asked to surrender all independent moral judgment when they sign their enlistment papers. American servicemembers are defending a nation of laws, not of men. Their obligation to obey the orders of their superiors does not include orders that are palpably illegal.

John Ford is a former military prosecutor and a current reserve U.S. Army Judge Advocate. He now practices law in California. You can follow him on twitter at [@johndouglasford](#).

Image: [Howard Brodie/Library of Congress](#)

Name: _____ Date: _____

Supporting Question 4

Featured Source

D

Blakemore, Erin. "Why German soldiers don't have to obey orders." *History*. <https://www.history.com/news/why-german-soldiers-dont-have-to-obey-orders>. Nov. 7, 2017. Accessed 5 October 2018.

Why German Soldiers Don't Have to Obey Orders

ERIN BLAKEMORE

Consider, if you will, a fraught military standoff. A soldier from the German army receives an order from a superior to fire his gun, but he puts it down and walks away. In the United States, he would have just committed the unforgivable and illegal act of insubordination, even if the superior officer weren't from the same service branch.

But in this scenario, the German soldier didn't break the rules—he followed them. Military disobedience is actually baked into the German *Bundeswehr*, or armed forces. And the reasons why can be found in the country's sinister past.

American military law states that an order can only be disobeyed if it is unlawful. However, the German military manual [states](#) that a military order is not binding if it is not "of any use for service," or cannot reasonably be executed. In fact, if the order denies human dignity to the armed forces member or the order's target, it must not be obeyed.

In practice, that means that a soldier or armed forces administrator can ignore a superior officer's order—even if it's in the midst of combat or is given by a high-ranking official.

That's not how it used to be. Unconditional obedience to military orders was once a norm going back to the kingdoms that preceded Germany before it became a nation state in 1871. During World War I, Germany [executed](#) 48 soldiers for insubordination, and its basic training regimen—designed around unconditional submission to higher officers—was known as one of Europe's most brutal.

After World War I, this discipline softened thanks to the Allied forces, which blamed the country's strict military hierarchy for the ruthlessness of World War I. Under the [Treaty of Versailles](#), Germany was forced to admit guilt for the war and to restrict its military's numbers and weapons. The country's military was effectively dismantled, with officer schools shut down and the number of troops reduced to just 100,000.

However, Germany had no intention of following the treaty's military provisions. Soon after the treaty was signed, German general Hans von Seeckt began to reorganize and secretly [rebuild](#) the military with the help of Russia. German companies began producing forbidden arms on Russian soil and German troops trained with Russian soldiers—all in secret.

By the time [Adolf Hitler](#) came into power in 1933 with promises to revive the country's former might, the German public was ready for it. Hitler immediately began to openly flout the treaty. As he brought Germany's secretive postwar military into the open, they began pledging their loyalty directly to him. From 1934 on, the German military [oath](#) was sworn to Hitler himself—and it contained a clause that promised "unconditional obedience."

That rule was taken seriously during the lead up to World War II and the conflict itself. At least 15,000 German soldiers were [executed](#) for desertion alone, and up to 50,000 were killed for often minor acts of insubordination. An unknown number were summarily executed, often in the moment, by their officers or comrades when they refused to follow commands.

This wasn't always the case. Historian David H. Kitterman's [research](#) on a group of 135 German soldiers who refused orders to kill Jews, POWs or hostages shows they suffered beatings and death threats for defying their superiors, but none were executed. Although insubordination was taken seriously, excuses that soldiers had "just been obeying orders" when they participated in Holocaust atrocities weren't entirely true.

When the war ended, the Allies assumed control of Germany and [decommissioned](#) its entire military. It took a decade for Germany—now split in two—to regain a military, and in 1955 a new *Bundeswehr* was created.

The new German armed forces were a different beast than their predecessors. German law forbids the use of its military to do anything other than defend Germany itself, though the military does participate in some humanitarian and NATO coalition missions. Instead of blind obedience, the military [emphasizes](#) *Innere Führung*, a hard-to-translate concept that centers the military experience around the inner conscience of each individual.

As a result, many German soldiers [refuse](#) combat assignments or disobey orders—with no consequence. Their ability to do so has been repeatedly held up in civil courts (Germany has no military courts) and in the federal government. In 2007, the German federal government even went so far as to [state](#) that German law means unconditional authority or loyalty to superiors can't exist. Soldiers must not obey unconditionally, the government wrote, but carry out "an obedience which is thinking." However, the policy statement added, soldiers can't disobey an order merely because their personal views conflict with those of their superior.

Nowhere is that conception of conscientious military service more apparent than at the [Benderblock](#), a Berlin building where participants of a failed [attempt to assassinate Hitler](#) were executed in 1944. Today, the building is a museum to German resistance—and every year, it's the place where new German soldiers are traditionally [sworn](#) to their duties.

It's intentional that their oaths to defend Germany are sworn in a place not of military obedience, but of military resistance. The brutal legacy of two world wars and the Holocaust explains Germany's reticence to make its soldiers obey orders no matter what.

Summative Performance Task - Overview for the Teacher

Summative Performance Task	ARGUMENT Is “I was only following orders” an acceptable defense? Construct an argument (e.g., detailed outline, poster, essay) that discusses the compelling question using specific claims and relevant evidence from historical sources while acknowledging competing views.
	EXTENSION While the Rome Statute is clear that soldiers have an obligation to disobey a “manifestly unlawful” order, it does not state what makes an order “manifestly unlawful.” Work in teams to rewrite the Rome Statute so that it offers a clear statement of what makes an order “manifestly unlawful” so that it is less confusing to officers and soldiers.

Constructing an Argument

At this point in the inquiry, students have examined the historic uses of the superior orders defense from its first known appearance in the 15th century, to the Nuremberg trials, and to the present. They have seen that at times the superior orders defense has provided an absolute shield against charges of war crimes, but at other times it has afforded no protection at all. Students have learned that while the superior orders defense is generally rejected by international law since the Nuremberg trials, the soldier’s responsibility to follow or reject orders is interpreted differently in different nations and under different circumstances.

What should be the standard applied to the superior orders defense? In this task, students construct and extended, evidence-based argument responding to the Compelling Question, *“I was only following orders! Is this an acceptable defense?”*

This response may take the form or forms that the teacher deems most appropriate for their students. For example, the argument could be in the form of a detailed outline, a poster, an essay, a video, or any other creative format the teacher and student may decide is best for constructing their argument and supporting it with evidence.

Extension

Professor Gary D. Solis writes,

What can be said with some assurance is that military defendants will raise the defense of superior orders, ancient as it is, in the future. Moreover, subordinates will obey illegal orders, given the overwhelming influence of the military hierarchical structure—particularly in the lower ranks and in combat.

The defense has seldom prevailed in the past, while its application, more important than ever, has not grown clearer in today's world. Finally, those who devote their energies to military justice and to international law will continue to wrestle with definitions, intent, and the accused's understanding. As one United States Army commander said after a recent training exercise, "I know that if I ever go to war again, the first person I'm taking is my lawyer," indicating that commanders require the counsel of their judge advocates more than ever.

As the students learned in Supporting Question 4, Article 33 of the Rome Statute of the International Criminal Court establishes that the fact that a crime was committed pursuant to superior orders does not relieve the perpetrator of criminal responsibility if the order was "manifestly unlawful." The statute adds that, "for the purposes of this article, orders to commit genocide or crimes against humanity are manifestly unlawful."

How could this standard be made clearer? What kind of conduct should be considered "manifestly unlawful"? Are there universal standards of behavior that exist even in war? If so, can this behavior be clearly defined so that an Army commander does not feel the need to take a lawyer with them to war?

In this extension activity, students work in teams to rewrite the Rome Statute so that it offers a clearer statement of what makes an order "manifestly unlawful" so that it is less confusing to officers and soldiers.

Taking Informed Action - Overview for the Teacher

Now it's time for students to take what they've learned and put it into action in today's world.

Today, as in 1474, international law and the military law of most nations rejects the superior orders defense in cases where the accused obeyed orders that are manifestly unlawful. This however, has not stopped its use as a defense.

In this activity, students civically engage this issue by *understanding*, *assessing*, and *acting* in response to a recent case in which "just following orders" is raised by those at the highest levels of the United States government in defense of the acts of CIA director Gina Haspel.

<p>Taking Informed Action</p>	<p>UNDERSTAND Research a recent case in which someone accused of committing atrocities has used the superior orders defense: "Washington Breaks Out the 'Just Following Orders' Nazi Defense for CIA Director-Designate Gina Haspel," <i>The Intercept</i>, 15 March 2018.</p> <p>ASSESS Evaluate the circumstances of the case and determine whether the "superior orders" defense is acceptable in this case.</p> <p>ACT Write an editorial response to the publisher expressing agreement or disagreement with the article's argument. Use evidence from this inquiry to support your argument.</p>
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The **Featured Source** is an article titled "[Washington breaks out the "just following orders" Nazi defense for CIA director-designate Gina Haspel](#)," published just prior to the Senate confirmation hearings for Gina Haspel, who was nominated by President Donald Trump to be Director of Central Intelligence. Haspel was a controversial choice for CIA director because she "[oversaw](#) a secret 'black site' in Thailand, at which prisoners were waterboarded and subjected to other severe forms of abuse. Haspel later participated in the destruction of the CIA's videotapes of some of its torture sessions." The Senate confirmed Haspel's nomination.

After a brief description of the Nuremberg defense, the author states that the the United Nations' rejection of the defense

...is likely the most famous declaration in the history of international law and is as settled as anything possibly can be.

However, many members of the Washington, D.C. elite are now stating that it, in fact, is a legitimate defense for American officials who violate international law to claim they were just following orders.

Specifically, they say Gina Haspel, a top CIA officer whom President Donald Trump has designated to be the agency's next director, bears no responsibility for the torture she supervised during George W. Bush's administration.

Practicing the Historian Skill of "Sourcing"

The piece was written by journalist Jon Schwartz for [The Intercept](#), a news website dedicated to what it calls “adversarial journalism.” The Intercept states that it “gives its journalists the editorial freedom and legal support they need to pursue investigations that expose corruption and injustice wherever they find it and hold the powerful accountable.”

As you might have guessed from that description, The Intercept is not a news organization that is afraid to take a position on issues. While journalist Jon Schwartz quotes members of both political parties who both support and oppose Ms. Haspel’s nomination, the author clearly takes a position in opposition to her confirmation as Director of Central Intelligence. The fact that Mr. Schwartz takes a position, rather than striving for some a sort of “he said, she said” neutrality in reporting the debate, makes this article provocative for the student, and gives them the opportunity to respond to Schwartz’s argument and take a position of their own.

As a pre-reading activity, ask your students to practice the historian skill of [sourcing](#) by reading The Intercept’s “[About Us](#)” page, which is the source of the description in the previous paragraph. Ask the students to consider what kind of position they predict the article will take, based on the information they have from the “About Us” page and the title of the article. Follow up during and after the reading by asking students what position the author took, and how the author supported their argument. Did they use evidence to support their claims, or just assert their opinion? Who did they quote for the article? Did they only quote people they agree with, or did they acknowledge opposing claims? Did they quote only people from one political party?

Assessing the Case

This article presents students with many opportunities to apply what they have learned about the history of the superior orders defense and its current standing in international and military law.

Schwartz reports that Michael Hayden, former director of both the CIA and the National Security Agency, who served under Presidents Clinton, Bush, and Obama, endorsed Haspel as head of the CIA in an [op-ed](#), writing that “Haspel did nothing more and nothing less than what the nation and the agency asked her to do, and she did it well.”

Schwartz continues:

Hayden later said [on Twitter](#) that Haspel’s actions were “consistent with U.S. law as interpreted by the department of justice.” This is true: In 2002, the Office of Legal Counsel at the Justice Department declared in a series of [notorious memos](#) that it was legal for the U.S. to engage in “enhanced interrogation techniques” that were obviously torture. Of course, the actions of the Nuremberg defendants had also been “legal” under German law.

This is an opportunity to ask students to refer to their research in this unit. If it was “obviously torture,” does it matter that the government said it was legal? What does the Rome Statute say about laws that are “manifestly illegal”?

Texas Republican Rep. Will Hurd, a member of the House Intelligence Committee and a former CIA operative, defended Haspel by arguing, “You have to remember where we were at that moment, thinking that another attack was going to happen.”

Schwartz responds:

This is another defense that is explicitly illegitimate under international law. The U.N. Convention Against Torture, which was [transmitted](#) to the Senate by Ronald Reagan in 1988, [states](#) that “no exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture.”

This provides another opportunity for students to apply their learning: Does the 1988 convention mean that Ms. Haspel should have known that her orders to torture were unlawful and therefore should not have been obeyed? What have courts ruled on cases when a perpetrator “should have known” that an order was unlawful, even though it was in fact legal according to their superiors?

Samantha Winograd, who served on President Obama’s National Security Council and now is an analyst for CNN, likewise used Nuremberg defense language in an appearance on the network. Haspel, [she said](#), “was implementing the lawful orders of the president... You could argue she should have quit because the program was so abhorrent. But she was following orders.”

Should she have quit? What does Winograd imply when she says “but she was following orders”? Is she saying that it was good or that it was bad?

Schwartz concludes the article with a statement from Senator Rand Paul:

Remarkably, this perspective has even seeped into the viewpoint of regular journalists. At a recent press conference at which Kentucky Republican Sen. Rand Paul criticized Haspel, a reporter [asked him](#) to respond to “the counterargument” that “these policies were signed off by the Bush administration... They were considered lawful at the time.”

It fell to Paul to make the obvious observation that appears to have eluded almost everyone else in official Washington: “This has been historically a question we’ve asked in every war: Is there a point at which soldiers say ‘no’? ... Horrendous things happened in World War II, and people said, well, the German soldiers were just obeying orders ... I think there’s a point at which, even suffering repercussions, that if someone asks you to torture someone that you should say no.”

Once again, does it matter that Haspel’s actions were “considered lawful at the time”? Who “considered” these acts lawful? What do the cases and laws you have studied say about this?

Name: _____ Date: _____

Taking Informed Action

Featured Source

Schwartz, Jon. "Washington Breaks Out the 'Just Following Orders' Nazi Defense for CIA Director-Designate Gina Haspel," *The Intercept*.

<https://theintercept.com/2018/03/15/washington-breaks-out-the-just-following-orders-nazi-defense-for-cia-director-designate-gina-haspel/>. 15 March 2018. Accessed 5 October 2017.



DURING THE NUREMBERG TRIALS after World War II, several Nazis, including top German generals Alfred Jodl and Wilhelm Keitel, claimed they were not guilty of the tribunal's charges because they had been acting at the directive of their superiors.

Ever since, this justification has been popularly known as the "Nuremberg defense," in which the accused states they were "only following orders."

The Nuremberg judges rejected the Nuremberg defense, and both Jodl and Keitel were hanged. The United Nations International Law Commission later codified the [underlying principle](#) from Nuremberg as "the fact that a person acted pursuant to order of his Government or of a superior does not relieve him from responsibility under international law, provided a moral choice was in fact possible to him."

This is likely the most famous declaration in the history of international law and is as settled as anything possibly can be.

However, many members of the Washington, D.C. elite are now stating that it, in fact, is a legitimate defense for American officials who violate international law to claim they were just following orders.



View of some of the Nazi leaders accused of war crimes during World War II during the war crimes trial at Nuremberg International Military Tribunal court, held between Nov. 20, 1945 and Oct. 1, 1946. Photo: Stringer/AFP/Getty Images.

Specifically, they say Gina Haspel, a top CIA officer whom President Donald Trump has designated to be the agency's next director, bears no responsibility for the torture she supervised during George W. Bush's administration.

Haspel [oversaw](#) a secret "black site" in Thailand, at which prisoners were waterboarded and subjected to other severe forms of abuse. Haspel later participated in the destruction of the CIA's videotapes of some of its torture sessions. There is [informed speculation](#) that part of the CIA's motivation for destroying these records may have been that they showed operatives employing torture to generate false "intelligence" used to justify the invasion of Iraq.

John Kiriakou, a former CIA operative who helped capture many Al Qaeda prisoners, [recently said](#) that Haspel was known to some at the agency as "Bloody Gina" and that "Gina and people like Gina did it, I think, because they enjoyed doing it. They tortured just for the sake of torture, not for the sake of gathering information." (In 2012, in a [convoluted case](#), Kiriakou [pleaded guilty](#) to leaking the identity of a covert CIA officer to the press and spent a year in prison.)

Some of Haspel's champions have used the exact language of the popular version of the Nuremberg defense, while others have paraphrased it.

One who paraphrased it is Michael Hayden, former director of both the CIA and the National Security Agency. In a [Wednesday op-ed](#), Hayden endorsed Haspel as head of the CIA, writing that "Haspel did nothing more and nothing less than what the nation and the agency asked her to do, and she did it well."

Hayden later said [on Twitter](#) that Haspel's actions were "consistent with U.S. law as interpreted by the department of justice." This is true: In 2002, the Office of Legal Counsel at the Justice Department declared in a series of [notorious memos](#) that it was legal for the U.S. to engage in "enhanced interrogation techniques" that

were obviously torture. Of course, the actions of the Nuremberg defendants had also been “legal” under German law.

John Brennan, who ran the CIA under President Barack Obama, made similar remarks on Tuesday when asked about Haspel. The Bush administration had decided that its torture program was legal, [said Brennan](#), and Haspel “tried to carry out her duties at CIA to the best of her ability, even when the CIA was asked to do some very difficult things.”

Texas Republican Rep. Will Hurd used the precise language of the Nuremberg defense during a [Tuesday appearance on CNN](#) when Wolf Blitzer asked him to respond to a statement from Sen. John McCain, R-Ariz.: “The Senate must do its job in scrutinizing the record and involvement of Gina Haspel in this disgraceful program.”

Hurd, a member of the House Intelligence Committee and a former CIA operative as well, told Blitzer that “this wasn’t Gina’s idea. She was following orders ... She implemented orders and was doing her job.”

Hurd also told Blitzer, “You have to remember where we were at that moment, thinking that another attack was going to happen.”

This is another defense that is explicitly illegitimate under international law. The U.N. Convention Against Torture, which was [transmitted](#) to the Senate by Ronald Reagan in 1988, [states](#) that “no exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture.”

Notably, Blitzer did not have any follow-up questions for Hurd about his jarring comments.

Samantha Winograd, who served on President Obama’s National Security Council and now is an analyst for CNN, likewise used Nuremberg defense language in an appearance on the network. Haspel, [she said](#), “was implementing the lawful orders of the president... You could argue she should have quit because the program was so abhorrent. But she was following orders.”

Last but not least there’s Rich Lowry, editor of National Review, who issued a ringing defense of Haspel in Politico, [claiming](#) she was merely acting “in response to what she was told were lawful orders.”

Remarkably, this perspective has even seeped into the viewpoint of regular journalists. At a recent press conference at which Kentucky Republican Sen. Rand Paul criticized Haspel, a reporter [asked him](#) to respond to “the counterargument” that “these policies were signed off by the Bush administration... They were considered lawful at the time.”

It fell to Paul to make the obvious observation that appears to have eluded almost everyone else in official Washington: “This has been historically a question we’ve asked in every war: Is there a point at which soldiers say ‘no’? ... Horrendous things happened in World War II, and people said, well, the German soldiers were just obeying orders ... I think there’s a point at which, even suffering repercussions, that if someone asks you to torture someone that you should say no.”

(Thank you to [@jeanbilly545](#) and [Scott Horton](#) for telling me about Hurd and Paul’s remarks, respectively.)

Top photo: Gina Haspel speaks at the 2017 William J. Donovan Award Dinner.

Appendix A: Definitions of “Genocide” and “Crimes Against Humanity” from the Rome Statute of the International Criminal Court.

Accessed from: [Rome Statute of the International Criminal Court](https://www.icc-cpi.int/nr/rdonlyres/ea9aeff7-5752-4f84-be94-0a655eb30e16/0/rome_statute_english.pdf) (https://www.icc-cpi.int/nr/rdonlyres/ea9aeff7-5752-4f84-be94-0a655eb30e16/0/rome_statute_english.pdf)

Article 6 Genocide

For the purpose of this Statute, "genocide" means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

- a. Killing members of the group;
- b. Causing serious bodily or mental harm to members of the group;
- c. Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
- d. Imposing measures intended to prevent births within the group;
- e. Forcibly transferring children of the group to another group.

Article 7 Crimes against humanity

1. For the purpose of this Statute, "crime against humanity" means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack:
 - a. Murder;
 - b. Extermination;
 - c. Enslavement;
 - d. Deportation or forcible transfer of population;
 - e. Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law;
 - f. Torture;
 - g. Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity;
 - h. Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court;
 - i. Enforced disappearance of persons;

- j. The crime of apartheid;
 - k. Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.
2. For the purpose of paragraph 1:
- a. "Attack directed against any civilian population" means a course of conduct involving the multiple commission of acts referred to in paragraph 1 against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack;
 - b. "Extermination" includes the intentional infliction of conditions of life, inter alia the deprivation of access to food and medicine, calculated to bring about the destruction of part of a population;
 - c. "Enslavement" means the exercise of any or all of the powers attaching to the right of ownership over a person and includes the exercise of such power in the course of trafficking in persons, in particular women and children;
 - d. "Deportation or forcible transfer of population" means forced displacement of the persons concerned by expulsion or other coercive acts from the area in which they are lawfully present, without grounds permitted under international law;
 - e. "Torture" means the intentional infliction of severe pain or suffering, whether physical or mental, upon a person in the custody or under the control of the accused; except that torture shall not include pain or suffering arising only from, inherent in or incidental to, lawful sanctions;
 - f. "Forced pregnancy" means the unlawful confinement of a woman forcibly made pregnant, with the intent of affecting the ethnic composition of any population or carrying out other grave violations of international law. This definition shall not in any way be interpreted as affecting national laws relating to pregnancy;
 - g. "Persecution" means the intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity;
 - h. "The crime of apartheid" means inhumane acts of a character similar to those referred to in paragraph 1, committed in the context of an institutionalized regime of systematic oppression and domination by one racial group over any other racial group or groups and committed with the intention of maintaining that regime;
 - i. "Enforced disappearance of persons" means the arrest, detention or abduction of persons by, or with the authorization, support or acquiescence of, a State or a political organization, followed by a refusal to acknowledge that deprivation of freedom or to give information on the fate or whereabouts of those persons, with the intention of removing them from the protection of the law for a prolonged period of time.
3. For the purpose of this Statute, it is understood that the term "gender" refers to the two sexes, male and female, within the context of society. The term "gender" does not indicate any meaning different from the above.