
Volume 6
Number 5 *Volume 6, No. 3, Fall 2013*
Supplement: Ninth Annual IAFIE
Conference: Expanding the Frontiers of
Intelligence Education

Article 34

Bearing Silent Witness: A Grandfather's Secret Attestation to German War Crimes in Occupied France

McKay M. Smith

Follow this and additional works at: <https://scholarcommons.usf.edu/jss>
pp. 358-381

Recommended Citation

Smith, McKay M. "Bearing Silent Witness: A Grandfather's Secret Attestation to German War Crimes in Occupied France." *Journal of Strategic Security* 6, no. 3 Suppl. (2013): 358-381.

This Paper is brought to you for free and open access by the Open Access Journals at Scholar Commons. It has been accepted for inclusion in *Journal of Strategic Security* by an authorized editor of Scholar Commons. For more information, please contact scholarcommons@usf.edu.

Bearing Silent Witness: A Grandfather's Secret Attestation to German War Crimes in Occupied France

McKay M. Smith

*Over half a century after the Nazi era, the U.S. Government continues to keep secret much of the information it has on Nazi war criminals. It is imperative that this information receive full scrutiny by the public. Only through an informed understanding of the Nazi era and its aftermath can we guard against a repeat of one of the darkest moments in history.*¹

Rep. Stephen Horn, July 1998

Introduction

The Nazi War Crimes Disclosure Act of 1998 required the U.S. Government to expedite the release of classified intelligence information related to German war crimes committed during World War II.² In an effort to fulfill this mandate, an interagency working group was called upon to “locate, identify, recommend for declassification, and make available to the public at the National Archives and Records Administration, all classified Nazi war criminal records of the United States.”³ This working group would ultimately release over 8.5 million pages from documents “scattered among the vast quantities of files stored in the national archives and individual federal agencies.”⁴ As a result, this project would come to be regarded as the “largest congressionally mandated declassification effort in history.”⁵ Although members of Congress were successful in initiating an unprecedented release of information,⁶ their efforts are notable for another reason as well — America’s lawmakers failed to allocate funds for the continued research and preservation of this material.⁷ Rather, they left this substantial responsibility to inquisitive historians and members of the general public.⁸

Scholars have acknowledged that the study of World War II era intelligence can be an extremely arduous undertaking.⁹ Intelligence tradecraft, by its very nature, requires that certain information

¹ Nazi War Crimes Disclosure Act: Hearing on H.R. 4007 and S. 1379 Before the Subcomm. on Gov’t Mgmt., Info., and Tech. of the H. Comm. on Gov’t Reform and Oversight, 105th Cong. 1 (1998) [hereinafter Hearing] (Statement of Rep. Stephen Horn, Chairman, Subcomm. on Gov’t Mgmt., Info., and Tech.).

² Nazi War Crimes Disclosure Act, Pub. L. No. 105-246, 112 Stat. 1859 (1998) (codified as amended in 5 U.S.C. § 522 note).

³ *Ibid.*, 1(c)(1); See also Nazi War Criminal Records Interagency Working Group, *Implementation of Nazi War Crimes Disclosure Act: An Interim Report to Congress* (1999).

⁴ Nazi War Crimes and Japanese Imperial Government Records Interagency Working Group, *Final Report to Congress*, at 1, 5 (2007) [hereinafter *Final Report*].

⁵ *Ibid.*, 1.

⁶ See generally Hearing, *supra* note 1, at 2 (describing congressional intent behind the Nazi War Crimes Disclosure Act of 1998).

⁷ Implementation of the Nazi War Crimes Disclosure Act: Hearing Before the Subcomm. on Gov’t Mgmt., Info., and Tech. of the H. Comm. on Gov’t Reform and Oversight, 106th Cong. 8 (2000) (Statement of Dr. Michael Kurtz, Assistant Archivist of the United States, Nat’l Archives and Records Admin.).

⁸ *Ibid.*, 15; see also *Final Report*, *supra* note 4, at 1, 2 (clarifying that agency participants did not receive independent funding for the prolonged study of these documents—rather, their mandate was to release these records to the general public).

⁹ Richard Breitman et al., *U.S. Intelligence and the Nazis* 8 (2005); Richard Aldrich, *The Hidden Hand: Britain, American, and Cold War Secret Intelligence* 16 (2001).

remain secret.¹⁰ It necessitates the sustained concealment of activities and events.¹¹ Moreover, this government emphasis on secrecy often results in the suppression of sensitive information from historians and citizens alike.¹² Thus, it has “become a tradition in intelligence scholarship to look to the declassified records of the past for enlightenment.”¹³ This trend has led multiple historians to conclude that “there are remarkable fragments of the story which have lain undiscovered in improbable places for more than fifty years.”¹⁴ Consequently, those choosing to carry out archival research “will undoubtedly find their own discoveries in these declassified documents and in related records of the National Archives.”¹⁵

This Article should be regarded as a spirited departure from traditional legal scholarship. It endeavors to be a “largely empirical contribution to the start of a wider project”¹⁶ — namely, one that examines fragments of declassified intelligence and attempts to place this information into a larger mosaic of historical events.¹⁷ The following discussion utilizes the case study method to communicate a powerful message related to both law and history. Readers are encouraged to examine this narrative and related analysis in conjunction with the primary source material it references. More importantly, they are asked to evaluate relevant provisions of international law and to apply these principles to a specific declassified report. It is through a similar process that this Article arrives at its central conclusion.

Background

There is little doubt that memory is an essential concept for historians.¹⁸ In their search for “the ‘truth’ of remembered account,” scholars often turn to the case study method to “record and value” historical events.¹⁹ In his recent work related to postwar intelligence, Michael Salter emphasizes the importance of the case study in placing declassified intelligence into its broader historical context.²⁰ Specifically, he suggests that “detailed case studies can be as revealing of

¹⁰ Mark Lowenthal, *intelligence: from secrets to policy* 1 (2009); John Radsan, *The Unresolved Equation of Espionage and International Law*, 28 Mich. J. Int'l L. 595, 599-602 (2007).

¹¹ See Lowenthal, *supra* note 10, at 1.

¹² See *id.* (explaining that secrecy can be a source of consternation to private citizens, especially in a democratic society such as the United States).

¹³ Lorie Charlesworth, *2 SAS Regiment, War Crimes Investigations, and British Intelligence: Intelligence Officials and the Natzweiler Trial*, 6 J. Intelligence Hist. 21 (2006) [hereinafter Charlesworth, *2 SAS Regiment*].

¹⁴ Aldrich, *supra* note 9, at 15. See also Breitman et al., *supra* note 9, at 8; Michael Salter, *Nazi War Crimes, U.S. Intelligence and Selective Prosecution at Nuremberg: Controversies Regarding the Role of the Office of Strategic Services* 2, 3 (2007).

¹⁵ Breitman et al., *supra* note 9, at 8.

¹⁶ Salter, *supra* note 14, at 4.

¹⁷ Aldrich, *supra* note 9, at 15, 16; Salter, *supra* note 14, at 5 (discussing the inherent difficulty in researching events that are recorded in documents scattered across various archival collections); Charlesworth, *2 SAS Regiment*, *supra* note 13, at 21 (comparing the study of declassified intelligence to assembling a larger mosaic of historical information).

¹⁸ Lorie Charlesworth, *Forgotten Justice: Forgetting Law's History and Victim's Justice in British "Minor" War Crimes Trials 1945-48*, 74 Amicus Curiae 2 (2008) [hereinafter Charlesworth, *Forgotten Justice*].

¹⁹ See *id.* at 4.

²⁰ See Salter, *supra* note 14, at 3. See also Michael Salter, *Intelligence Agencies and War Crimes Prosecution: Allen Dulles's Involvement in Witness Testimony at Nuremberg*, 2 J. Int'l Crim. Just. 826 (2004) (describing CIA Director Allen Dulles's involvement in the Nuremberg proceedings); Michael Salter, *Trial by Media: The Psychological Warfare Background to OSS's Contribution to the Nuremberg War Crimes Trials*, 9 J. Intelligence Hist. 15 (2010) (analyzing the role of the Office of Strategic Services in the Nuremberg proceedings); Ian Bryan & Michael Salter, *War Crimes Prosecutors and Intelligence Agencies: The Case for Assessing their Collaboration*, 16 Intelligence & Nat'l Security 93 (2001) (providing additional discussion of the involvement of intelligence agencies in monitoring war criminality).

wider historical and institutional tendencies as apparently broader sociological approaches that seek to capture and generalize about the entire field.”²¹ As Salter’s viewpoints have gained acceptance amongst prominent academic circles, a new legal sub-discipline has started to emerge.

Socio-legal analysis is described as a “fluid, changing, open movement [that] defies a fixed descriptor.”²² At its core, however this approach focuses on the intersection of law, intelligence, and human rights.²³ Proponents of this movement stress that it explores historical events “from the perspective of the various participants, emphasizing their ‘lived experience.’”²⁴ As a result, some scholars have asserted that this legal sub-discipline “encourages the voice of the historian to be heard directly in the text,” thereby making remembered account an integral piece of the ensuing narrative.²⁵ Thus, readers should be aware that throughout the remainder of this Article, “the authorial voice, my voice, disrupts this narrative... to allow other interpretations to emerge and to sabotage illusions of closure.”²⁶ This was done deliberately and in an effort to familiarize the audience with the case study that follows.

In the summer of 2011, through hard work and a bit of luck, my father and I were able to learn more about the man who made our very existence possible, Lt. Raymond Murphy. The task of locating my grandfather was complicated by a number of factors, not the least of which was his misrepresenting his age by one year to join the U.S. Army Air Corps in 1942. In addition, my father never met his birth father and knew few particulars of the man’s life. Although my grandfather passed away in 1970 at the age of forty-six, we were fortunate to discover a series of documents detailing his experiences during World War II.²⁷ Moreover, our journey led us to his final resting place at Arlington National Cemetery.

Although the details that led to this discovery are certainly noteworthy, this Article seeks to examine something much more significant — the story my grandfather was able to share with us nearly forty years after his death. On April 28, 1944, Lt. Murphy was shot down by German anti-aircraft fire over Avord, France on his sixteenth mission as a B-17 Navigator with the 91st Bomb Group, 324th Squadron.²⁸ For the next three months, he successfully evaded German patrols and Nazi collaborators with the help of local French Resistance fighters known as *le Maquis*.²⁹

²¹ Salter, *supra* note 14, at 3.

²² Charlesworth, *Forgotten Justice*, *supra* note 18, at 3.

²³ *See id.* (referencing socio-legal studies in the context of Salter’s emphasis on intelligence studies and humanitarian scholarship).

²⁴ *Ibid.*

²⁵ *Ibid.*, 4.

²⁶ *Ibid.*

²⁷ The information in this Article is primarily drawn from Missing Air Crew Report (MACR) No. 4235 and Escape and Evasion Report (*E&E*) No. 866. During World War II, U.S. Army Air Corps Bomb Groups were required to submit MACRs when airmen were lost during combat operations. E&E Reports were required when personnel subsequently avoided capture by enemy forces. Notably, the National Archives and Records Administration recently made E&E reports publicly available in electronic format. Thus, the primary source material contained in MACR No. 4235 and *E&E* No. 866 should be examined in conjunction with this Article. Please see relevant citations and associated hyperlinks to access publicly available versions of these documents.

²⁸ *See generally* *Escape and Evasion Report No. 866, Evasion in France* (Aug. 15, 1944) [hereinafter *E&E* No. 866], available at http://media.nara.gov/nw/305270/EE-866.pdf?bcsi_scan_0F6519961A220080=0&bcsi_scan_filename=EE-866.pdf.

²⁹ *Ibid.*; *See also* Julian Jackson, *France: The Dark Years 1940-1944* (2001); Claude Chambard, *The Maquis: A History of the French Resistance Movement* (1976) (providing a more thorough discussion of French Resistance efforts and the structure of *le Maquis* generally).

Following his escape in August of 1944, my grandfather was questioned by the U.S. Army Military Intelligence Service at Headquarters, European Theater of Operations.³⁰ The information he provided during his debriefing was recorded in narrative form and analyzed for intelligence related to the continued presence of German forces in occupied France. At the conclusion of his interview, my grandfather signed a security certificate forbidding him from disclosing any facts related to his wartime experience.³¹ The resulting report was marked “SECRET” and titled *Escape and Evasion Report No. 866, Evasion in France*.³² Only recently has this document been made available to the public in electronic format.³³

Although my father and I will never be able to sit down with Lt. Murphy and discuss his story, his words are compelling even forty years after his death. As a scholar of intelligence law and history, I was struck by the significance of his experiences in the summer of 1944. When examined from a legal perspective, his declassified first person account is illustrative of a number of law of war topics, including the law related to land and aerial warfare, escape and evasion, and the duties owed to inhabitants during belligerent occupation. Most notably, however, my grandfather’s report also evidences criminal atrocities committed by German soldiers.

The story told by Lt. Murphy is one of great valor and sacrifice. Accordingly, this Article will attempt to honor his memory while also providing a thorough legal analysis of the conduct that he witnessed. The following discussion will examine his experiences in the context of the law of war as it existed in 1944. It will also provide a modern perspective of how this body of law has evolved since World War II. In addition, this Article will examine a particularly disturbing recollection reported by my grandfather to military intelligence officers and attempt to answer one important question — could the terrible event described in *Escape and Evasion Report No. 866* constitute evidence of a long-forgotten war crime?³⁴

The Law of War in Historical Perspective

In order to analyze Lt. Murphy’s account, it is first necessary to provide some context to the war as it existed in the skies over Europe during this period. The experiences of my grandfather and the crew of his B-17 were in no way unique or exceptional. Rather, all airmen in the U.S. Eighth

³⁰ See *E&E No. 866*, *supra* note 28, at 1. See, e.g., Charlesworth, *2 SAS Regiment*, *supra* note 13, at 13 (demonstrating that intelligence collection played a critical role in post-War proceedings such as the Nuremberg Trials and other minor war crimes trials).

³¹ *E&E No. 866*, *supra* note 28, at 21.

³² *Ibid*; According to the National Archives, E&E Reports were developed to collect and evaluate data on escape and evasion activities in the European Theater of Operations. They included a brief questionnaire as well as a typed or handwritten narrative provided by the escapee or evader. Notably, these reports were not intended to collect information on war crimes or other criminal acts perpetrated by enemy forces.

³³ National Archives, NARAtions: The Blog of the United States National Archives, World War II Escape and Evasion Reports Are Now Available Online (Sept. 14, 2010), <http://blogs.archives.gov/online-public-access/?p=2751> (stating that digitized versions of Escape and Evasion Reports first became available on NARA’s website in September 2010); see also National Archives, Prologue: Pieces of History, <http://blogs.archives.gov/prologue/?p=1798>.

³⁴ Leslie C. Green, *The Contemporary Law of Armed Conflict* 50, 320 (2008); Salter, *supra* note 14, at 6 (illustrating that under Article 6 of the London Charter of 1945, the International Military Tribunal at Nuremberg was given jurisdiction over crimes against peace, war crimes, and crimes against humanity — although crimes against peace and humanity had never been previously defined under international law, these terms were given broad application under these proceedings).

Air Force, or the Mighty Eighth as it was often referred to, took part in fierce aerial combat in the period leading up to the summer of 1944.³⁵ One aircrew in particular, the crew of the *Memphis Belle*, made my grandfather's squadron famous when they were the first to successfully complete twenty-five missions and return to America as celebrated heroes.³⁶ The air war had raged in Europe "for two years by the time elements of the Eighth Air Force began to arrive in late 1942 and deploy across the misty English countryside."³⁷ As the conflict wound on, the air war "kept on creating and re-creating itself in a furious upward curve, attackers and defenders alike improvising tactics on a round-the-clock basis, ransacking science and engineering for new technology, any kind of edge – new bomber specs and new fighter-plane wrinkles... ever-higher ranges in anti-aircraft fire."³⁸ In addition, the Eighth Air Force's mission in Europe was made all the more deadly by one major factor — daytime bombing missions.³⁹ The American forces had committed themselves to daylight bombing, against the advice of their British counterparts, who considered it suicidal and had long since switched to nighttime bombing. The Eighth still held to the theory that a tight formation or a combat box, of B-17 Flying Fortresses, each bristling with guns, was capable of defending itself from enemy fighter aircraft. And the Eighth was finding that this was a mistake.⁴⁰

The losses suffered by the Eighth Air Force were staggering. During the European Campaign, more than 30,000 U.S. airmen were killed or missing and another 30,000 were captured as prisoners of war.⁴¹ Overall, the Eighth Air Force "took more casualties in World War II than the Marine Corps and the Navy combined."⁴² Of the thirty-six bombers that had originally crossed the Atlantic to form the 91st Bomb Group, "twenty-nine had been shot down, a casualty rate of 82 percent."⁴³

As a result of the alarming rate of casualties, many survivors were troubled by the memories of friends and acquaintances who, just the day before, had been drinking next to them in a pub in England.⁴⁴ Although some men chose to talk openly about their experiences, others suffered in silence.⁴⁵ All airmen, however, speculated about what happened to those who were able to escape their crippled aircraft and survive their rapid descent to German occupied territory.⁴⁶ Robert Morgan, the pilot of the *Memphis Belle*, reflected on these men when he wrote:

³⁵ Roger Freeman, *The Mighty Eighth: A History of the United States, Men and Machines of the US Eighth Air Force* (1970); Marion Havelaar, *The 91st Bombardment Group in World War II* (1995). *See also* Rob Morris, *Untold Valor: Forgotten Stories of American Bomber Crews in World War II* (2006) (detailing personal accounts of airmen from the 8th Air Force during World War II).

³⁶ Ron Powers & Robert Morgan, *The Man Who Flew the Memphis Belle: Memoir of a World War II Bomber Pilot* (2001).

³⁷ *Ibid.*, 102; *See also* Havelaar, *supra* note 35, at 9 (describing the arrival and deployment of the 8th Air Force in 1942).

³⁸ Powers & Morgan, *supra* note 36, at 102.

³⁹ *See* John Keegan, *The Second World War 425-26* (1989); *see also* David Metz, *The Air Campaign: John Warden and the Classical Airpower Theorists* 28 (1999) (describing daylight bombing and the theoretical underpinnings for this wartime practice).

⁴⁰ Morris, *supra* note 35, at 54.

⁴¹ Powers & Morgan, *supra* note 36, at 106. *See also* Freeman, *supra* note 35; Havelaar, *supra* note 35 (providing more specific casualty reporting for the 8th Air Force and 91st Bomb Group).

⁴² Powers & Morgan, *supra* note 36, at 106.

⁴³ *Ibid.*, 132.

⁴⁴ *Ibid.*, 132-33; *see also* Travis Ayres, *The Bomber Boys: Heroes Who Flew the B-17s in World War II* (2005); Bert Stiles, *Serenade to the Big Bird* 69 (2001) (detailing personal accounts of airmen who served in World War II).

⁴⁵ *See* Powers & Morgan, *supra* note 36, at 133.

⁴⁶ *See* Kay Sloan, *Not Without Honor: The Nazi Journal of Steve Carano* 129 (2008) (providing Bill Blackmon's personal account of the events of April 28, 1944 — notably, Blackmon spent months in German captivity after his

[w]e knew every time we went up, that it was very possible, likely even, to get hit hard, maybe knocked out of the sky. We might get trapped and roasted at our stations, or riddled with flak or machine gun bullets, or captured and sent to prison camps if we bailed out, provided we survived the trip down.⁴⁷

From twenty-five thousand feet, the conflict below may have seemed somewhat impersonal or distant at times. When an airman found himself in the unfortunate situation of being shot down, however, the deadly reality of the situation quickly became apparent.⁴⁸ Rather than returning to base to enjoy a hot meal and shower, men like Lt. Murphy and his crew members were forced to come face to face with the ground truth of land warfare.

In 1944, the law of land warfare was primarily regulated by the 1907 Hague Convention IV Respecting the Laws and Customs of War on Land (Hague IV).⁴⁹ The precursor to Hague IV was the 1899 Hague Convention II (Hague II).⁵⁰ Although Hague II represented the “first successful effort of the international community to codify a relatively comprehensive regime governing the laws of land warfare,”⁵¹ the treaty provisions agreed upon by the parties to Hague IV are still in force today.⁵²

Parties to both Hague II and Hague IV laid the foundation for what would become known as *jus in bello*, or “the laws and customs of war.”⁵³ Notably, the Preamble to Hague IV also gave expression to certain “high ideals” which formed the basis for modern humanitarian law.⁵⁴ The Preamble reads in part:

“[a]nimated by the desire to serve, even in this extreme case, the interests of humanity and the ever progressive needs of civilization; [t]hinking it important, with this object, to revise the general laws and customs of war... the high contracting Parties deem it expedient to declare that, in cases not included by the Regulations adopted by them, the inhabitants and belligerents remain under the protection and the rule of the principles of the law of nations, as they result from

B-17 was shot down during the bombing run on Avord, France); see also Stuart Hadaway, *Missing Believed Killed: Casualty Policy and the Missing Research Service and Enquiry Service 1939-1952* (2008) (describing the search for missing Allied airmen in Europe).

⁴⁷ Powers & Morgan, *supra* note 36, at 165.

⁴⁸ Sloan, *supra* note 46, at 136. See also Thomas Childers, *In the Shadows of War: An American Pilot's Odyssey Through Occupied France and the Camps of Nazi Germany* (2002).

⁴⁹ See Michael Schmitt, *Military Necessity and Humanity in International Humanitarian Law: Preserving the Delicate Balance*, 50 VA. J. INT'L. L. 795, 800, 806 (2010); Chris Jochnick & Roger Normand, *The Legitimization of Violence: A Critical History of the Laws of War*, 35 Harv. J. Int'l L. 49, 52 (1994).

⁵⁰ See Adam Roberts & Richard Guelff, *Documents on the Laws of War* 67, 68 (2000). See also Kevin Chamberlain, *War and Cultural heritage* 9 (2004).

⁵¹ Green, *supra* note 34, at 41.

⁵² Fritz Kalshoven & Liesbeth Zegveld, *Constraints on the Waging of War: An Introduction to International Humanitarian Law* 23 (3d ed. 2001).

⁵³ Green, *supra* note 34, at 22. See also Robert Sloane, *The Cost of Conflation: Preserving the Dualism of Jus ad Bellum and Jus in Bello in the Contemporary Law of War*, 34 Yale J. Int'l L. 47, 49 (2009); Carsten Stahn, 'Jus ad bellum', 'jus in bello' . . . 'jus post bellum'? – Rethinking the Conception of Law of Armed Force, 17 Eur. J. Int'l L. 921, 925 (2006).

⁵⁴ Green, *supra* note 34, at 22, 23.

the usages established among civilized peoples, from the laws of humanity, and the dictates of the public conscience.”⁵⁵

This section of Hague IV, which would come to be known as the Martens Clause, makes a clear distinction between the “laws” versus the “customs” of war.⁵⁶ Thus, while Hague IV represented a “relatively comprehensive agreement on the law of land warfare,”⁵⁷ its provisions were not intended to be inclusive of all applicable law. Rather, the Martens Clause proscribes that “cases not included in the Regulations annexed to the Convention remain governed by customary international law relating to the conduct of warfare.”⁵⁸ Consequently, this principle would be resoundingly reaffirmed in the 1949 Geneva Convention III Relative to the Treatment of Prisoners (GPW), the 1949 Geneva Convention IV Relative to the Protection of Civilian Persons in Times of War (GC IV), and the 1977 Geneva Protocol I Additional to the Geneva Conventions of 1949 (AP I).⁵⁹

The “Geneva Law,” as this postwar collective is sometimes referred to, dictates that the principles of humanitarian law are applicable to any conflict, even if a nation has clearly denounced the Conventions.⁶⁰ Thus, Hague IV, which regulated land warfare during World War II, contained many of the fundamental precepts for modern international agreements.⁶¹ In effect, the Geneva Law “complemented and supplemented” these already existing legal norms.⁶² German officials, however, had a much different interpretation of the duties owed under Hague IV in the build-up to World War II.⁶³ Although Germany signed and ratified the annexed Regulations, they maintained a specific reservation to Article 44.⁶⁴

Germany’s reservation to Hague IV should have served as a forewarning of events to come. Specifically, Article 44 states that a “[b]elligerent is forbidden to force the inhabitants of territory occupied by it to furnish information about the army of the other belligerent, or about its means of self-defense.”⁶⁵ Thus, Germany’s reservation to Hague IV could be viewed as evidence of the country’s intention to not only invade neighboring territory, but also gather information on a

⁵⁵ Convention Respecting the Laws and Customs of War on Land (Hague IV), pmbl., Oct. 18, 1907, 36 Stat. 2277, 1 Bevens 631, 632-33 (1968) [Hereinafter Hague IV].

⁵⁶ Roberts & Guelff, *supra* note 50, at 68. *See also* Thedor Meron, *The Martens Clause, Principles of Humanity, and Dictates of Public Conscience*, 94 Am. J. Int’l L. 78, 79 (2000); William Downey, *The Law of War and Military Necessity*, 47 Am. J. Int’l L. 251 (1953).

⁵⁷ Roberts & Guelff, *supra* note 50, at 68. *See also* Schmitt, *supra* note 49, at 797.

⁵⁸ Roberts & Guelff, *supra* note 50, at 68.

⁵⁹ *Ibid*; *See also* Rupert Ticehurst, *The Martens Clause and the Laws of Armed Conflict*, 317 Int’l Rev. Red Cross 125-34 (1997).

⁶⁰ *See* Kalshoven & Zegveld, *supra* note 52, at 53-54; *see also* Green, *supra* note 34, at 23.

⁶¹ Roberts & Guelff, *supra* note 50, at 68. *See also* Schmitt, *supra* note 49, at 807-11 (explaining the evolution of the law of war).

⁶² Roberts & Guelff, *supra* note 50, at 68.

⁶³ *See* The War Book of the German General Staff (J.H. Morgan trans., McBride, Nast & Co. 1915) [hereinafter War Book], available at http://books.google.com/books?id=j3kDAAAAIAAJ&printsec=frontcover&source=gbs_ge_summary_r&cad=0#v=onepag&q&f=false (providing a pre-World War II translation of the German War Manual). *See also* James Garner, *The German War Code*, 15 U. Ill. Bull. 1, 9-10, 20 (1918) (containing a complimentary analysis of the doctrine of *Kriegsraison* and its relation to Hague IV).

⁶⁴ *See* Roberts & Guelff, *supra* note 50, at 84. Germany signed the annexed Regulations of Hague IV on October 18, 1907 and subsequently ratified these provisions on November 27, 1909. *Id.* at 83, 84. At the time of signature they made note of their specific reservation and maintained this reservation until ratification, as did Austria-Hungary, Japan, Montenegro, and Russia. *Id.*

⁶⁵ Hague IV, *supra* note 55, at 651.

country's military defenses by forcing local inhabitants into collaboration.⁶⁶ These facts become even more troubling when coupled with the doctrine of *Kriegsraison geht vor Kriegsrecht*, or as it is more commonly referred to, *Kriegsraison*.⁶⁷

Kriegsraison is a concept that first appeared in German literature in the late 18th century.⁶⁸ The literal translation of this term is “military necessity in war overrides the law of war.”⁶⁹ Accordingly, German proponents of the doctrine believed that “military necessity... renders inoperative ordinary law and the customs and usages of war.”⁷⁰ Interestingly, this belief starkly contrasts with the contemporary law of war framework which recognizes that “[n]ecessity cannot overrule the law of war.”⁷¹ In fact, modern U.S. Army doctrine explains that “[m]ilitary necessity has been generally rejected as a defense for acts forbidden by the customary and conventional laws of war.”⁷² Of particular note, relevant law and custom are binding “not only upon states... but also upon individuals, and in particular, the members of their armed forces.”⁷³

Although *Kriegsraison* was overwhelmingly repudiated by the international community in the years following World War II, the facts and circumstances in *Escape and Evasion Report No. 866* strongly suggest that this doctrine was thriving amongst German forces in war-torn France.⁷⁴ While *Kriegsraison* allows a belligerent to violate rules of international law it deems “necessary for the success of its military operations,”⁷⁵ the underlying reasoning for this viewpoint is fundamentally flawed.⁷⁶ As German forces in World War II were the sole judge of what constituted military necessity, the “doctrine [was] really that a belligerent may violate the law or repudiate it or ignore it whenever [it was] deemed to be for its military advantage.”⁷⁷ Thus, *Kriegsraison* had no basis in fundamental principles of international law, but rather relied on a practitioner's self-serving motivations and an innate “contempt” for the established law of war.⁷⁸

⁶⁶ See Garner, *supra* note 63, at 10, 20.

⁶⁷ Scott Horton, *Kriegsraison or Military Necessity? The Bush Administration's Wilhelmine Attitude Towards the Conduct of War*, 30 Fordham Int'l L.J. 576, 585-87. For a more detailed discussion of the doctrine, see also Gary D. Solis, *The Law of Armed Conflict: International Humanitarian Law* 266 (2010). Solis writes that “*Kriegsmanier* was the conduct of war according to the customs and laws of war; *Kriegsraison*, its opposite, was the non-observation of those customs and laws.” *Id.* He further asserts that while *Kriegsraison* was embraced by some German politicians and military officers, “it is probable that the resort to this doctrine was above all based on contempt for the law.” *Id.*

⁶⁸ Solis, *supra* note 67, at 266. See also Garner, *supra* note 63, at 11.

⁶⁹ Solis, *supra* note 67, at 265. See also War Book, *supra* note 63, at 68. Notably, this German manual on land warfare states that: A war conducted without energy cannot be directed merely against the combatants of the Enemy State and the positions they occupy, but it will and must in like manner seek to destroy the total intellectual and material resources of the latter. Humanitarian claims such as the protection of men and their goods can only be taken into consideration in so far as the nature and object of the war permit.

⁷⁰ Solis, *supra* note 67, at 266 (citing Louis Doswald Beck, *International Humanitarian Law and the Advisory Opinion of the International Court of Justice on the Legality or Threat or Use of Nuclear Weapons*, 316 Int'l Rev. Red Cross 33 (1997)).

⁷¹ *Ibid.*, 265.

⁷² Department of the Army, *The Law of Land Warfare, Field Manual 27-10*, Appendix A-1 (July 1956) [hereinafter *The Law of Land Warfare*]. See also Judge Advocate General's School: *Law of War Handbook* 164-65 (2005).

⁷³ *The Law of Land Warfare*, *supra* note 72.

⁷⁴ See Downey, *supra* note 56, at 253 (discussing the doctrine of *Kriegsraison* and its application in World War II); see also Norman Dunbar, *Military Necessity in War Crimes Trials*, 29 Brit. Y.B. Int'l L. 441, 446-67 (1952).

⁷⁵ Solis, *supra* note 67, at 267.

⁷⁶ Horton, *supra* note 67, at 586; see also Schmitt, *supra* note 49, at 797-99.

⁷⁷ Solis, *supra* note 67, at 267 (citing Clad Mullins, *The Leipzig Trial: An Account of the War Criminals' Trials and a Study of German Mentality* 123 (1921)).

⁷⁸ *Id.*; see also Jochnick & Normand, *supra* note 49, at 63-64.

The First to Leave the Ship

At 1154 hours on April 28, 1944, two airmen in accompanying B-17s observed my grandfather's aircraft leave formation with its "No. 3 engine on fire."⁷⁹ The weather conditions for the mission over Avord, France were relatively clear with only "slight ground haze... [and] scattered clouds."⁸⁰ Although this enabled the heavy bombers a great deal of visibility over their target, it also allowed German forces below to more effectively direct their anti-aircraft fire during this dangerous daytime mission. The first witness to the incident remembered seeing nine parachutes before his vision was obstructed by other planes in the formation.⁸¹ The second witness saw all ten airmen bail out of the crippled aircraft before it exploded in midair.⁸²

My grandfather reported that his B-17 was "in pretty bad shape" after receiving a direct hit immediately over its target.⁸³ He had been wounded in both hands by exploding flak and observed a substantial amount of "fire on [the] wing."⁸⁴ The gas tank between the No. 3 and No. 4 engine was in flames, which left the crew with little time to escape.⁸⁵ My grandfather "was the first to leave the ship" and jumped from an altitude of approximately 15,000 feet.⁸⁶ He delayed opening his parachute to avoid German flak and machine gun fire.⁸⁷ Unfortunately, he waited too long and the resulting impact knocked him unconscious and fractured his back.⁸⁸ Shortly thereafter, local Frenchmen picked him up and carried him into the woods where they gave him some "wine and a woodman's jacket" and "helped [him] the best they could."⁸⁹

Although the pilot, Lt. James Cater, also escaped the crippled B-17, his exit from the nose hatch at 15,000 feet was less than ideal.⁹⁰ He jumped with his hand on the rip cord, and accidentally released his parachute while he was "still in the prop wash."⁹¹ In all, Lt. Cater hung from his parachute harness, exposed to exploding flak, for nearly eighteen minutes.⁹² During the final stage of his descent, he observed German "machine gun fire from the ground, directed at [him] and the other men."⁹³ Although he landed unharmed, he reported that other downed airmen were not so lucky. Lt. Cater recounted that "[t]wo men were said to be shot by German machine gun fire" while trapped in their harnesses.⁹⁴

⁷⁹ See Missing Air Crew Report (MACR) No. 4235 (May 2, 1944) [hereinafter MACR No. 4235], available at <http://heroesoffreedom.nl/42-97199.pdf>; see also Havelaar, *supra* note 35, at 118.

⁸⁰ MACR No. 4235, *supra* note 79, at 2.

⁸¹ *Ibid.*, 3.

⁸² *Ibid.*

⁸³ E&E No. 866, *supra* note 28, at 12.

⁸⁴ *Ibid.*

⁸⁵ *Ibid.* See also Havelaar, *supra* note 35, at 188.

⁸⁶ E&E No. 866, *supra* note 28, at 1.

⁸⁷ *Ibid.*

⁸⁸ *Ibid.*

⁸⁹ *Ibid.*

⁹⁰ See generally Escape and Evasion Report No. 827, Evasion in France (July 14, 1944) [hereinafter E&E No. 827], available at http://media.nara.gov/nw/305270/EE-827.pdf?bcsi_scan_0F6519961A220080=0&bcsi_scan_filename=EE-827.pdf. Lt. James Cater also survived the destruction of my grandfather's aircraft over Avord, France. Id. His personal account is recorded in E&E No. 827, dated July 1944. Thus, his rescue preceded that of my grandfather by approximately one month. Although these two men did not act in concert to escape German occupied France, they were both able to evade German forces by working in close coordination with le Maquis. Id.

⁹¹ *Ibid.*, 1.

⁹² *Ibid.*

⁹³ *Ibid.*

⁹⁴ *Ibid.*, 10.

When interviewed by military intelligence officers after his escape, my grandfather was unsure of the fate of his fellow crewmembers.⁹⁵ He reported seeing seven parachutes open during his rapid descent, and remarked that the bombardier was exiting the aircraft “at the moment” the plane exploded.⁹⁶ When asked during his debriefing, “[w]hat is [the] source’s opinion as to the fate of the other crew members,” my grandfather’s answer revealed the hopelessness he must have felt.⁹⁷ Lt. Murphy responded matter-of-factly that all men were “believed to be prisoners or dead — no one [else] contacted the resistance.”⁹⁸

While my grandfather’s predicament must have seemed quite desperate, he was fortunate to have survived such a harrowing experience. As he rightfully noted, he had not been killed during his escape nor had he been captured as a prisoner of war. Most importantly, the delayed release of his parachute had saved him from the indiscriminate machine gun fire directed at his crew while they hung defenseless from their parachutes. While such conduct on the part of German forces certainly seems less than chivalrous, it is also notable for another reason. It evidences a clear disregard for the laws and customs of war.

As a matter of course, “the belligerents in both World Wars accepted the 1907 [Hague] Conventions as governing their activities.”⁹⁹ Although Hague IV provides limited guidance related to the targeting of defenseless airmen, it is notable that the annexed Regulations make reference to the use of “balloons” and “appliances in the air” during times of war.¹⁰⁰ Thus, while Hague IV’s provisions were intended to apply to land warfare rather than aerial warfare, one could infer that it is often quite difficult to ascertain where one type of conflict ends and the other begins. This distinction is especially complicated when discussing the duty owed to those who have successfully parachuted to the earth after their aircraft has been destroyed.

While Hague IV contains guidelines related to the treatment and care of prisoners of war, my grandfather’s situation was not directly analogous to that of a captured prisoner.¹⁰¹ Rather, he was a combatant who had successfully escaped his stricken aircraft and had not yet been given the opportunity to surrender. He was admittedly unarmed and was effectively incapacitated at the time of his landing.¹⁰² Despite the fact that Germany maintained a reservation to Article 44 of the annexed Regulations, they were bound by all other duties imposed by Hague IV when dealing with U.S. airmen.¹⁰³ In particular, Article 23 imposes a specific prohibition on killing or wounding an enemy “who, having laid down his arms, or having no longer means of defence [sic], has surrendered at [his] discretion.”¹⁰⁴

⁹⁵ *E&E No. 866, supra* note 28, at 12.

⁹⁶ *Ibid.*

⁹⁷ *Ibid.*

⁹⁸ *Ibid.*; *See also* Claude Grimaud, *Ils Etaient Dix-Sept Mai-Juin 1944*, at 56-64 (2011). Although Lt. Murphy did not encounter any of his crewmembers in occupied France, he was mistaken when he asserted that “no one [else] contacted the resistance.” *E&E No. 866, supra* note 28, at 12. Four other airmen found shelter with *le Maquis* including James Cater, Clement Dowler, Regis Carney, and Herbert Campbell. Grimaud, *supra*, at 56. Their story was recently recounted by French historian Claude Grimaud. *Id.*

⁹⁹ Green, *supra* note 34, at 44. *See also* Jochnick & Normand, *supra* note 49, at 52.

¹⁰⁰ Hague IV, *supra* note 55, arts. 29 & 53.

¹⁰¹ *Ibid.*; ch. II (containing provisions related to prisoners of war); *see also* Adam Klein & Benjamin Wittes, *Preventive Detention in American Theory and Practice*, 2 Harv. Nat. Sec. J. 85, 96 (2011); The Judge Advocate General’s Legal Center and School, *Law of War Desktop* 74 (2011).

¹⁰² *E&E No. 866, supra* note 28, at 1, 10.

¹⁰³ Roberts & Guelff, *supra* note 50, at 84; Garner, *supra* note 63, at 7, 8.

¹⁰⁴ Hague IV, *supra* note 55, art. 23.

In addition, German soldiers were constrained by the rules of customary international law articulated in the 1923 Hague Rules of Aerial Warfare.¹⁰⁵ Although these draft rules were never adopted as legally binding, “they were regarded as an authoritative attempt to clarify and formulate rules of air warfare, and largely corresponded to [established] customary rules and general principles.”¹⁰⁶ As evidence of their applicability during World War II, “both Axis and Allied powers proclaimed their adherence to the [Hague Rules of Aerial Warfare] and made accusations of their violation.”¹⁰⁷ Specifically, Article 20 expressly forbids the type of misconduct witnessed by my grandfather and his crew.¹⁰⁸ It states, “[w]hen an aircraft has been disabled, the occupants when endeavoring to escape by means of parachute must not be attacked in the course of their descent.”¹⁰⁹

Under the modern law of war, there is still no “formally binding agreement that exclusively addresses air warfare.”¹¹⁰ As if to emphasize the importance of the 1923 Hague Rules of Aerial Warfare, however, a number of its principles are reiterated in modern provisions of international law.¹¹¹ Notably, GPW formally recognizes the concept of combatant immunity that is further articulated in contemporary U.S. jurisprudence.¹¹² In recent times, combatant immunity has come to signify “a doctrine rooted in the customary international law of war, [which] forbids prosecution of soldiers for their lawful belligerent acts committed during the course of armed conflicts against legitimate military targets.”¹¹³

Furthermore AP I, that has not been adopted by the United States but has come to represent persuasive customary international law that provides unambiguous protections for escaping parachutists.¹¹⁴ Specifically, AP I forbids the targeting of a “person parachuting from an aircraft in distress” and further requires that a downed airman “be given an opportunity to surrender before being made the object of attack.”¹¹⁵ Thus, it is “generally considered a rule of customary international law that an aircrew baling out [sic] of a damaged aircraft are *hors de combat* and immune from attack whether by enemy aircraft or from the ground.”¹¹⁶ In addition, once an airman reaches the ground he shall not be made the object of attack if “he has been rendered

¹⁰⁵ See generally Hague Rules of Air Warfare (1923); Natalino Ronzitti & Gabriella Ventuini, *The Law of Air Warfare: Contemporary Issues* 43 (2006); Richard Wyman, *The First Rules of Aerial Warfare* (1984).

¹⁰⁶ Roberts & Guelff, *supra* note 50, at 139.

¹⁰⁷ *Ibid.*, 140.

¹⁰⁸ Hague Rules of Air Warfare, *supra* note 105, art. 20.

¹⁰⁹ *Ibid.*

¹¹⁰ Roberts & Guelff, *supra* note 50, at 141.

¹¹¹ Ronzitti & Ventuini, *supra* note 105, at 10, 21, 45, 96.

¹¹² Geneva Convention (III) Relative to the Treatment of Prisoners of War, arts. 87, 99 (Aug. 12, 1949) [hereinafter GPW]; *United States v. Lindh*, 212 F. Supp. 2d 541, 553 (Ed. Va. 2002). See also Geoffrey Corn & Chris Jenks, *Two Sides of the Combatant Coin: Untangling Direct Participation in Hostilities from Belligerent Status in Non-International Armed Conflicts*, 33 U. Pa. J. Int'l L. 313, 336 (2011); Major Alex Peterson, *Order Out of Chaos: Domestic Enforcement of the Law of Internal Armed Conflict*, 171 Mil. L. Rev. 1, 19 (2002).

¹¹³ *Lindh*, 212 F. Supp. 2d at 553.

¹¹⁴ Green, *supra* note 34, at 177; Michael Matheson, Deputy Legal Adviser, U.S. Dep't of State, *Remarks at the Sixth Annual American Red Cross – Washington College of Law Conference on International Humanitarian Law: A Workshop on Customary International Law and the 1977 Protocols Additional to the 1949 Geneva Conventions*, 2 Am. U. J. Int'l L. & Pol. 415, 419, 422–29 (1987). See also Michael Schmitt, *Deconstructing Direct Participation in Hostilities: The Constitutive Elements*, 42 N.Y.U. J. Int'l L. & Pol. 697, 716–17 (2010).

¹¹⁵ Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, art. 42 (1977) [hereinafter AP I].

¹¹⁶ Green, *supra* note 34, at 177. See also The Judge Advocate General's School, *Air Force Operations and the Law* 16, 25 (2009).

unconscious or is otherwise incapacitated by wounds or sickness, and therefore is incapable of defending himself.”¹¹⁷

Thus, the conduct of German forces described by both my grandfather and the pilot of his B-17 constituted violations of the laws and customs of war. Despite the fact that Hague IV contained no specific prohibition on the targeting of downed airmen descending from their crippled aircraft, these actions were strictly forbidden by established customary international law. In addition, it is unclear how such behavior could be justified under the doctrines of *Kriegsraison* or military necessity. Certainly, killing unarmed and incapacitated airmen is not indispensable for military success. Rather, it signifies a gross repudiation of the laws of war and an overall contempt for the humanitarian principles embodied in Hague IV.

Successful Escape and Evasion

While Lt. Murphy was certainly fortunate to have escaped the fate of some of his fellow airmen at the hands of the Germans, his adventure was far from over. For the next three months he would be forced to evade capture by enemy soldiers and *la Milice Française*, local French militias loyal to occupying German forces.¹¹⁸ My grandfather had been trained in escape and evasion in February of 1944 by an Intelligence Officer in England and he found the lectures to be of significant value.¹¹⁹ As revealed in *Escape and Evasion Report No. 866*, he took his duties very seriously. When asked about the destruction of “secret papers and equipment,” my grandfather responded in partially capitalized letters, “I ATE them,” as if to emphasize his resolve.¹²⁰

In order for my grandfather to escape detection by German soldiers, it was necessary for him to blend in with the civilian population. He was lucky that the Frenchmen who initially found him saw fit to place a “woodman’s jacket” over his shoulders.¹²¹ Although my grandfather could barely walk because of the back injury he sustained during his landing, the jacket provided a much needed disguise.¹²² He remarked:

“I started S by compass. Shortly after I started out, and while I was talking to some Frenchmen, three truckloads of Germans drove by, evidently searching for me. They paid no attention to me while the Frenchmen said “Bonjour” to them... [Subsequently] I kept well off the roads and stayed in the woods as much as possible.”¹²³

Throughout my grandfather’s escape, German soldiers were in close pursuit. He was told by resistance fighters that the “Germans formed a circle from Avord and followed him as far as [the

¹¹⁷ AP I, *supra* note 116, arts. 41(2)(c) & 42(1).

¹¹⁸ See *E&E No. 866*, *supra* note 28, at 5. See also Herbert Lottman, *The Purge: The purification of French Collaborators after World War II* (1986). While *le Maquis* was composed of rural French Resistance fighters, *la Milice Française* was a paramilitary militia loyal to the Vichy Regime. In his narrative, Lt. Murphy described how he was weary of not only traditional German forces but also French collaborators. For periods up to a week in duration, he was forced to sleep “in the woods carefully concealed, for the Milice were raising hell in the section.” *E&E No. 866*, *supra* note 28, at 5.

¹¹⁹ *E&E No. 866*, *supra* note 28, at 19.

¹²⁰ *Ibid*, 22.

¹²¹ *Ibid*, 1.

¹²² *Ibid*.

¹²³ *Ibid*,

town of] Blet.”¹²⁴ This was a distance of nearly twenty kilometers. At one point, “they were just three or four kilometers behind; one town they entered about four hours after [he] had left it.”¹²⁵ My grandfather, however, had discovered a creative means of transportation in light of his injuries. He observed that “[b]icycling seemed to be quite safe as long as one ducked for cars.”¹²⁶

Following the D-Day invasion of June 6, 1944, travel became increasingly difficult.¹²⁷ My grandfather noted that German patrols were increasing as a result of the Allied landing, and the “Gestapo ran patrols on the main roads, using chiefly motor cars.”¹²⁸ In addition, the Germans did away with all “through trains in France” and transportation was limited to only those rail cars running east or northeast towards the German border.¹²⁹ In the meantime, however, my grandfather had been fortunate to come across a French family that put him in direct contact with *le Maquis*.¹³⁰

After contacting the French Resistance, Lt. Murphy was moved to the farm of a local resistance leader, Monsieur Camille Gerbeau.¹³¹ At this point in his journey, my grandfather seemed less concerned with affecting his own escape and instead turned his attention towards assisting the nearly 575 men training at this “center of resistance activities.”¹³² He was introduced to the *grand chef de resistance*, and “participated in the parachuting [of resistance forces] and in their radio work, decoding messages as they instructed [him].”¹³³

As a result of his actions, my grandfather was now acting in concert with *le Maquis* and aiding their efforts as if he was a fellow resistance fighter rather than a downed U.S. airman. He writes that he was “sending out regular messages” to Allied forces and was also relaying information related to German “V-1” and “V-2” weapons.¹³⁴ When he was finally rescued by the British Royal Air Force on August 5, 1944, he was fully immersed in the culture of the resistance fighter. As evidenced in *Escape and Evasion Report No. 866*, my grandfather often used the term “we” to describe the efforts of *le Maquis* against the occupying German forces.¹³⁵ Thus, on August 4, 1944, he recalls that “we got our operational messages over the BBC... that night we went to the [meeting location], armed with MG’s [machine guns] and psitols [sic].”¹³⁶

Finally, more than three months after his plane was shot down over Avord, Lt. Murphy’s long awaited salvation arrived.¹³⁷ Although my grandfather returned to England on August 6, 1944

¹²⁴ Ibid, 4.

¹²⁵ Ibid, 1.

¹²⁶ Ibid, 2.

¹²⁷ Ibid.

¹²⁸ Ibid.

¹²⁹ Ibid.

¹³⁰ Ibid, 4.

¹³¹ Ibid.

¹³² Ibid, 5.

¹³³ Ibid.

¹³⁴ Ibid; See also Peter Cooksley, *Flying Bomb: The Story of Hitler’s V-Weapons in World War II* (1979); Ayres, *supra* note 44, at 216. See also Richard Holmes, *World War II: the Definitive Visual History 278* (2009). The German V-Weapons, known as the V-1 flying bomb and the V-2 rocket, were pilotless, free-flight rockets developed for use against England. Holmes, *supra*, at 278. Notably, these weapons were largely indiscriminate and inflicted substantial casualties on Allied civilians. *Id.*

¹³⁵ *E&E No. 866*, *supra* note 28, at 5.

¹³⁶ Ibid.

¹³⁷ Ibid.

after a daring Royal Air Force rescue,¹³⁸ the danger he faced in occupied France is even more significant when analyzed from a law of war perspective. Prior to World War II, parties to a conflict presupposed that treaty obligations applied only to international armed conflicts or conflicts between states.¹³⁹ Notably, Hague IV and its annexed Regulations refer exclusively to “conflicts between nations.”¹⁴⁰

As demonstrated by my grandfather’s narrative, however, the conflict in German occupied France was extremely complex.¹⁴¹ It had both the characteristics of an inter-state and intra-state conflict.¹⁴² While German soldiers were forced to defend against aerial bombardment from traditional military forces stationed outside of German occupied territory, internal resistance fighters such as *le Maquis* were actively challenging German control from within.¹⁴³ The multifaceted nature of this conflict allowed escaping combatants to more easily blend in with sympathetic members of the local French population in order to avoid capture.¹⁴⁴ Although my grandfather deliberately disguised himself in civilian clothing to avoid detection, his interactions with *le Maquis* appear to go well beyond that of a typical downed airman. As a result, he could no longer be considered as merely an escaping combatant. Rather, his activities are more accurately described as being analogous to that of a spy or saboteur.¹⁴⁵

The term “spy,” as it is generally understood under Hague IV, refers to a person who “collects information clandestinely behind enemy lines while wearing civilian clothing.”¹⁴⁶ Specifically, a person is considered a spy when “he obtains or endeavors to obtain information in the zone of operations of a belligerent, with the intention of communicating it to [a] hostile party.”¹⁴⁷ While my grandfather provided valuable assistance to the French Resistance, such activities were likely conducted with substantial risk to his well-being.

Hague IV makes a clear distinction between soldiers “carrying out their missions openly” and those seeking to conceal their identities by removing their uniforms.¹⁴⁸ In addition, the 1923 Hague Rules of Aerial Warfare requires members of the crew of a military aircraft to wear a “distinctive emblem... should they become separated from their aircraft.”¹⁴⁹ Generally, “[a]ny person who collects information while in uniform retains his status as a combatant... and if captured is to be treated as a prisoner of war.”¹⁵⁰ In contrast, spies and saboteurs do not enjoy

¹³⁸ Ibid.

¹³⁹ Green, *supra* note 34, at 66.

¹⁴⁰ Hague IV, *supra* note 55, pmbl.

¹⁴¹ See generally *E&E No. 866*, *supra* note 28.

¹⁴² Sylvain Vite, *Typology of Armed Conflicts in International Humanitarian Law: Legal Concepts and Actual Situations* (2009); Roy Schondorf, *Extra-State Armed Conflicts: Is There a Need for a New Legal Regime*, 37 N.Y.U. J. Int’l L. & Pol. 1, 68 (2004); Waldemar Solf, *The Status of Combatants in Non-International Armed Conflicts Under Domestic Law and Transnational Practice*, 33 Am. U.L. Rev. 53, 58–59 (1983).

¹⁴³ See generally *E&E No. 866*, *supra* note 28.

¹⁴⁴ Ibid; See also Childers, *supra* note 48, at 173-98.

¹⁴⁵ Radsan, *supra* note 10, at 599-602.

¹⁴⁶ Green, *supra* note 34, at 176 (citing Hague IV, *supra* note 55, art. 24).

¹⁴⁷ Hague IV, *supra* note 55, art. 29.

¹⁴⁸ Ibid; Radsan, *supra* note 10, at 601-02.

¹⁴⁹ Hague Rules of Air Warfare, *supra* note 105, art. 15.

¹⁵⁰ Green, *supra* note 34, at 176.

protected status when captured by enemy forces.¹⁵¹ Rather, they may be tried and sentenced to death for their actions.¹⁵²

In contemporary conflicts, AP I provides that, as a matter of customary international law, “combatants are obliged to distinguish themselves from the civilian population while they are engaged in an attack or in a military operation preparatory to an attack.”¹⁵³ Therefore, it would be contrary to the modern law of war for a combatant to disguise himself as a civilian while openly taking part in hostilities. AP I recognizes, however, “that there are situations in armed conflicts where, owing to the nature of the hostilities an armed combatant cannot so distinguish himself.”¹⁵⁴ All that is required in these instances is that an individual “[carry] his arms openly.”¹⁵⁵ A combatant that is captured by an enemy while refusing to comply with these provisions effectively “forfeit[s] his right to be a prisoner of war.”¹⁵⁶

Therefore, under the law of war as it existed in 1944 and in modern treaty provisions, it is highly advisable that “members of the armed forces engaged in the collecting of information or sabotage in... enemy-occupied territory should, whenever possible, wear [a] uniform.”¹⁵⁷ To do otherwise would run the risk of being treated as a spy if captured. Given the remainder of the discussion contained in this Article, it seems likely that my grandfather would have been put to death without the benefit of a trial had he been captured while assisting *le Maquis*. In fact, Adolf Hitler had issued an order in 1942 calling for the immediate execution of Allied parachutists as a matter of military necessity.¹⁵⁸ Thus, like many downed airmen and French resistance fighters who met their fate, my grandfather’s death might have served as yet another example of Germany’s violent occupation.

The Horrors of War and Germany’s Violent Occupation

Lt. Murphy survived the harrowing experience of parachuting from his stricken B-17 and subsequently evading capture. Specific details of his declassified account, however, reveal that he was likely unprepared for the horrific nature of land warfare.¹⁵⁹ As described in the remainder of *Escape and Evasion Report No. 866*, the conduct of German soldiers was not only contrary to the law of war as it existed in the summer of 1944, it was also morally reprehensible.¹⁶⁰

¹⁵¹ *Ibid*, 145; Radsan, *supra* note 10, 1277–78.

¹⁵² Hague IV, *supra* note 55, art. 30; *see also Ex parte Quirin*, 317 U.S. 1 (1942). In this historic decision, the U.S. Supreme Court upheld the jurisdiction of a military tribunal that sentenced eight German-born conspirators to death when they were captured entering the United States during World War II for the purposes of espionage and sabotage. *Ex parte Quirin*, *supra*, at 48. These individuals initially wore German military uniforms. *Id.* at 21. After penetrating inland, however, they buried their uniforms and disguised themselves in civilian attire. *Id.* Notably, Article 30 of Hague IV requires that “a spy taken in the act shall not be punished without previous trial.” Hague IV, *supra* note 55, art. 30. In fact, in modern conflicts it is widely understood that to “punish [a spy] without a proper trial is a war crime.” Green, *supra* note 34, at 176.

¹⁵³ *Ibid*, Article 44(3).

¹⁵⁴ Green, *supra* note 34, at 174.

¹⁵⁵ *Ibid*.

¹⁵⁶ *Ibid*.

¹⁵⁷ *Ibid*, 176.

¹⁵⁸ Charlesworth, *2 SAS Regiment*, *supra* note 13, at 12. Charlesworth writes that this Commando Order and subsequent Supplementary Order of the Fuhrer “called for all captured parachutists to be handed over . . . for disposal.” *Id.* at 18. Notably, both documents cite military necessity as justification for such conduct. *Id.* To view a translation of this primary source material, see Hitler’s Commando Order (Oct. 18, 1942), *available at* http://www.combinedops.com/Hitlers_Commando_Order.htm.

¹⁵⁹ *See generally E&E No. 866*, *supra* note 28.

¹⁶⁰ *Ibid*.

Within the first two days of his attempted escape, my grandfather learned that survival was going to be a daily struggle. He slept in the woods at night and nearly froze to death.¹⁶¹ He quickly exhausted the meager supplies in his survival pack and had no food or water.¹⁶² As a result, he had to approach sympathetic civilians for assistance.¹⁶³ One of the few facts my father and I knew about my grandfather was that the man was a devout Catholic. Thus, it must have seemed like divine providence when in those first few days he was directed to a Catholic Priest for assistance.¹⁶⁴

Although my grandfather spoke no French, local inhabitants likely realized his religious preference from the engravings on his dog tags.¹⁶⁵ They gave him a letter and pointed him toward a nearby village.¹⁶⁶ He circled the small town at first, looking for signs of German patrols, and then proceeded directly to the church as he had been instructed.¹⁶⁷ When the Priest appeared at the door, my grandfather handed him the note and pleaded for assistance.¹⁶⁸ The Priest responded almost immediately with one simple phrase — “Au revoir.”¹⁶⁹ Like most of the civilian population, this man of faith was likely frightened by the threat of retribution.

German forces had increased patrols because they knew “Americans were in the region.”¹⁷⁰ In addition, *la Milice Française* was terrorizing the countryside at the behest of its German occupiers.¹⁷¹ With few options, my grandfather slept on the bare earth and later concealed himself amongst horses in local stables.¹⁷² He even hid in one family’s “WC,” or outhouse, on June 6, 1944, the day the Normandy landings took place.¹⁷³ His daily existence was fraught with peril, and during this time, German soldiers monitored all radio transmissions in the region.¹⁷⁴ As a result, a number of French operatives were captured after they signaled my grandfather’s position to Allied troops.¹⁷⁵ One man who narrowly escaped had “literally been beaten half to death” during the incident.¹⁷⁶

Being taken into custody by German forces or *la Milice Française* meant certain death for many members of *le Maquis*.¹⁷⁷ While staying at Monsieur Gerbeau’s farm, my grandfather met a “tall very good looking young captain in the French Intelligence Service, Jean, who had arrived with a short very heavily bearded chap... having parachuted into France.”¹⁷⁸ These men came to meet with the *grand chef de resistance* and assist training operations at the farm.¹⁷⁹ Unfortunately,

¹⁶¹ Ibid, 8.

¹⁶² Ibid, 9.

¹⁶³ Ibid, 8.

¹⁶⁴ Ibid.

¹⁶⁵ Ibid.

¹⁶⁶ Ibid.

¹⁶⁷ Ibid, 8-9.

¹⁶⁸ Ibid, 9.

¹⁶⁹ Ibid.

¹⁷⁰ Ibid..

¹⁷¹ Ibid, 5.

¹⁷² Ibid.

¹⁷³ Ibid, 4.

¹⁷⁴ Ibid, 5.

¹⁷⁵ Ibid.

¹⁷⁶ Ibid.

¹⁷⁷ Jackson, *supra* note 29, at 544-46. See generally Chambard, *supra* note 29.

¹⁷⁸ *E&E No. 866*, *supra* note 28, at 5.

¹⁷⁹ Ibid.

both men were captured and subsequently brutalized by German forces.¹⁸⁰ Jean, the tall good looking captain, was tortured.¹⁸¹ His companion, the “bearded chap,” was summarily murdered.¹⁸²

Although these events are alarming, they represent only a hint of the true horror my grandfather witnessed. German soldiers throughout France used violence as a tool of occupation.¹⁸³ Furthermore, they were capable of far more egregious conduct than merely murdering local resistance fighters. While the deaths of members of *le Maquis* were certainly tragic, there is one particular recollection contained in *Escape and Evasion Report No. 866* that defies all explanation.¹⁸⁴ It can only be described as a grotesque and appalling perversion of war. In a handwritten note scrawled in the margin of the report, my grandfather attests to having witnessed a shameful atrocity committed against the French population.¹⁸⁵ In his own voice, he painfully recalls:

“About 3 weeks ago I saw a town within 4 hours bicycle ride up the Gerbeau farm where some 500 men, women, and children had been murdered by the Germans. I saw one baby who had been crucified.”¹⁸⁶

There is no question that the event described by Lt. Murphy signifies a complete abandonment of the laws and customs of war. Readers of his words, even sixty-nine years after they were first transcribed, cannot help but succumb to the powerful and deplorable imagery they invoke. Such conduct seemingly transcends all conscionable bounds of cruelty. Furthermore, it suggests a gross repudiation of every principle of human decency. While the men who committed these crimes likely justified their behavior under the doctrine of *Kriegsraison*, the genuine rationale behind their conduct may be far simpler to explain. German soldiers were attempting to terrorize French civilians into submission.¹⁸⁷ In effect, they were acting out of desperation as the War slowly slipped from their grasp.¹⁸⁸

Despite the shocking content of this revelation, it is initially unclear whether the full significance of my grandfather’s addendum was recognized by military intelligence officers overseeing his debriefing. As a practical matter, this hastily transcribed addition was not included in the final, typed version of the report.¹⁸⁹ The officer charged with conducting my grandfather’s interview also failed to record any other information related to this grisly remembrance.¹⁹⁰ Rather, he seemed far more concerned with discussing German tactical movements and troop concentrations — the precise type of information that escape and evasion reports were intended to collect. Thus, it seems possible this classified postscript, which was unavailable for public

¹⁸⁰ Ibid.

¹⁸¹ Ibid.

¹⁸² Ibid.

¹⁸³ Max Hastings, *Das Reich: The March of the 2nd SS Panzer Division Through France* (1982) (documenting the 2nd SS Panzer Division’s march through France to reinforce German soldiers battling the advancing American Army).

¹⁸⁴ *E&E No. 866*, *supra* note 28, at 5.

¹⁸⁵ Ibid.

¹⁸⁶ Ibid.

¹⁸⁷ Hastings, *supra* note 185 (describing savage reprisals taken against civilians by the 2nd SS Panzer Division in central France).

¹⁸⁸ Ibid.

¹⁸⁹ See generally *E&E No. 866*, *supra* note 28.

¹⁹⁰ Ibid.

scrutiny, went unnoticed by the approving official and the Army chain of command due to its nearly indecipherable penmanship.

By the time this document was first declassified in 1974, nearly thirty years had passed since the end of the War and four years since my grandfather's death.¹⁹¹ In addition, the war crime trials at Nuremberg and other related war crimes proceedings had concluded over twenty-five years prior. During this intervening period, my grandfather was prohibited from openly discussing the particular facts of his wartime experience because of the security certificate he signed in 1944.¹⁹² Moreover, it seems likely that he found it difficult to speak about such hellish recollections. In subsequently contacting members of the Murphy family, it was clear they had no knowledge of this report or the incident described therein. As a result, it has yet to be determined whether this long-faded and nearly forgotten attestation represents undiscovered evidence of a terrible criminal act perpetrated against the French population.¹⁹³

One can only imagine how this experience affected my grandfather, a religious man forced to observe this scene of extreme malice. These memories likely haunted him for the remainder of his life. While German soldiers had demonstrated little regard for the law of war, nothing could prepare an individual for the horrific image of a crucified child. In addition, there is no feasible justification for why these activities would have been necessary for military success. Rather, such misconduct suggests an innate contempt for all humanitarian duties imposed under international law.

This event demonstrates an absolute disregard for the "high ideals" expressed in the Preamble to Hague IV.¹⁹⁴ Moreover, it represents multiple violations of the Articles contained in the annexed Regulations.¹⁹⁵ During World War II, there was "no special provision in the law of armed conflict concerning the treatment of the civilian population in territory controlled by a belligerent... although atrocities against the civilian population of the adverse party would amount to war crimes."¹⁹⁶ Rather, the duties inherent to belligerent occupation were expressed by a host of provisions in Hague IV.¹⁹⁷

Generally, Hague IV's annexed Regulations "proscribe the rules of conduct and the limitations imposed upon the occupant on behalf of the inhabitants of the territory in question."¹⁹⁸ Article 43

¹⁹¹ According to the National Archives and Records Administration, *E&E No. 866* was declassified under Declassification Project Number NND 745001 in 1974. E-mail from National Archives and Records Administration, to author (June 2, 2011, 15:46 EST) (on file with author). Thus, the report remained classified for a period of thirty years after its initial transcription and classification. Notably, this declassified document was only recently made available to the public in electronic format on the National Archives website.

¹⁹² *E&E No. 866*, *supra* note 28, at 21.

¹⁹³ See Sarah Farmer, *Martyred Village* (1999); Jean-Jacques Fouche, *Massacre at Oradour France, 1944: Coming to Grips with Terror* (2005); Andre Desourteaux, *Oradour/Glane: Notre Village Assassine* (1998). Atrocities similar to that described in *E&E No. 866* occurred in a west central French village named Oradour-sur-Glane. Farmer, *supra*, at 1. On June 10, 1944, a special unit of German forces indiscriminately massacred 642 men, women, and children. *Id.* On June 11, "all that remained of Oradour was a smoldering mass of burnt farms, shops, and houses." *Id.* at 24. The ruins of the town, sometimes referred to as *village martyr*, were left untouched after the war as a memorial to those who were murdered. *Id.* at 2. It is unclear from Lt. Murphy's account whether this is the town in question.

¹⁹⁴ Green, *supra* note 34, at 41; Meron, *supra* note 56, at 79. See generally Downey, *supra* note 56, at 251.

¹⁹⁵ See generally Hague IV, *supra* note 55.

¹⁹⁶ Green, *supra* note 34, at 256.

¹⁹⁷ See generally Hague IV, *supra* note 55, pmb. & arts 22, 25, 43, 50.

¹⁹⁸ Green, *supra* note 34, at 284. For primary source material related to the American view of the Law of Occupation during World War II, see The Judge Advocate General's School, *The Law of Belligerent Occupation* (1944)

dictates that “the authority of the legitimate power having in fact passed into the hands of the occupant, the latter shall take all the measures in his power to restore, and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country.”¹⁹⁹ Notably, the conduct described in *Escape and Evasion Report No. 866* seems to embody the antithesis of protecting public order and safety.²⁰⁰

The concept of distinction, which was first articulated in Article 25, requires that parties to a conflict distinguish at all times between combatants and peaceful civilians.²⁰¹ This provision effectively precludes “the attack or bombardment, by whatever means, of towns, villages, dwellings, or buildings which are undefended.”²⁰² Articles 22 and 23(e) of the annexed Regulations prohibit the infliction of “unnecessary suffering” and “superfluous injury” during hostilities.²⁰³ As noted, “[t]he right of belligerents to adopt means of injuring the enemy is not unlimited.”²⁰⁴ In addition, Article 50 declares that “[n]o general penalty, pecuniary or otherwise, shall be inflicted upon the population on account of the acts of individuals for which they cannot be regarded as jointly and severally liable.”²⁰⁵ Thus, collective punishment of the civilian population is forbidden.²⁰⁶

World War II was “catastrophic for many civilian populations, especially those in besieged and bombarded cities, and in occupied territories.”²⁰⁷ At the end of hostilities, however, “there was broad international acceptance of the need to adopt an international agreement for the protection of civilians.”²⁰⁸ As a result, GC IV was the “first treaty devoted exclusively to the protection of civilians in time of war.”²⁰⁹ Article 3 of GC IV reemphasizes the humanitarian principles outlined in the Martens Clause when it requires that “[p]ersons taking no active part in the hostilities... shall in all circumstances be treated humanely.”²¹⁰ Furthermore, Article 4 introduces the term “protected persons” which is defined as “those who, at a given moment and in any manner whatsoever, find themselves, in case of a conflict or occupation, in the hands of a party to the conflict or Occupying Power of which they are not nationals.”²¹¹

In contemporary conflicts, GC IV requires that certain common protections be applied to protected persons, in particular women and children.²¹² For example, “[p]rotected persons are

[hereinafter *Law of Occupation*], available at http://www.loc.gov/rr/frd/Military_Law/pdf/law-of-belligerent-occupation_11.pdf.

¹⁹⁹ Hague IV, *supra* note 55, art. 43. See also *Law of Occupation*, *supra* note 200, at 36, 38, 54, 55, 70.

²⁰⁰ See generally *E&E No. 866*, *supra* note 28.

²⁰¹ Hague IV, *supra* note 55, art. 25. For a modern discussion of the concept of distinction, see Ganesh Sitaraman, *Counterinsurgency, the War on Terror, and the Laws of War*, 95 Va. L. Rev. 1745, 1780-91 (2009); Mark Maxwell & Richard Meyer, *The Principle of Distinction: Probing the Limits of Customariness*, 2007 Army L. 1 (2007).

²⁰² Hague IV, *supra* note 55, art. 25.

²⁰³ *Ibid*, Articles 22 & 23(e).

²⁰⁴ *Ibid*, Article 22.

²⁰⁵ *Ibid*, Article 50; See also *Law of Occupation*, *supra* note 200, at 116.

²⁰⁶ For a discussion of the evolution of civilian immunity under Hague IV, see Richard Rosen, *Targeting Enemy Forces in the War on Terror: Preserving Civilian Immunity*, 42 Vand. J. Transnat'l L. 683, 699-702 (2009).

²⁰⁷ Roberts & Guelff, *supra* note 50, at 300.

²⁰⁸ *Ibid*.

²⁰⁹ *Ibid*, 299.

²¹⁰ Geneva Convention IV Relative to the Protection of Civilian Persons in Time of War, art. 4 (1949) [hereinafter Geneva Convention IV]. See also SOLIS, *supra* note 67, at 234-37; Michael Schmitt, *The Interpretive Guidance on the Notion of Direct Participation in Hostilities*, 1 Harv. Nat. Sec. J. 5, 28, 39 (2010).

²¹¹ Geneva Convention IV, *supra* note 212, art. 4.

²¹² *Ibid*, Article 27; See also Solis, *supra* note 67, at 311.

entitled, in all circumstances, to respect for their persons, their honour, their family rights, their religious convictions and practices, and their manners and customs... [t]hey shall at all times be humanely treated, and shall be protected especially against all acts of violence.”²¹³ Article 32 of GC IV also forbids “physical suffering or extermination of protected persons... [t]his prohibition applies not only to murder, torture, corporal punishment, mutilation... but also to any other measures of brutality whether applied by civilian or military agents.”²¹⁴

In addition, GC IV’s provisions have been heavily supplemented by AP I which deals with the protection of civilian persons during times of war.²¹⁵ Notably, Article 35 of AP I reiterates Hague IV’s prohibition on superfluous injury and unnecessary suffering.²¹⁶ Moreover, Article 51 states that the “civilian population and individual civilians shall enjoy general protection against dangers arising from military operations... [they] shall not be the object of attack.”²¹⁷ Thus, “[a]cts or threats of violence the primary purpose of which is to spread terror among the civilian population” are expressly prohibited.²¹⁸

As such, there is little question that the event described in *Escape and Evasion Report No. 866* constitutes a gross violation of both the historical and contemporary laws of war. In addition, this incident signifies a repudiation of the humanitarian principles outlined in the Preamble to Hague IV and in relevant customary international law. Despite Germany’s reliance on the doctrine of *Kriegsraison*, there was no general exception to applicable treaty provisions which allowed for indiscriminate attacks and infliction of unnecessary suffering based upon military necessity.²¹⁹ Rather, the event described by my grandfather should have been characterized as an egregious war crime and punished accordingly.

Conclusion

The study of declassified intelligence has the potential to reshape modern conceptions of history. In particular, World War II era records provide valuable insight into “aspects of German behavior, and thus of Western European culture in the first half of the twentieth century.”²²⁰ As German forces swept across Europe, Nazi leaders worried “that ‘weaker’ contemporaries and subsequent generations might not understand the ‘necessity’ of their actions.”²²¹ Thus, they attempted to conceal not only the corpses of their victims but also the homicidal policies underlying their wartime indiscretions.²²² At the conclusion of this great conflict, thousands of war criminals escaped prosecution due in part to an “intelligence failure” by Allied forces.²²³

²¹³ Geneva Convention IV, *supra* note 212, art. 27.

²¹⁴ *Ibid*, Article 32.

²¹⁵ Roberts & Guelff, *supra* note 50, at 300. *See also* Solis, *supra* note 67, at 121-25.

²¹⁶ AP I, *supra* note 116, art. 35.

²¹⁷ *Ibid*, Article 51; *See also* Mark Maxwell, *The Law of War and Civilians on the Battlefield: Are We Undermining Civilian Protections?*, Mil. L. Rev. 18 (Sept-Oct. 2004) (citing International Committee of the Red Cross, Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949, at 615).

²¹⁸ AP I, *supra* note 116, art. 35.

²¹⁹ Charlesworth, *Forgotten Justice*, *supra* note 18, at 10 (theorizing that Nazi law itself “constituted a ‘state of exception,’ thereby conferring a separate cocoon-like status upon law in Nazi Germany”).

²²⁰ *Ibid*, 9.

²²¹ Breitman et al., *supra* note 9, at 3.

²²² *Ibid*; *See also* Charlesworth, *Forgotten Justice*, *supra* note 18, at 10 (explaining that Nazi rule sanctioned gross misconduct “all the while ensuring that it was publicly unmentionable . . . The taboo was not the doing but the talking about what was done”).

²²³ Breitman et al., *supra* note 9, at 6. *See also* Charlesworth, 2 *SAS Regiment*, *supra* note 13, at 21. While Breitman notes the partial intelligence failure of Allied forces, Charlesworth adds that this situation was complicated by the

Scholars acknowledge that “this failure had less to do with collecting information than with recognizing its significance.”²²⁴

Socio-legal methods have a tendency to reveal alternative viewpoints or reconstructions of historical events.²²⁵ As Salter notes, “[n]o single and supposedly self-sufficient academic discipline can ever be adequate to any research topic.”²²⁶ Thus, proponents of this interdisciplinary approach understand that “history is a work in progress.”²²⁷ They appreciate that by elevating the experience of the individual above the collective, researchers are able to challenge the assumptions of traditional historians. When ordinary soldiers “include personal comments in their correspondence, or write in pencil on the margins of reports... [t]hey are not writing diaries for posterity.”²²⁸ Rather, these historical witnesses are “writing in the moment to satisfy military requirements.”²²⁹ As a result, their words should be afforded additional deference by virtue of their having experienced these events firsthand.²³⁰

Unfortunately, modern war crimes scholarship is often dominated by “pessimism, disapproval, and critique.”²³¹ This environment of negativity has led some to reject the study of declassified intelligence, and by implication socio-legal analysis, as a “naive search for heroes.”²³² Such academic detachment ignores “the possibility of alternative histories... [as well as] a broader understanding and recognition of the personal roles of individuals.”²³³ Moreover, it marginalizes the voices of victims whose stories have yet to be told.²³⁴ Most scholars fail to understand that only by questioning established orthodoxy can we truly “expose and destabilize claims to the authority of objectivity.”²³⁵ Thus, “our best hope of completing this complex mosaic... are aggressive and inquisitive historians who believe that there are no real secrets.”²³⁶

Although critics of this Article will contend that numerous treatises have dealt with German atrocities committed during the War, there is one important distinction that must be made. As with any historical research, it is often difficult to shift from a theoretical analysis of events to a precise study of “temporal and geographic locations.”²³⁷ Thus, I went to great lengths to determine the accuracy of the information contained in my grandfather’s report. In October of 2011, I traveled to the Cher region of France. More importantly, I was accompanied by a

size of the displaced population in postwar Europe. She writes, “It has been estimated that seven million German soldiers had surrendered in the west, one and a half million German civilians had fled from the Red Army into the other occupied zones, some eight million foreign workers were displaced and ten million German urban residents had fled to the countryside.” *Id.*

²²⁴ Breitman et al., *supra* note 9, at 6.

²²⁵ Charlesworth, *Forgotten Justice*, *supra* note 18, at 3.

²²⁶ Salter, *supra* note 14, at 3.

²²⁷ Charlesworth, *Forgotten Justice*, *supra* note 18, at 4.

²²⁸ *Ibid.*, 7.

²²⁹ *Ibid.*

²³⁰ *Ibid.*

²³¹ *Ibid.*

²³² *Ibid.*

²³³ *Ibid.*, 8.

²³⁴ *Ibid.*, 9.

²³⁵ *Ibid.*, 4.

²³⁶ Aldrich, *supra* note 9, at 16.

²³⁷ *Ibid.*, 2.

remarkable historical witness, Tech Sergeant Clement Dowler, the eighty-seven year old ball turret gunner from my grandfather's fateful flight.²³⁸

Mr. Dowler and I saw many memorable things as we retraced my grandfather's journey south through the French cities of Avord, Bourges, Sancoins, and Sagonne. Thanks to the generosity of the French Air Force, we gazed out upon the old runway of the Avord Airbase where Mr. Dowler fractured his leg during a rough parachute landing on the afternoon of April 28, 1944. We also visited with the wonderful townspeople of the region who sheltered my grandfather and still referred to him as the "géant américain" due to his surprising height.²³⁹ In addition, historians associated with *le Musée de la Résistance* in Bourges introduced us to extraordinary men who served with *le Maquis* during this tumultuous period in French history.²⁴⁰

Of particular note, not one of the individuals present — scholar, resistance fighter, or Mr. Dowler himself — could state with certainty where the dreadful event described by my grandfather occurred. In subsequent correspondence, a historian in the region, Frederic Henoff, described the difficulties he encountered during his search for related information: Regarding your grandfather's [Escape and Evasion Report], I had also read this handwritten note. When he was hidden at Mr. Gerbeau farm [sic], at the time of the Normandy landing, a city not far from there — Saint-Amand-Montrond — was for a short time a place of fights between the French underground and the Germans... But we don't know [the whole] story, and perhaps your grandfather saw things which were forgotten then in the storm of the following fights, at the time of the liberation of the area.

The scale of the carnage described in *Escape and Evasion Report No. 866* strongly suggests that my grandfather bore witness to the aftermath of the massacre at Oradour-sur-Glane.²⁴¹ This infamous mass murder represents one of the most disgraceful wartime atrocities committed by German forces in occupied France. Moreover, he may have been recalling the fighting that took place in Saint-Amand-Montrond, or events that transpired in another nearby village, as Mr. Henoff maintains. It is clear that Lt. Murphy traveled through this region, and he likely overestimated the number of victims he observed. Nonetheless, there is one other alternative that has significant historical and moral implications — no matter how improbable it may seem, this declassified intelligence report could contain evidence of an undocumented German war crime.

Criminal acts were witnessed by many, including Mr. Dowler, during his five month escape from German occupied France. Despite this fact, the victims described in my grandfather's report are no less deserving of justice than the millions of innocents who suffered during this brutal conflict. At the conclusion of hostilities in World War II, it was widely acknowledged that the

²³⁸ See generally *Escape and Evasion Report No. 1669, Evasion in France*, Sept. 7, 1944, available at <http://media.nara.gov/nw/305270/EE-1669.pdf>.

²³⁹ See Laurent Boudier, *Lurcy-Levis: D'Hier et D'Aujord'Hui* 169 (1965) (explaining the general history of the region and providing specific description of Lt. Murphy's involvement with resistance efforts during the war).

²⁴⁰ See Natalee Seely, *Dowler Thanks French for Saving Him: Evaded German Capture During World War II*, *Parkersburg News & Sentinel* (Nov. 11, 2011), available at <http://www.newsandsentinel.com/page/content.detail/id/554025.html> (providing more information on Mr. Dowler's recent visit to France).

²⁴¹ For additional discussion of the massacre at Oradour-sur-Glane, see generally Farmer, *supra* note 195. Notably, the village of Oradour is within a four hour bicycle ride of the Cher department. In addition, this is the general area where by grandfather and Tech Sergeant Clement Dowler independently participated in resistance activities from the period May through August 1944. Interview with Clement Dowler, former Tech Sergeant, in Avord, France (Oct. 12, 2011).

“Germans had ill-treated and in many cases executed Allied personnel belonging to both regular and resistance forces, as well as civilians... in occupied territories.”²⁴² As a result of Germany’s disregard for the tenets of humanitarian law, the Nuremberg Tribunal was established pursuant to the London Charter of 1945 for the purpose of securing “just and prompt trial and punishment of the major war criminals of the European Axis.”²⁴³

The London Charter was notable in that it first provided a clear definition of what constituted a war crime for the purpose of the ensuing proceedings.²⁴⁴ The principles established in the Charter and in the Nuremberg Tribunal’s resulting judgment would come to be regarded as declaratory of the law of war.²⁴⁵ The term “war crime” was given broad application in the proceedings and included conduct that evidenced “violations of the laws *and customs* of war.”²⁴⁶ In addition, the Charter introduced a new subset of war crimes described as crimes against humanity.²⁴⁷ This designation included such transgressions as “murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population.”²⁴⁸

Interestingly, the Nuremberg Tribunal gave little credence to the use of military necessity as a defense to German war crimes.²⁴⁹ Many felt that by distorting this concept, German soldiers reduced “the entire body of the laws of war to a code of military convenience, having no further sanction than the sense of honour [sic] of the individual military commander.”²⁵⁰ Thus, within the guidelines set forth by the Nuremberg Tribunal, my grandfather’s account unequivocally demonstrates that *Kriegsraison* is both morally reprehensible and criminal. In effect, this doctrine allows a belligerent to justify even the most abhorrent behavior under the guise of military necessity. Consequently, it serves as nothing more than a means of enabling wartime misconduct.

While the Nuremberg Tribunal is now a fixture of the past, the majority of German war criminals were tried by national courts.²⁵¹ This trend continues to the present day.²⁵² One only has to look to the May 2011 conviction of a former guard at a Nazi concentration camp to see the utility of

²⁴² Green, *supra* note 34, at 320.

²⁴³ Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, and *Charter of the International Military Tribunal*, art. 1, Aug. 8, 1945, 82 U.N.T.S. 280 [hereinafter London Charter]. For primary source material related to the judgment at Nuremberg, see Telford Taylor, *Final Report to the Secretary of the Army on the Nuernberg War Crimes Trials* (Aug. 15, 1949), available at http://www.loc.gov/rr/frd/Military_Law/pdf/NT_final-report.pdf.

²⁴⁴ Taylor, *supra* note 244, at 324. See also Theodor Meron, *Reflections on the Prosecution of War Crimes by International Tribunals*, 100 Am. J. Int’l L. 551, 562 (2006).

²⁴⁵ Green, *supra* note 34, at 320.

²⁴⁶ London Charter, *supra* note 245, art. 6 (emphasis added).

²⁴⁷ *Ibid.*

²⁴⁸ *Ibid.*

²⁴⁹ See generally U.N. Secretary-General, *The Charter and Judgment of the Nurnberg Trial – History and Analysis*, U.N. Doc. A/CN.4/5 (1949), available at http://untreaty.un.org/ilc/docume ntation/english/a_cn4_5.pdf. See also Jochnick & Normand, *supra* note 49, at 64; Schmitt, *supra* note 49; Downey, *supra* note 56.

²⁵⁰ Green, *supra* note 34, at 148. See also Horton, *supra* note 67, at 585-87; Solis, *supra* note 67, at 266.

²⁵¹ Roberts & Guelff, *supra* note 50, at 11; Charlesworth, *Forgotton Justice*, *supra* note 18. See also Meron, *supra* note 246, at 557; M. Cherif Bassiouni, “*The War to End all Wars*” and the Birth of a Handicapped International Criminal Justice System, 30 Denv. J. Int’l L. & Pol’y 244, 253 (2002).

²⁵² Roberts & Guelff, *supra* note 50, at 11.

this forum for prosecuting war crimes which occurred many years ago.²⁵³ Although my initial intent in writing this Article was to pay tribute to Lt. Murphy's bravery and sacrifice, my thoughts often turned to the innocent French civilians whose lives were extinguished in the summer of 1944. I pondered whether the perpetrators of this vicious crime were punished and whether the true extent of their acts had been exposed to the world.

As a result, my final conclusion related to *Escape and Evasion Report No. 866* is that the facts outlined in this document simply demand further scrutiny. In essence, this Article is a humble appeal for renewed investigation of this historical evidence. National courts still provide a feasible venue for determining culpability should my grandfather's report lead to evidence that is more substantial in nature. Furthermore, the Nuremberg Tribunal did not place a statute of limitations on war crimes or crimes against humanity, nor should the French government.²⁵⁴

Thus, even though my grandfather passed away over forty years ago, his story could finally bring justice for the men, women, and children who suffered unlawful deaths at the hands of their German occupiers. Although I never had the pleasure of meeting Lt. Murphy, I strongly suspect that he, and the honorable men that fought alongside him, would have wanted it that way.

About the Author

McKay Smith is an Attorney with the U.S. Department of Justice, National Security Division. He is also an Adjunct Professor at the George Washington University Law School and the George Mason University School of Law where he teaches courses on government oversight and internal investigations. Prior to joining the Department of Justice, Mr. Smith was a Senior Inspector with the Department of Homeland Security, Office of Inspector General. He worked in multiple capacities within the Office of Inspector General, including as an Attorney and as the Acting Intelligence Operations Specialist. Mr. Smith earned his J.D. from William and Mary Law School and an LL.M., with distinction, from the Georgetown University Law Center.

²⁵³ See generally Jack Ewing & Alan Cowell, *Demjanjuk Convicted for Role in Nazi Death Camp*, N.Y. Times, available at <http://www.nytimes.com/2011/05/13/world/europe/13nazi.html>. On May 12, 2011, John Demjanjuk was found guilty by a German court of taking part in the murder of 28,000 people in 1943. *Id.* He served as a guard at the Sobibor concentration camp in German occupied Poland during World War II. *Id.* After decades of legal proceedings, Demjanjuk's conviction was hailed by many as evidence of the immutability of justice. *Id.*

²⁵⁴ The applicability of statutes of limitation to war crimes and crimes against humanity has been an area of debate in France. National law and subsequent decisions by the Court of assation seemingly indicate that war crimes prosecutions are constrained by a statute of limitations. See *Barbie Case* (1985). Nonetheless, France unequivocally supported non-applicability during debate in front of the U.N. General Assembly. See *Statement Before the U.N. General Assembly* (1967). In addition, they signed the European Convention on the Non-Applicability of Statutory Limitations to Crimes against Humanity and War Crimes. See *Signatories to the Convention* (1968).