

# Forgotten justice: forgetting law's history and victims' justice in British "minor" war crime trials in Germany 1945-8

by Lorie Charlesworth

This article will consider some of the reasons for and consequences of the minimal interest shown to date by academic researchers in the investigation and prosecution of German war criminals by Allied military tribunals between 1945-48; here characterised as "forgotten." This designation has pertinence as memory forms an important theme for historians, and never more so than in Holocaust Studies, an interdisciplinary area of scholarship that is greatly concerned with remembering. It follows, that this neglect by historians, legal scholars and others of those "minor" war crimes prosecutions by the Allies in Occupied Germany and elsewhere, to the extent that even their number remains uncertain, has presented this researcher with a series of questions and concerns discussed below.

It is important to note that Priscilla Dale Jones, ("British policy towards German Crimes against German Jews, 1939-45" (1991), *Leo Beck Institute Year Book*, 36, 339; (1998) "British Policy; Nazi Atrocities against Allied Airmen: Stalag Luft III and the end of British War Crimes Trials," (1998) *The Historical Journal* 41 (2), 543) has researched the ending of these trials by Britain, positing a variety of explanations. It is also worth mentioning that this largely political decision allowed many guilty individuals to escape prosecution. Nevertheless, it still remains unclear why both lawyers and historians largely disregard those trials that did take place. It is against this background that this article asks if research into the investigation and prosecution of these trials, including close readings of their transcripts may reveal, illuminate, refute or add further dimensions to many of those themes currently contested or established as orthodoxy in Holocaust Studies and elsewhere. These issues and a number of other concerns have emerged from the writer's current research project into Allied "minor" trials. Those aspects discussed below are not, nor are they intended to be, an exhaustive list.

## "FORGETTING:" A SUMMARY OF THE MAIN ISSUES

It is striking that in most histories and associated texts concerning German/Nazi war crimes trials, discussion of the "minor" trials is, for the most part, reduced to a brief discussion; for example by Donald Bloxham (*Genocide on Trial*, (2001), Oxford, OUP, pp 95-101). In consequence of this neglect, a reader has no sense of what was attempted or achieved if anything within these trials. Conventionally, legal reconstructions of "Nazi war crimes trials" begin with the International Military Tribunal (IMT) at Nuremberg of the "major" war criminals, then Subsequent US Trials, finally considering the problematic national trials (Eichmann - Israel; Auschwitz - Germany; Barbie - France etc.). In this intellectual environment it is not surprising that the same pattern is largely followed in many Holocaust/war crimes academic courses in the UK, USA, Canada, Australia and elsewhere. Furthermore, this pattern is repeated in specialist museums; for example, the Jewish and Wahnsee Museums in Berlin, fail to reference "minor" Allied trials in their exhibits, although both make particular mention of the 1965 German *Auschwitz Trial*. There, 22 camp officials were accused of war crimes; however, neither museum refers to those Allied military trials where officials from Auschwitz were successfully convicted. However, Sachsenhausen Concentration Camp outside Berlin, does reference a number of "minor" trials (by USSR and USA) concerning former officials of that camp.

Those post-war trials that have been researched to date continue to attract considerable scholarly analysis, scrutiny and criticism both of their historically contingent and juristic aspects, including that critique popular in Germany as: "victor's justice." However, the exclusion of detailed analysis of Allied "minor" trials marginalises evidence that

may have potential to nuance, validate or refute such analysis. One element of this is the extent to which those “minor” trials demonstrate a substantial contribution by Holocaust victims to successful prosecutions of individual perpetrators. This close connection constitutes a personal engagement that occurs on many levels, challenging orthodox accounts that there was no Holocaust-awareness in Allied prosecutions. To that end, extensive War Office (WO) and other records reveal the role serving soldiers played in war crimes prosecutions and one unexpected element; namely that, alongside British Army War Crimes Investigation Teams (WCIT), members of the Special Air Services (SAS) made an unexpected contribution to war crimes prosecutions (Charlesworth, Lorie, “2 SAS Regiment, War Crimes Investigations and British Intelligence: Intelligence Officials and the *Natzweiler Trial*,” (2006) *Journal of Intelligence History*, 13). In short, these WO records reveal investigative activity with a personal connection between victims, investigators and prosecutors, unlike that underpinning the public spectacle of Nuremberg.

Examined in these terms, and this from a distinctly human perspective, those trials reveal something undervalued in the historiography of Nazi war crimes trials. That is, repeatedly Jewish and other witnesses confront their abusers, are heard, believed and are an integral part of successful prosecutions. In the *Belsen-Auschwitz Trial* (ed Phillips, *Trial of Joseph Kramer and Forty-Four Others (The Belsen Trial)*, (1949), London, William Hodge and Co), which began on September 17, 1945, this occurs barely five months after Belsen was surrendered, urgency rarely achieved in war crimes trials today. One result of scholarly neglect of these trials is that witnesses’ courage and commitment to their role has not been fully appreciated. This is all the more surprising as the extent and value of that contribution serves as a counterweight to a now orthodox and widespread perception of Holocaust survivors as helpless, feeble, emaciated Jews. Surely their considerable contribution deserves to be celebrated as a testimony to both their personal courage and to the human spirit?

At this point, therefore, this writer suggests it is timely to follow other lines of research into Nazi war crimes; including approaches and perspectives specifically belonging to the legal sub-discipline socio-legal studies. Unfortunately this fluid, changing, open movement defies a fixed descriptor, as its membership depends upon types of activity carried out by those who identify themselves as contributors to this movement and its application to different areas of law. To that end, Phil Thomas summed up a key belief that underpins the commitment to socio-legal studies as a fully-fledged “law in context” approach:

*“Empirically, law is a component part of the wider social and political structure, is inextricably related to it in an infinite variety of ways, and can therefore only be properly understood if studied in that context.”* (“Curriculum Development in Legal Studies,” (1986), *Law Teacher* (20) 110, at 112.

For this writer’s research a socio-legal approach involves considering war crimes trials from the perspective of the various participants, emphasising their “lived experience.” Such an approach involves diverting current focus from the admittedly important, juristic concern with academic definitions of legality into a precise temporal and geographical locations; the example drawn upon in this article is the concentration camp of Bergen-Belsen, 1945. The British Army liberated this camp in full operation on April 15, and later 45 camp officials stood accused in the first British war crimes trial that predated all US trials including the IMT. During that summer of 1945, war crimes investigators may be observed in Belsen making crucial decisions and operating within an immediate “novel” judicial process. Meanwhile they are living alongside former prisoners, camp officials, Hungarian guards and initially the Wehrmacht. Here the investigators are surrounded by a continuing humanitarian disaster that nearly defeated British Army relief efforts. Here finally, survivors of that disaster perform as witnesses, providing affidavit evidence for British officers, even as their tormentors remain at large. The pressure must have been considerable as senior officers of the newly formed No 1 WCIT arrived to take over the war crimes investigation at Belsen on May 20, 1945, yet they produced a comprehensive, scholarly and legally sophisticated *Interim Report* on the prosecution of war crimes on June 22.

This and more is revealed within those surviving records; one particular source from the archives has proved very revealing; a file belonging to Major, later Lt Col Savile Geoffrey Champion, Second-in-Command of No 1 WCIT, 21<sup>st</sup> Army unit. This confirms that from the day Belsen was liberated, potential witnesses (victims), rescuers, investigators, accused and later lawyers came together in that place; many remaining there until the trial five months later (the last victim left Belsen in 1950). Examining that trial from these participant’s perspective provides one platform from which to provide alternative reconstructions which might satisfy David Fraser’s critique (*Law after Auschwitz*, (2004), Durham, North Carolina, Carolina Academic Press); in summary, that historicity concerning “perpetrator” trials exemplifies a concern with various ideological aspects of law, culture, politics and history in the creation of a collective Holocaust memory. Some Holocaust scholars and theorists go so far as to state: “We are all guilty of Auschwitz”, a belief that I do not share; unfortunately neither did those responsible. That statement serves to diminish their guilt; an oddity expressing historical transference and a somewhat disturbing empathy. In this context, revisiting contemporary records from a socio-legal perspective discloses an alternative viewpoint. It reveals that in the very intimate and intimidating physical environment of Belsen, British army investigators retained a strong sense of the “transgressive and taboo-breaking” nature of what we now understand as “the Holocaust”, whilst concerned on a

personal level to demonstrate “legality” and “fairness” in their actions.

In arriving at such observations and some provisional conclusions this researcher has followed a number of methodologies in addition to doctrinal legal analysis. There is a tradition in Holocaust scholarship that draws upon witness statements and trial materials to illuminate that past. Most notable is that adopted by Christopher Browning (*Ordinary Men: Reserve Police Battalion 101 and the Final Solution in Poland*, (1992), New York, Harper Collins) and subsequently, rather less stringently, by Daniel Goldhagen (*Hitler's Willing Executioners; Ordinary Germans and the Holocaust*, (1996), New York, Alfred A Knopf, Inc). Both have drawn upon investigation records held across West Germany in state and court archives dating from 1945 to at least 1987, concentrating largely upon those created by the West German authorities in pursuance of war crimes prosecutions. Unfortunately, many of those statements were made at least 20 years after the events they concern. Similarly, Henry Friedlander (*The Origins of Nazi Genocide, from Euthanasia to Final Solution*, (1995), Chapel Hill, University of North Carolina Press) draws on the same material, concentrating upon Nazi sterilisation and euthanasia programmes. More unusually, he extensively cites the published *Hadamard Trial* (ed Earl W Kintner, (1949) London: William Hodge and Co), the first of the US “minor” trials, held at Dachau in October 1945

It is therefore in that tradition that I have prioritised a “bottom up” approach, and as a social as well as socio-legal historian, further adapted these methodologies to synergise with that suggested by Saul Friedlander (*Nazi Germany and the Jews, Vol 1, The Years of Persecution, 1933-39*, (1997), New York, Phoenix, and *The Years of Extermination: Nazi Germany and the Jews 1939-1945*, (2007), London, Weidenfeld and Nicholson). This aims specifically to enrich historical meaning and scholarship within Holocaust histories. Thus, in my work I mirror Saul Friedlander's use of victims' voices, which he incorporates into the text as primary source material, to record and value their accounts. Friedlander argues for the value and “truth” of remembered accounts of a time before the exterminations began, before the participants knew the horror of the Final Solution. His reasoning is equally valid as a justification for the use of investigators' contemporary notes to illuminate current understanding of war crimes prosecutions in Occupied Germany. For those investigators in 1945, as Friedlander says of the victims before 1940: “theirs were the only voices that conveyed both the clarity of insight and the total blindness of beings confronted with an entirely new and horrifying reality” (Vol I, p 2). For investigations in Belsen and elsewhere, the records, testimony of and later memoirs by those soldiers, who experienced, shared and often suffered (including from “Belsenitis”) in that same hostile environment, provide an alternative perspective to add to or nuance current accounts and critiques in war crimes scholarship.

A second methodology has also been adopted from Saul Friedlander. This permits, even encourages the voice of the historian to be heard directly in the text. As a result, the authorial voice, my voice, disrupts the narrative to remove any sense of linear progression, to allow other interpretations to emerge and to sabotage illusions of closure. Furthermore, as I question established orthodoxy, so the methodology allows the reader in turn to question my position. Where this is the case, the intention is to expose and destabilise claims to the authority of objectivity. This has become increasingly an issue due to that unique status Holocaust history has acquired. To that end, LaCapra's perceptive work (*History and Memory after Auschwitz*, (1998), Ithaca, USA, Cornell University Press) captures the problems this presents to scholars and posits some very human questions concerning transference and identification that challenge historians' position of scholarly detachment.

In addition, this writer acknowledges that scholarly history is a work in progress and worth writing at least in part because of where we stand now. Seen in these terms, the value of a socio-legal historical approach is evident as international, national and military courts are actively engaged in prosecuting individuals for genocide and war crimes. That methodology adds another dimension to current legal scholarship, that of the participants' experience to broaden and refocus debate and concerns concerning both contemporary and post WWII war crimes prosecutions. Finally, this article in considering these and other issues asks why those earlier trials still remain largely ignored or disregarded. Indeed, their name, the “minor” trials, underlines that neglect. In reality, their designation was: “trials of the minor war criminals,” given to differentiate the accused from those high-ranking Nazis tried at the IMT.

### WHAT IS SPECIAL ABOUT THE “MINOR” TRIALS?

As noted above, this writer's reconstructions of some Allied war crimes trials have revealed an intimacy between legal process, investigators and victims. In addition, investigators demonstrate a primary concern with the prosecution of camp officials for activities closely connected with the Final Solution. This must surely serve in some way to nuance one critique that charges the Allies with Holocaust-blindness in these prosecutions. More than any other, these military trials began public revelation of the nature and extent of the Holocaust as a bureaucratic, government-authorised system of death. This is underlined within the WO files held at Kew where the details of that system stand stark and clear in the investigators' reports and victims' affidavits. And yet, very little has been published concerning those hundreds of military investigations and prosecutions. Meanwhile, there is a growing body of literature concerned with and critiquing the failure of post World War II war crimes trials, some

dismissing these “minor” trials as abysmal practical failures; this example drawn from a reading of Frank M. Buscher’s coverage of US trials (*The US War Crimes Trial Program in Germany, 1946-55*, (1998), New York, Greenwood Press).

This following section will begin to explore possible explanations for such negativity and neglect. The first observation is that the precise number of these trials remains uncertain; particularly how many took place in the Eastern Occupied Zone of Germany, continuing longer than in the other Zones. The official 1948 *History of the United Nations War Crimes Commission* (UNWCC) (London, HMSO), gives some data for trials to 1948 (excluding the USSR) but it is difficult to calculate totals from the information provided. The most “probable” totals are 356 British trials involving more than 1,000 Nazi war criminals. For the US Zone of Occupation, in 1953 the US Army reported that some 3,887 case files were opened and 1,672 persons brought to trial before the Army courts in 489 separate cases. In Europe the total military trials (absent the USSR) involved at least 5,000 accused; in the Far East, including trials by China, over 5,500 accused stood trial.

All US “minor” trials were automatically reviewed. According to one official US account (Fredericksen, Oliver J, (1953), *The American Military Occupation of Germany 1945-53* HQ, US Army, Europe, Historical Division, 97) many sentences were commuted or modified. Finally, during 1950-1 all war crimes sentences still unexecuted were reviewed for clemency consideration. Of these, more than 300 sentences were modified. In addition, trials were conducted by the French Permanent Military Tribunal, the French Court of Appeal and the French General Military Government Tribunal of the French Occupation Zone of Germany, the Australian Military Court, the Canadian Military Court, the Netherlands Temporary Court-Martial and Special Courts, the Norwegian Court of Appeal, the Supreme Court of Norway, and the Supreme National Tribunal of Poland.

A supplementary explanation for the lack of research in this area may be that few British and US trial transcripts were published in any detail. This situation is markedly out of line with that intention articulated by the UNWCC, whose *Law Reports* series were intended specifically to achieve that aim. However, those cases published in the *Reports* are abbreviated and generally record the charges and judgements, and not all of those. An astonishing number of reported cases concern actions brought by individuals from the former occupied countries attempting to recover appropriated property (land, businesses, even trucks) from those who had received the same from German hands. There is a “legal” explanation for this failure to publish; war crimes trials are first instance trials and are thus excluded from statutory publishing requirements. Indeed details of British military and naval courts martial are not published today. In addition, Supreme Headquarters Allied Expeditionary Forces

(SHAEF) held “Courts of Inquiry” into (at least) war crimes against Allied servicemen. These are still closed under the 70 years rule, but may eventually provide a fascinating source of research.

However, the British “minor” trials sat largely outside the civil criminal appeals process, are unique historically and uniquely important. Thus, although their lack of “status” ensured publishing was not a legal requirement, Hodge & Co. published some, undoubtedly due to commercial motives. In addition, for reasons that include brevity and perhaps censorship, those published are cut. In the case of the *Natzweiler Trial* 1946 (Webb M, ed, (1949), London, Hodge and Co), one motive was probably intelligence concerns and perhaps, if the editor’s comments are to be believed, to restrict prurient interest in other horrors perpetrated in that camp. It is significant that such an intention did not prevent the publication of horrors in the *Belsen-Auschwitz Trial*. Alarming, the British Library copy is well thumbed, especially the pages recording Irma Grise’s testimony, which are now loose. In this context, Hodge and Co published some high profile trials (*Belsen, Hadamar, Peleus, Natzweiler* etc.), noting that these are not official law reports. Nonetheless, there was a fall in public interest in the “war” by the 1950s; a cultural shift engendered in part by saturation with horrors and an understandable desire for life to return to “normal.” Such a change in public attitude would also have confirmed the decision to end the trials noted above.

On the other hand, the publishing history of one work in particular seems to pull all these contradictory threads together; Lord Russell of Liverpool’s *The Scourge of the Swastika* published in 1954 (London, Cassell and Co Ltd). This work, whose author was at time of writing Deputy Judge Advocate General (DJAG), gives an account of German war crimes in a legal and historical context. The furore surrounding its publication, synergises, confronts and confounds any attempt at a simple explanation for forgetting these trials. This book was enormously popular; within two years it reached its 14<sup>th</sup> impression. At the same time there were government efforts to prevent publication; pressure on Russell forced him to resign as DJAG in order to proceed. The book is a socio-legal history, it pulls no punches and covers a range of atrocities committed by Germany that is by Nazis, Germans and others. It specifically references the IMT, two of the Subsequent Trials, 14 Allied military “minor” war crimes trials and draws on further incidents from approximately six other un-named trials for eyewitness accounts.

This early comprehensive and scholarly reconstruction of war crimes was not followed for many years; unsurprisingly as the WO investigation records and trial transcripts were closed, some eventually released under the 30-year rule. Remarkably, the records concerning 2SAS WCIT were only released in 2005. In addition, the political decision to end these trials may have influenced not only limited publication of transcripts, but also further

discouraged any development of Russell's work. Such a position is in line with a combination of well-researched contemporary concerns; cold war realpolitik, geopolitics and that national unease about damaging a desired, necessary rapprochement with the new West German Government felt by British officials at the highest level. Whatever the explanation, nothing suggested above explains continuing scholarly neglect of British "minor" trials.

This story has echoes in scholarship concerning US minor trials where, however, there has been some recent interest. Again, apart from those few examples mentioned above, transcripts are not published and in fact, are extremely difficult to locate. As a result, most research has been drawn from trial Reviews. In one example, Fern Hilton (*The Dachau Defendants*, (2004), Jefferson, McFarland & Company, Inc) has reconstructed partial life stories of some accused drawn from Reviews of the US Dachau series of Military Commissions. Although revealing, the work totally mis-states and mis-understands legal process and appears more concerned to highlight US mis-treatment of German prisoners. Hilton's perspective, which includes discussion of perceived failure by US justice, unfortunately mirrors the earliest German publications (in the late 40s and early 50s) about these trials. None of this material allows for an evaluation of those trials within their contingent legal and other circumstance, nor does it match Russell's scholarly work. Canadian war crimes trials of this period form the subject of Patrick Brode's work. However, as his title suggests: *Casual Slaughter and Accidental Judgements*, (Toronto, (1997), University of Toronto Press), he is not very positive. Indeed, Brode appears preoccupied with offences committed by Canadian soldiers; the Holocaust does not figure in the work.

### **SOCIO-LEGAL HISTORICAL RECONSTRUCTIONS AND THE "MINOR" TRIALS**

One doctrinal aspect of this research is its potential to reveal much concerning the novel field courts-martial process used to prosecute "foreigners" for war crimes committed against other "foreigners" (civilian detained non-Germans) in trials heard on foreign soil by the British Army. Technically, the manner and legal framework of British trials can be found set out in the terms of the Royal Warrant of June 14, 1945, specifically to bring those charged with war crimes to trial within the British Zone. The terms of that Warrant authorised the setting up of military courts governed by provisions of the Army Act and rules of procedure relating to field general courts-martial, with certain modifications and "relaxation" of the rules of evidence set out in Regulation 8. In addition, US Military Commissions for the US Zone of Occupation, authorised by General Eisenhower's Proclamation No 1 and Ordinance No 2, similarly relaxed the rules of evidence; a

matter which greatly exercised JAG lawyers both defending and prosecuting those trials.

On the other hand, archival sources reveal British soldiers' awareness of and engagement with legal issues raised by the Warrant and by this use of military courts. These were fully explored in contemporary scholarship and today by Fraser. In addition, the British military courts extensively debated questions of legality; what German law sanctioned and International law forbade. One such example concerns the *Belsen-Auschwitz Trial* and offers an alternative reading to the negative comments by Bloxham or that of Ben Shephard's more extensive reconstruction; the latter dismisses the trial as a shambolic disorganised failure, (*After Daybreak*, (2005), London, Jonathan Cape). Shephard's view, like Hilton's, echoes the type of material produced earlier by former SS officers reflecting upon these trials.

This writer's reading of and research into the *Belsen-Auschwitz Trial* has arrived at rather different conclusions. These suggest for example, that the court's permission for Col Smith, Professor of International Law at London University, to attend and present legal arguments on behalf of the defence was no error (Shephard's contention) but part of a larger pattern revealing a desire to observe all the legal proprieties. Smith's presentation (they actually hoped to get Professor Lauterpacht) was virtually an academic lecture that expressed many legal concerns still contested today. Those legal arguments, although eventually rejected by the court, were fully explored. This juristic discussion occurs a mere five months after Belsen's liberation and only three months after issue of the Royal Warrant, in a court composed of serving officers who were fully aware of the background to this trial. Thus, in spite of complex physical, temporal and juristic circumstances, a reading of the investigators' records contextualised within that trial transcript demonstrates British willingness to explore all the relevant legal issues. This writer's reconstruction favours a view that those actors concerned in the process demonstrated behaviour that can be best summed up as: "justice must be done and seen to be done", not the sloppy, ignorant incompetence portrayed by Shephard.

This conclusion is underlined by evidence available within the archives that indicates there was full awareness on the part of investigating British soldiers as to the novelty of the amendments to the rules of evidence contained within the Royal Warrant. Those involved repeatedly expressed concern that affidavits should therefore be scrupulously obtained, as far as was practicable. As a result, those sources permit an analysis of legal and other aspects of these amendments as they operated in these military trials on many levels. Furthermore, these sources reveal that these legally sophisticated, educated soldiers were aware of the debate on the "legality" of German law and its implications for the defence of "superior orders" thereby potentially invalidating guilty verdicts. Those WCIT soldiers understood and may have accepted (I am not yet

clear about this latter point) why that defence was specifically removed by reference to the rules of war in the amended British Military Manual of 1942. In addition, the archives reveal that these soldier-lawyers who lived, experienced, and smelt Belsen believed it transgressed all norms of human society.

Perhaps seen from that perspective, for those men Belsen transmuted doctrinal juristic concerns about the legality of war crimes prosecutions into decisions to behave other than Germans; to differentiate their own activities from those their daily work exposed as the norm for their prisoners. Reading their records conveys a sense that some investigators approached their front line, immediate and contingent investigations with personal integrity. This is an important point, for there are many political issues surrounding these trials, including whether they provide justice for the accused. However, cloaking such discussions in juridical doctrinal analysis cannot conceal that these were moral and practical questions of immediate concern to these investigators. As such, what alternative solution existed to that “nice” juristic “problem” of the precise legal status of German camp atrocities? Finally, how may those legal critiques, clearly articulated by Smith and in subsequent academic legal research be reconciled with often-repeated accusation that too many guilty escaped prosecution? Are these legal arguments a fine way of avoiding examining what really happened in the “minor” trials? Specifically, do these reconstructed human stories scramble the detachment of doctrinal legal analysis and theory providing a more subtle reason to overlook these trials?

This is not to dismiss legal theory, nor academic criticism of this use of military courts-martial in Occupied Germany, rather to reposition war crimes analysis away from juristic analysis, legal deconstruction of trial strategies and issues of legal jurisdiction that to date have centred around the IMT and later, national war crimes trials. The alternative approach adopted by this writer, with the *Belsen-Auschwitz Trial* here serving as exemplar, reveals more “human” civilised behaviour (for the most part) by serving soldiers, some lawyers in civilian life. Examples of their mind-sets appear within the archives, encompassing their personal and cultural values. These include, that due process and fairness be adopted in investigations and trial, that “justice”, including a concern with juristic legalism be seen to be done, and that those camp officials who believed German law supported their actions, still be brought to trial. There are far more complex issues involved here than this list, but reconstructions to date have led this researcher to propose that “justice” as understood from the perspective of those involved, was sometimes achieved. And note, not all accused were convicted; not all those found guilty of the charge of: “murder as a war crime” were sentenced to death, a discretion permitted under Regulation 9 of the Royal Warrant; the trials do not read as vendettas.

These are, of course provisional conclusions pending further research. To date the archival evidence seems to support a view that the investigators, lawyers and other soldiers whose contemporary correspondence and reports survive today, demonstrate a very English sense of “fair play” that informs their approach to what is more classically defined as a sense of justice. In summary, a “bottom up” methodology appears to be revealing another dimension to aid understanding of these trials. Part of this requires following Saul Friedlander’s lead in order to take those soldier’s words at face value; and why not? They were present, experiencing these events at first hand, writing in the moment to satisfy military requirements. Unlike Count Ciano, Mussolini’s Foreign Minister, they are not writing diaries for posterity. Friedlander’s method “allows” the researcher to believe these men when writing their official reports and filed correspondence, who sometimes reveal their personal values: it permits an interpretation giving intellectual significance and weight to their words. The files are official, are “on the record”, but these battle-hardened men do not write as if bureaucratic clerks in Whitehall. In summary, when these soldiers include personal comments in their correspondence, or write in pencil on the margins of reports, they are not depersonalised or commodified by those requirements that led to the files being created.

Seen in these terms, this writer believes that any reading of these files, taken within the context of the resulting trials, demonstrates that these officers own their words, inhabit them fully and that their words reveal a commitment to this task beyond soldierly duty. This methodology has further scholarly provenance in that employed to research the activities of ordinary Wehrmacht soldiers in the East by historians, for example Bartov, Shulte, Fritz and Kuhne. Browning too has concentrated upon individual Order Police to great scholarly effect; all this research has initiated a reappraisal of Wehrmacht historical immunity from the charge of war crimes, particularly, but not exclusively in the East. These scholars have thus been able to reveal aspects of how the influences of indoctrination, prejudice and a brutal environment acted individually upon those soldiers, thus opening the secret door to the many crimes committed by Wehrmacht soldiers at all levels. It may be that another “secret door” in contrast to that discussed above, a door to decency, a much maligned word, can be opened to temper the negative, critical orthodoxy that currently flavours much Nazi war crimes scholarship. In this most appalling of historical subjects, pessimism, disapproval and critique naturally dominate. Correspondingly, juristic doctrinal analysis of legal issues again implicitly contributes to marginalising the personal contribution of those who carried out these critiqued activities.

This writer suggests such negativity requires nuancing. This is not a naïve hunt for heroes, nor is it an attempt to exonerate the Allies for their many failures on all levels within war crimes prosecutions, but rather to add a missing

dimension to current scholarship; that of the personal, the individual voices of investigators, prosecutors, and witnesses. The thrust of this piece has been an exploration of issues surrounding the lack of research concerning “minor” trials; thus it is inevitable that the role, actions, and personal values of those individuals involved in the process remain largely unknown. In this neglect, current scholarship denies itself the possibility of alternative histories, alternative readings of those prosecutions and a broader understanding and recognition of the personal role of individuals, how they experienced these matters. In other words, this subject requires a similar level of scholarly attention to that achieved by Browning when reconstructing the activities of the Order Police in Poland.

The final, rather different point in this section concerns the critique that the Allies failed to adequately prosecute Germans for the Holocaust. It begins by noting that the charges in the first British “minor” trial, the *Belsen-Auschwitz Trial*, concerned atrocities and murder of foreign nationals by Bergen-Belsen camp officials and others as war crimes. In addition, there was a further charge concerning atrocities at Auschwitz, including the use of use of gas chambers. This was set out as an additional charge against 13 of the 45. Although Bloxham notes this in passing, he fails to accord it much weight as nuancing those criticisms of Allied failure to comprehend Hitler’s “Final Solution”. Similar, *ex post facto* criticism has been levelled at other aspects of these trials, including limited prosecutions for atrocities committed by Germans across Europe. There are further allegations of a deliberate Allied failure to prioritise, emphasise and record the Final Solution to the Jewish “problem” as a system of mass execution, sufficiently in prosecutions. This has led some scholars to assert that those prosecutions, by their inaccurate characterisation of those extermination, labour and concentration camps, deliberately minimise the extent of Nazi criminality. As research into the “minor” trials has played no part in the conventional historiography of this subject this writer suggests that such criticisms are currently based upon insufficient research data and therefore some tenets of Holocaust Studies remain untested assumptions.

### DO SOCIO-LEGAL HISTORICAL RECONSTRUCTIONS OF THE “MINOR” TRIALS ADD ANYTHING TO WAR CRIMES RESEARCH?

As discussed above, this article suggests that a socio-legal approach has potential to nuance much current war crimes scholarship, particularly that dismissive view of the “minor” trials that is established orthodoxy; demonstrated for example in Shephard’s work. There are other possible advantages. The first of these suggests that the availability, volume and range of archival sources permit an integrated approach to reconstructing investigations and prosecutions from the perspective of a wide range of participants. Such

sources include; investigators’ reports, witness statements, film, photographs, military reports, Judge Advocate General’s Department reports, scribbled notes and correspondence, autobiographies and personal memoirs of participants both victims and soldiers, much now held in special collections and finally, the trial transcripts themselves.

As an extension of this point, a second suggestion is that this approach enables the researcher to deconstruct the “unique” legal feature of these trials, that is the use of a Royal Warrant with its terms containing significant legal amendments to criminal law process, particularly the rules of evidence. Examining the conduct of these trials, their investigation and prosecution within the context of those amendments could support, rebut or even produce new paradigms for the various challenges that have been raised concerning the legality of post-war war crimes trials more generally. Neither the Royal Warrant nor the Proclamations and Orders for US Military Commissions have been researched, considered or analysed within the context of their operation since the 1950s. A third point argues that research within the range of archival sources above, can shed light on what those actually involved with applying the terms of the Royal Warrant thought of and understood about its implications.

In addition, from a socio-legal perspective, reconstructions of “minor” trials have contemporary significance as the US Government has, after 60 years, revived their use at Guantanamo Bay in Cuba. There, the use of Military Commissions raises issues, questions and problems analogous to those faced by the British and US military in Occupied Germany, 1945-48. It would be stretching the point to argue a teleological progression from “minor” post-WWII war crimes trials to the Guantanamo Bay Military Commissions, but some correlations can be made. One case in point concerns the investigation and prosecution of camp officials from the Natzweiler Concentration Camp in Alsace for the murders of four women Special Operations Executive (SOE) agents, the first *Natzweiler Trial*, 1946. In that case, there was an intimate connection between intelligence officials and Special Forces officers in presenting and providing hearsay and untested affidavit evidence, permitted under the terms of the Royal Warrant. This early trial resonates with the current US Military prosecutions in Cuba, also largely based upon evidence from intelligence sources within a legal framework containing extensive amendments to the rules of evidence.

Finally, there is another significant juristic point of modern relevance. These cases concern the application of law by occupying powers *ius post bellum*, a matter of great contemporary significance. As such it would be expected that such extraordinary cases would have set legal norms, and yet this has not occurred. Jurgen Habermas (*The Past as Future*, (1994), Lincoln, USA, University of Nebraska Press), has suggested that such norms can only have

compelling force in the long term if the procedure that creates them is recognised as legitimate. Perhaps that is the most damning explanation for forgetting these trials; that the Allies themselves doubted their legality. Such doubts constitute a recurring theme demonstrated for example in the public and Parliamentary debates surrounding the War Crimes Act 1991. It appears that initially the trials slipped out of public consciousness and then cold war realpolitik made “forgotten” a permanent status. However, with British and US involvement in, or occupation of, Iraq and Afghanistan the question of the legitimacy of Allied “minor” trials moves centre stage once more. Thus socio-legal reconstructions to examine that legitimacy become of more than historical interest.

### SOME PRELIMINARY CONCLUSIONS

There are details concerning many prosecutions recorded in the WO files held at Kew. Taken in their entirety, thousands of files reveal the nature and extent of atrocities committed in German concentration camps and elsewhere across Europe and in the East in both successful and failed British prosecutions. However, the significance of those records for modern scholarship still remains to be evaluated.

It is in this context that the writer draws some provisional conclusions; the first, notes that the weight of this historical evidence, so long forgotten, so consistently underestimated, reveals much, both about the contingency of contemporary concerns and the negative influence of a strengthening cold war mentality. Secondly and more tellingly, that continuing scholarly neglect demonstrates the pernicious lingering influence of those same geopolitical and ideological concerns that emerged into full flower as the trials were taking place. As a third point, it is arguable that the power of that historical silence continues to distort our understanding of human, military and legal activities of war crimes prosecutions in the bloody aftermath of WWII. In consequence, scholars have not evaluated that active role taken by serving Allied soldiers, military legal officers and victims in those prosecutions. Fourthly, again as a result of this forgetting, historians, legal scholars, and contemporary military and international war crimes tribunals amongst others, deny themselves, or are denied access to, knowledge, data and expertise of past extensive war crimes prosecutions.

The fifth conclusion, and the starting point for a connected but other-focussed debate, concerns those German men and women camp officials who were tried, convicted, imprisoned and then released back into post-war German society. Close readings of statements and trial transcripts reveal a consistent pattern of bafflement, beyond “normal” denials of guilt, expressed by those accused. Many clearly do not understand why they are on trial for performing duties “authorised” by the German bureaucratic State. Following from that, it also seems from anecdotal evidence that after release from prison many convicted war

criminals resumed their normal productive lives as full “respectable” and respected members of German society. If this is the case, then there is congruity with those so-called “respectable” war criminals, who appeared as the accused in later national trials both within and outside Germany. Those fathers, mothers, later grandfathers and grandmothers, hard-working, conventional citizens faced trial for genocide, war crimes and camp atrocities to widespread disbelief on the part of their families, neighbours, priests, pastors and an observing populace.

Such is the power of these claims of innocence expressed by most perpetrators within all trials from 1945, that it points to serious questions about the nature of law and legality in society as evidenced by these German accused. This is discussed by Fraser, but remains a project requiring further consideration of the detail and nature of law in Nazi Germany; for example the local disputes between the Gestapo and the People’s Courts over jurisdiction etc. However, a socio-legal analysis of such perceptions has potential to illuminate significant aspects of German behaviour, and thus of Western European culture in the first half of the twentieth century. Michael Stolleis (trans Thomas Dunlop, *A History of Public Law in Germany 1914-45*, (2004), Oxford, OUP) lays bare the ease with which most legal academics rolled over in the face of political reality to compromise normative legal values. This was commonly not an issue of principle but simply to further personal ambition. Significantly, Browning reveals much the same motive in the activities of the Order Police in Poland, where “ordinary” respectable Germans take part in genocide.

From a different but important perspective, the sixth and final conclusion is that the lack of detailed research within the “minor” trials further silences the voices of those victims, predominantly but not exclusively Jewish (often specifically naming themselves such) who played such a vital and active role in those prosecutions. Furthermore, that intimate connection, between Holocaust survivors and the punishment of their German torturers and jailors framed within legal process, challenges orthodoxies and nuances critiques of Allied failure to secure justice for some at least of those victims. Consequently, these trials represent a convergence on and a display of the practical truth of an (in)human situation.

In addition, it may be that for the perpetrators, the “minor” trials form a significant psychological point break in those patterns of transgressive socialisation, of pathological “legality” in Germany under Nazi rule. In this context, Allied trials could be characterised as a legal *Stunde Nul*, separating that time from post-war resumption of “normal” legality for those convicted, for the many who escaped prosecution for war crimes and indeed for all the citizens of the new Bundesrepublik Deutschland (FRG). “Forgetting” these trials assisted that juristic clean break with the past. This is too convenient; as Fraser suggests, the fact that contemporary German “law” enabled Auschwitz




potentially reveals fundamental flaws in the nature of law itself. Alternatively, Giorgio Agamben has argued (most recently in *Remnants of Auschwitz The Witness and the Archive*, (2002), New York, Zone Books), that Nazi law constituted “a state of exception”, thereby conferring a separate, encysted, cocoon-like status upon law in Nazi Germany. This separation confers immunity upon the purity of an idea of “law”, especially “normal” German law, permitting Germany to recover its previous status as a “lawful” state. One can see the attraction of this account. It is rather undermined by Agamben’s weak grasp of some aspects of legal history especially concerning war crimes trials (p 19). However, Fraser challenges this orthodoxy in *Law after Auschwitz*, suggesting that: “... murder at Auschwitz is a legal norm and normal legality” (p 72), tracking Agamben back to Heidegger. One result of this paradox of Nazi-law-not-law that so exercises theorists is that it serves to further challenge and weaken claims for “justice” in Allied war crimes trials.

Perhaps I am too little of a theorist. It was a considerable shock to realise that legal theorists bought into German claims of legal discontinuity with their Nazi past. It is clear that under Nazi rule, German law, (society and culture) revealed itself as lacking something fundamental; but all through that period, murder remained a crime, euthanasia was never “legal” and so on. The FRG itself recognised those failures in the compensation payments it began to pay German Jewish and other survivors during the 1950s; for loss of education, forced sterilisation; businesses stolen etc. More specifically, it was that absence of “normal” human decency, humanity, compassion and conscience in Germans through the Nazi period that forms a trope at the heart of many of the “minor” trials. This is not to say that we, in the full knowledge of what Germans did, can be sure any more that we might not do the same in certain circumstances. Rather the point is that in 1945, Allied soldiers entering the camps were absolutely sure that they could never behave as had the Germans. That assurance is revealed in the evidence surrounding these trials; innocence we have lost in labelling Auschwitz the: “death of legality.” In “forgetting” the “minor” trials we deny ourselves their moment of assurance that could make bearable the necessity of honestly confronting what Auschwitz and all the other horrors reveal about the contingent utterly unstable nature of law in society.

In conclusion, the author would suggest that social attitudes and behaviour underpin and validate all legal structures and law itself. Thus Germany, a modern Western European state, enabled, ordered, and sanctioned its citizens’ taboo-breaking behaviour, all the while ensuring that it was publicly unmentionable: a shared shame (for example see: Himmler’s Posen Speech, 1943). By this deliberate tactic, Nazi Germany and its citizens circumvented public conscience as a social construct, permitting evil as physically possible, acceptable, even natural. That process enabled the post-war German

population to claim: “We did not know.” The taboo was not the doing but the talking about what was done. Importantly, in the “minor” trials Allied soldiers in Germany broke that taboo, in talking publicly and enabling victims to speak.

However, the British Army has taboos and restraints ensuring conspiracies of silence too. Thus, in 1945, both army and 2SAS WCIT investigators had to get past their personal disgust and anger to perform their social, military and legal roles. Those duties and perhaps their decency generally combined to prevent any overt expression of anger; but not those expressions found in the margins of their reports in personal file copies. In consequence, what further emerges from my research to date is evidence of an unholy alliance between Allied decency and German doublethink facilitating the manifestation of a continuing public silence concerning these trials. The silence of Germans was due to social constraints, that of the British Army too; but the soldiers recorded their feelings. Geoffrey Champion, Royal Artillery, solicitor and JP from Tenterden in Kent, in breach of all regulations, took his “Top Secret” Belsen file-copy home and thence to the Imperial War Museum; thus ensuring that it could be read one day. His legacy short-circuited the “secrecy” of WO files and also bypassed the military social taboo of silence to allow us to hear his voice and that of his colleagues, telling the world their “real” story of Belsen. In this there is resonance with Gunter Grass (*Peeling the Onion*, (2007), London, Harcourt) who has broken his very German silence to finally reveal his truth; that of a juvenile Nazi past. This too is what Habermas called for in his statement in the 1987 *Historikstreit*, that the memory of the suffering of those murdered be kept alive openly not just in people’s minds.

Finally, if there is any hope in this story, if we need to believe that law as law did not forever fail the victims and was not ruptured by Auschwitz, then it is in the circumstances surrounding “minor” trials and in the actions of those humans involved, that we may find some redemption. It is notable that faith in law survived in Allied soldiers in 1945; for those soldiers, after Auschwitz there was only law, nothing else would suffice. 

#### Dr Lorie Charlesworth

*Reader in Law and History at the Law School, Liverpool John Moores University and Visiting Fellow at the IALS. The writer would like to thank Professor David Fraser and Dr Michael Kandiah, respondents at the Seminar for their helpful comments and suggestions; plus Professor Linda Archibald, Monique Charlesworth, Belinda Crothers, Dr Frank McDonough, Dr Judith Rowbotham and attendees at the seminar for their contributions. The views expressed are the author’s own.*