NO PLACE FOR HISTORY?

The Evolution of the Role of the Historian as an Expert Witness in Holocaust Trials, 1947-2000

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Declaration of Authorship

I, Amber Harriet Pierce, declare that the work presented in this thesis is my own.

I confirm that the content of this thesis has not been submitted, in whole or in part, in any previous application for a degree. Except where stated otherwise, by reference or acknowledgment, the work presented is entirely my own.

Signed:  Amber Harriet Pierce

Date: 28/05/2021

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Abstract

Since the proceedings of the *Hostage* Case (1947), the role of the expert historian has developed from acting as an eyewitness with historical knowledge, to an expert witness who provides structural guidance and testimony in the historical factors relevant to a particular case. This thesis explores the evolving role of the historian as an expert witness in Holocaust-related trials observed across five landmark case studies, enabling a comparative analysis of the factors that have impacted the development of the historian expert witness.

From the analysis, the role of the expert historian continues to face interdisciplinary limitations. Factors such as the requirements of different legal jurisdictions and the principle of satisfying the criminal evidentiary standard of 'beyond reasonable doubt', all give rise to a challenging courtroom experience for the expert historian. The evidentiary standards within English civil law ('balance of probabilities') was found to be closer to the way that historians engage with research, whereas criminal law imposes a standard that is outside the normal expectations of a historian. Nonetheless, whilst the interdisciplinary differences between history and law are consistently drawn upon as arguments against the inclusion of historical testimony in the courtroom, the role of the expert historian has been indispensable to Holocaust trials.

This thesis reaches three fundamental conclusions. Firstly, the role of the historian as an expert witness in Holocaust trials has developed, for a variety of reasons and in particular contexts, from 1947-2000. Linking to this, it is argued that the historical

discipline is better suited to the civil jurisdiction, which permits the expert historian to demonstrate that compelling conclusions can be reached without the ‘beyond reasonable doubt’ standard. Finally, within all Holocaust trials (civil and criminal), but for the contribution of the expert historian, proceedings could not have been adequately conducted. Indeed, if historical testimony and reports had not been included within Holocaust-related trials, the resulting historiography and memory would be far more problematic than without, resulting in a serious omission of evidence.

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PART ONE

INTRODUCTION

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> 'Such cases might have to be proved at some point in time when … no survivor witnesses [will be] alive'
>
> John Pearson, Lead Prosecutor 1988 *R v Zündel*[1]

INTRODUCTION

Witness *A person who gives evidence; in court such evidence must be given on oath or by affirmation*.[2]

Expert Witness *In the law of evidence, a witness who is allowed to give opinion evidence as opposed to evidence of his perception. This is the case only if the witness is indeed skilled in some appropriate discipline.*[3]

Oral testimony is the hallmark of criminal trials. Though often supplemented with other forms of exhibits such as documents and photographs, oral evidence is perceived by the Court to be fundamentally superior to written evidence.[4] It is widely accepted in legal practice that through personal testimony, the judge or jury can assess the credibility of the witness from his or her behaviour on the stand. Oral evidence should be reliable information that serves the purpose of the trial, and where knowledge is required that is beyond the Court's traditional remit, an 'expert' may be called to provide their opinion. The duty of the expert witness as a provider of expert knowledge is consistent across disciplines.[5] Whereas the legal definitions and duties of an expert witness may be universal, the positivist and subjective principles of different disciplines

[1] Christopher R. Browning, 'Law, History, and Holocaust Denial in the Courtroom: The Zündel and Irving Cases', in *Nazi Crimes and the Law*, eds. Nathan Stoltzfus and Henry Friedlander (New York: Cambridge University Press, 2008), pp.200-201.
[2] W. J. Stewart, *Collins Dictionary of Law* (Glasgow: HarperCollins Publishers, 2006), p.549.
[3] Ibid, p.182.
[4] Douglas Walton, *Witness Testimony Evidence: Argumentation, Artificial Intelligence, and Law* (New York: Cambridge University Press, 2008), pp.230-249.
[5] Legal definitions and duties of the expert witness are established in chapter two.

can affect the experience of the expert in the courtroom. For example, the criminal standard of 'beyond reasonable doubt' leaves little room for interpretation of evidence. Within disciplines such as genetics, the criminal evidentiary standard does not appear problematic. However, for the historian expert witness when testifying on historical events, a conflict arises with the law's desire to follow standard criminal practice such as the treatment of expert witness evidence, alongside engaging with the wider memory of a historical trauma. It is here that the debate concerning the interdisciplinary relationship between the role of the historian as an expert witness in Holocaust trials and the law begins.

Coinciding with the rise of International Criminal Tribunals in the latter half of the twentieth century, assessments of the interdisciplinary relationship between history and law have been heavily critiqued. As Henry Rousso contested in his letter to the Presiding Chief Justice, Bordeaux, declining the request that Rousso appear as an expert witness in the *Papon* trial in France (1997): '[i]t is one thing to try to understand history in the context of a research project … with the intellectual freedom that such activities presuppose; it is quite another to try to do so under oath'.[7] Rousso's argument addresses the pressure that historians as expert witnesses can experience, particularly under hostile cross-examination. Nonetheless, John Pearson's comment at the start of this chapter highlights the fundamental role that historians as expert witnesses have within the Court: without historical expert testimony, the wider context of the Holocaust and subsequent historiographical debates would not be adequately engaged with in Holocaust trial proceedings.

[7] Henry Rousso, *The Haunting Past: History, Memory, and Justice in Contemporary France* (Philadelphia: University of Pennsylvania Press, 2002), p.86.

With the time difference between the Holocaust and its related criminal proceedings increasing, the importance of the historian as an expert witness has similarly been amplified. As Pearson addresses, new forms of trials such as the Holocaust denial trial have meant that Holocaust trials have become more reliant on the weight of historical testimony, with the expert providing the relevant historical context and acting as a spokesperson for the historical discipline itself.

The demands placed on expert historical testimony in Holocaust trials over the second half of the twentieth century have evolved, necessitating changes in how the law approaches and utilises historical evidence within the legal guidelines. The relationship between the expert historian and the law, and its impact on the historical narratives that are presented through Holocaust trials, is at the centre of this dissertation. Fundamentally, given the wider public engagement with the memory of the Holocaust, the use of expert historical evidence is essential in doing justice to the historical record.[8]

Aims and Objectives

This dissertation will research the evolution of the historian as an expert witness throughout Holocaust trials from 1947 to 2000. Whilst the objectives of Holocaust trials have shifted over the postwar period, the progression of Holocaust trials from 1947 to

[8] By 'doing justice' to the historical record, the author means the importance of maintaining objective historical interpretations that consider all contextual considerations of genocide, before forming a reasoned judgement. Engaging with the relevant context is notably different from legal counsels that seek to reinterpret historical evidence to support a particular legal narrative, for example the Defence narrative in the Frankfurt-Auschwitz trial that argued that the defendants had saved lives by taking part in the selection process on the arrival ramp at Auschwitz. Consequently, this thesis maintains that the moral and ethical context of an historical event must be considered and addressed by both historians and the Court when reaching their conclusions to sufficiently act as a form of memorialisation within public memory.

2000 provides a clear framework to evaluate the evolution of the expert historian. Prior to Case Seven in the Nuremberg Military Tribunals (NMT) conducted from 1947-1948, otherwise known as the *Hostage* Case, there were few instances where historians (not exclusive to Holocaust trials) were called as expert witnesses. As chapter two shows, the first recorded use of historians as expert witnesses occurred during the trial of Émile Zola following the Dreyfus Affair in France (1894-1906). Whilst trials such as Zola's provide the necessary context to understand the role of the historian as an expert witness, this dissertation assesses the role of the expert witness within a defined time frame to enable a consistent narrative focus.

History and Law: Interdisciplinary Relationship

Recent historiographical debates indicate that academic differences continue to hinder the relationship between the historian and the lawyer.[9] In particular, Rousso has demonstrated the complexity of this interdisciplinary relationship and the shortcomings that can occur when history enters the courtroom. The justice system fundamentally examines a specified crime committed by named individuals and proved by specific evidence. Yet the link between Holocaust history on trial and national memory (a form of collective memory defined by shared experiences and culture) means that the trial also acts as a form of memorialisation.[10] Within this legal and political struggle, truthful history prevails through interpretation of the available evidence within the wider context, resulting in a legalised, historical narrative. As Rousso argues, the combination of these domains and their conflicting multiplicity of concerns means that

[9] See chapter two for additional existing literature that assesses the interdisciplinary relationship between history and law.
[10] Chapter four discusses the impact that the wider socio-political context during the 1950s and 1960s had on the historical narratives produced in West German Holocaust trials.

both Holocaust and current war crime trials are burdened with trying to achieve extraordinary justice through ordinary legal boundaries.[11]

Research Questions

A comparative categorisation of the development of the interdisciplinary relationship and its impact on the expert historian in Holocaust trials remains to be produced. Consequently, this dissertation will seek to answer the following questions:

1. Has the historian's role as an expert witness changed over the postwar period (1945-2000)? If so, how and why have these changes occurred?

2. Which form of Holocaust trial (criminal perpetrator, criminal denial, or civil denial) best suits historical expert testimony?

3. Finally, why do historians of the Holocaust continue to appear as expert witnesses despite a 'consensus of critique' that warns of the dangers to historical inquiry and the Holocaust narrative when reconstructed through the medium of the law?[12]

Case Studies

Addressing the above questions will provide an understanding of the historical and legal interdisciplinary relationship, and how the trends within wider Holocaust historiography both impact and reflect on Holocaust trial proceedings. The evolving role of the historian as an expert witness will be evaluated through five case studies: *United States of America v Wilhelm List, et al*., (the official title for the '*Hostage* Case'),

[11] Rousso, *Haunting Past,* p.57.
[12] Richard Wilson, *Writing History in International Criminal Trials* (Cambridge: Cambridge University Press, 2011), p.1; Leora Bilsky, 'The Judge and the Historian: Transnational Holocaust Litigation as a New Model', *History and Memory*, Vol. 24, No. 2 (2012): p.122.

1947-1948 (criminal perpetrator trial); *The Proceedings Against Mulka and Others*, otherwise known as the Frankfurt-Auschwitz trial, 1963-1965 (criminal perpetrator trial, Frankfurt); *Her Majesty the Queen v Ernst Zündel,* 1988 (criminal denial trial, Toronto); *R. v Anthony Sawoniuk*, 1999 (criminal perpetrator trial, United Kingdom [UK]); and *David Irving v Penguin Books Ltd. and Deborah Lipstadt*, 2000 (civil libel trial, UK).[13] These case studies will facilitate a comparison of the historian's development as an expert witness over the postwar period. The research questions will be addressed by assessing: the extent to which expert witnesses were involved in the trial proceedings; the content of the expert reports (if relevant) and testimony; experience of cross-examination; the historical narratives presented in the closing speeches and judgement; and the impact of the expert testimony in the overall verdict. Where the trial verdict influences subsequent Holocaust historiography and vice versa, an assessment of the aftermath of the trial is included to demonstrate the impact of the experience of the historian as an expert witness beyond the courtroom.[14]

These case studies have been selected for their significant historiographical use of historians as expert witnesses. The testimony of Christopher Browning as an expert witness in the *Zündel*, *Sawoniuk*, and *Irving* trials provides a further avenue of comparison. Firstly, the different testimonial content required by Holocaust perpetrator trials (*Sawoniuk*) compared to Holocaust denial cases (*Zündel* and *Irving*) can be assessed. Secondly, both the *Zündel* and *Sawoniuk* trial occurred under English common law, in contrast with the *Irving* trial which occurred in a civil courtroom. Hence,

[13] This dissertation only refers to the *Eichmann* trial as it has been thoroughly researched and there is extensive literature available. Hence a mere chapter on the trial would be insufficient.
[14] The relationship between Holocaust historiography and legal narratives pursued during Holocaust trials are discussed throughout this dissertation, particularly focusing on the Frankfurt-Auschwitz trial, *Sawoniuk* trial, and *Irving* trial.

the type of testimony presented in a criminal as opposed to a civil court can be compared.

An assessment of a broader survey of trials would provide a more thorough understanding of the evolution of the role of the historian as an expert witness. However, this is beyond the scope of this dissertation due to the vast number of Holocaust trials that have taken place. Therefore, rather than expand the quantity of case studies considered within this research, this dissertation will undertake a detailed evaluation of the aforementioned trials to form a clear and rational conclusion relating to the first research question. Observations will be drawn from the case studies to address the second research question, regarding the content of expert evidence, utilisation of expert evidence during trial proceedings, and the Courts' receptiveness of the historical expert evidence. The conclusions from the second research question will aid the objective of the third question: to understand how and why historians have responded to being called to testify as expert witnesses.

METHODOLOGY

Analysis

In consideration of the interdisciplinary narrative between history and law, the adopted methodology will provide a rational structure for the research and analysis to reach a conclusion and satisfy the above-mentioned objectives of this dissertation.

Interdisciplinary 'Truth'

The first point of understanding is the process by which 'truth' is reached. Browning makes the distinction between interpretive facts and uncontested historical facts. For example, in his research on Reserve Police Battalion 101, Browning notes that the Battalion arrived in Józefów (east-central Poland) on the morning of 13 July 1942. As Browning contends, '[s]uch "facts" quite simply allow no interpretation'.[15] However, when coming to decipher a historical 'fact' dealing with an event, the accounts and perspectives offered in the evidence available must be continuously weighed against each other; every other 'fact' is an act of interpretation.[16] Within law, the assessment of available evidence is usually straightforward as contradicting sources can be dismissed against others which follow the wider trend of events. However, in other cases, both the historian and the lawyer make instinctive judgments. Whereas the legal requirement for truth is defined by a distinction between 'matters of fact' and the explanations of those facts, within the discipline of history, claims of truth relating to empirically-verifiable individual statements are different from truth claims rooted in interpretation.[17] For Browning, whilst historians strive to be as objective as possible, it is unlikely that different historians analysing the same evidence will produce the same interpretation.[18] Consequently, there remains a spectrum of attestable fact present within both disciplines.[19] Browning's assessment is noteworthy considering that the

[15] Christopher R. Browning, 'German Memory, Judicial Interrogation, and Historical Reconstruction: Writing Perpetrator History from Postwar Testimony', in *Probing the Limits of Representation: Nazism and the 'Final Solution'*, ed. Saul Friedlander (Cambridge, Mass.: Harvard University Press, 1992), p.30.
[16] Ibid.
[17] Barbara Shapiro, 'The Concept "Fact": Legal Origins and Cultural Diffusion', *Albion: A Quarterly Journal Concerned with British Studies*, Vol. 26, No. 2 (1994): p.243.
[18] See chapter six for a comparison of Browning's and Daniel Goldhagen's assessment of Order Police Battalion, 101. Christopher R. Browning, *Ordinary Men: Reserve Police Battalion 101 and the Final Solution in Poland* (New York: HarperCollins, 1992); Daniel Jonah Goldhagen, *Hitler's Willing Executioners: Ordinary Germans and the Holocaust* (London: Abacus, 1996).
[19] Browning, 'German Memory', p.32.

level of interpretation that historians rely upon in their research exposes their arguments to challenges during cross-examination, particularly when legal fact emphasises specific instances.[20] As Richard Evans admitted in his cross-examination during the *Irving* trial, whilst historians strive to adhere to the most thorough research available at the time, there is always a possibility some evidence may have been overlooked and thus a given interpretation is not as factually correct as might have been previously believed.[21]

Moreover, as Browning contends, it is the questions being asked that shape the legal or historical narrative. Legal manipulation of the historian's expert narrative exists within all trials that involve historical expert testimony as a result of the objectives that the legal counsels seek to achieve. By adopting a comparative approach, this dissertation will demonstrate how the objectives of the Court can result in the selective interpretation of historical expert testimony by legal counsels.[22]

Comparative Methodology

Norman J. W. Goda argues that 'a one trial approach' has dominated war crime trial literature.[23] However, since 2000, there has been an increase in studies of Holocaust trials as historical events themselves and within this a trend towards comparative literature. Lawrence Douglas, Hanna Yablonka, and Moshe Tlamim offer comparisons

[20] Shapiro, 'The Concept "Fact"', p.230.
[21] *David Irving v Penguin Books Ltd. and Deborah Lipstadt.* 16 February 2000. pp.10-11. Accessed: 2 June 2020. [https://www.hdot.org/day21/#]
[22] Manipulation of expert testimony is universal across all disciplines. See chapter two explores the similarities of the courtroom experiences for expert historians' compared to expert witnesses from other disciplines.
[23] Norman J. W. Goda, 'Introduction', in *Rethinking Holocaust Justice: Essays Across Disciplines*, ed. Norman J. W. Goda (New York: Berghahn Books, 2018), p.4.

between different Holocaust trials. However, such literature only compares two trials, focusing on the trial context and its impact on the historical narrative produced within the trials. Norbert Frei's three-phase periodisation of Holocaust trials from 1950-1990 and Henry Rousso's assertion of three 'stages' of involvement for the expert historian in Holocaust trials both engage with the impact that changing Holocaust trial contexts and narratives can have on the *use* of an expert historian. However, within all comparative Holocaust literature, an assessment and understanding of how Holocaust historiography and trial contexts impact the *experience* of the expert historian is absent. This dissertation is novel in that it provides a comparative analysis of the experience and development of the expert historian across multiple trials over five decades, of difference formats and jurisdictions, alongside the use of new material ascertained from the interviews conducted; thereby establishing the findings of this research as original within wider Holocaust historiography.

For the first research question, comparing the development of the expert witness within the context of Holocaust trials draws awareness to the relationship between Holocaust historiography and Holocaust trials. The interdisciplinary engagement is particularly important when discussing the memory of the Holocaust, and war crimes in general, and it is clear that certain socio-political contexts influence the arguments presented by lawyers. These arguments in turn have a considerable impact on the types of narratives produced from a trial, affecting the public's engagement with the memory of a historical event, such as the *Eichmann* trial (1961).

Moreover, the three-way comparison of Browning's experience across the 1988 *Zündel, Sawoniuk*, and *Irving* trials is novel and provides a unique understanding of

the development of the role of the expert historian witness. No existing piece of literature examines the experience of a single expert across a variety of trials within different jurisdictions and trial narratives. Douglas does compare the behaviour of Raul Hilberg and Browning within the 1985 and 1988 *Zündel* trials respectively, however this is in isolation to other Holocaust trials where either expert has testified. Moreover, whilst Browning himself has reflected on his testimony in the 1988 *Zündel* and *Irving* trials, he has not written about his involvement in the *Sawoniuk* trial. Thus, by focusing on Browning, a level of consistency is maintained when assessing the development of the expert witness through a comparative methodology. This dissertation therefore provides original analysis in understanding the overall experience of the expert historian witness.

Concerning the second research question, existing literature also predominantly focuses on criminal Holocaust trials. The comparison between civil and criminal trials within this dissertation emphasises its original approach of focusing on the experience of the expert witness. A comparative approach provides a framework to understand why expert historians argue that certain trial environments are more suited to the historical discipline.

When considering the third research question, it is important to remember that Holocaust trials are still occurring. Most recently in February 2021, a Polish libel court ruled that two Holocaust scholars should issue a public apology for including ‘inaccurate information’ about the role that Poles played in the murder of Jews during

the Holocaust.[24] Thus, whilst it is necessary to address the epistemological differences between history and law, it is also crucial to emphasise the importance of historians continuing to appear as expert witnesses and how their testimony will be received depending on the trial format. As the trial in Poland demonstrates, there are contemporary laws that seek to challenge accepted Holocaust narratives, generating a form of Holocaust denial and damaging Holocaust memory.[25]

Consequently, the comparative methodology aids a further aim of this dissertation: to set expectations for future expert historians when encountering different trial formats and context. Given that Holocaust trials are still occurring, and thus expert historians continue to testify, the comparative method provides an understanding of the development that trials have undergone (1945-2000); how the use of expert witness testimony changes within the different types of trials, and how courts engage with certain historical narratives. The findings of this research will enable future expert witnesses to provide the most appropriate type of testimony, to understand how their testimony will be used and what interdisciplinary relationship can be expected depending on the trial format. Understanding the expectations of the historian within the trial can consequently help prepare an expert for their courtroom experience and improve the effectiveness of their contribution to the trial and historiography.

[24] 'Polish Court Tells Two Holocaust Historians to Apologise', *BBC News* (9 February 2021). Accessed: 22 April 2021. [https://www.bbc.co.uk/news/world-europe-55996291]; Andrew Higgins, 'Polish Court Orders Scholars to Apologize Over Holocaust Study', *The New York Times* (9 February 2021). Accessed: 22 April 2021. [https://www.nytimes.com/2021/02/09/world/europe/poland-holocaust-jews-libel.html]

[25] In 2018 a Polish law was passed that made it a crime to falsely accuse the Polish nation of crimes committed by Nazi Germany.

Research Evidence

Trial transcripts form the main source base for this dissertation. The transcripts will be used to assess the extent of the expert witnesses' involvement, the content of their testimony, experience of cross-examination, and the impact of their testimony on the overall judgement. Transcript analysis will enable an understanding of the evolution of the role of the expert witness. Primary memoirs and private papers by those present in the case studies will also be used alongside the trial transcripts to distinguish between the public narrative of the legal justice served, and the individual's experience of the interdisciplinary relationship. These primary sources will be supplemented with the existing secondary literature, particularly concerning the academic post-trial assessments of the legal historical narratives.

Interviews

Whilst there is substantial literature on the role of the expert historian, their personal experience is absent. Interviews were conducted to provide a valuable insight into the thoughts of leading actors in the trials, and to explore gaps and seek clarification within the post-trial documentation. The rationale for conducting interviews was three-fold. First, private papers and transcripts offer key insights into the dynamics of the courtroom, however they do not reveal the experience of an individual. As Sarah De Nardi notes, '[t]he relative informality of the oral interview in contrast to the consultation of documents in an archive, which we cannot interrogate in a literal sense, often opens

up hitherto undisclosed information and versions of [an] event'.[26] Therefore, interviews provided a valuable insight into the thoughts of those involved in the trials. Second, assessing the research material highlighted notable gaps within existing historiography. Hence, conducting interviews presented an opportunity to answer questions that arose from the preliminary research, such as the absence of Browning's own assessment of his experience during the *Sawoniuk* trial. Finally, when conducting research, it is important to utilise all available source material, including interviews with leading actors. Whilst not all the arguments raised within this dissertation are based on the conducted interviews, the interviews identified new material to add to historiography and contribute to the originality of this dissertation.

Interviewees were selected based on the benefit their testimony would have for the overall dissertation and their availability. Interviews were conducted with Christopher Browning; Martin Dean (historical researcher to Browning in the 1999 *Sawoniuk* trial); Richard Evans and Robert Jan van Pelt (defence expert witnesses in the *Irving* trial); William Clegg QC and Sir John Nutting QC (counsel from the *Sawoniuk* trial); Robert Donia (expert historical witness at the ICTY); and colleagues of Raul Hilberg based at the University of Vermont (UVM). Some leading trial actors, such as Peter Longerich and Richard Rampton QC (defence expert witness and Defence counsel respectively for the *Irving* trial) were not interviewed as no contact details could be found. Other figures, such as David Irving and Deborah Lipstadt (plaintiff and defendant respectively in the *Irving* trial) were not interviewed due to the substantial post-trial

[26] Sarah De Nardi, '"No One Had Asked Me About That Before": A Focus on The Body and 'Other' Resistance Experiences In Italian Second World War Storytelling', *Oral History*, Vol.42, No.1 (2014): p.76.

literature that exists and because their testimony would not further the overall assessment of the experience of the expert witness.

The interviews were conducted in accordance with oral history ethical protocol.[27] The interviewees were initially contacted via email, outlining the purpose and their potential contribution to this research. Once the interviewees had agreed to participate, they were consulted as to when and where the interview was to be conducted, following standard oral history practice to ensure that the interviewees felt at ease throughout the interview process. Upon meeting the interviewee, consent was obtained to record the interview and likewise, after the interview, the interviewees were invited to sign a disclosure agreement granting their permission for the content to be used within the dissertation also stating that they may withdraw their permission at any time. Two interviewees did not sign the disclosure agreement, and one did not wish for their name to be disclosed, hence their testimony is not included within this dissertation.

Following the 'shared authority' approach to oral history, each interview commenced with a few preliminary questions, focusing on the interdisciplinary relationship and the use of expert historians, before discussing the recollections of the interviewee.[28] Oral history theory emphasises the collaborative nature of interviews with the interviewer acting as a 'memory prompt' for the interviewee, thus allowing the latter to be more spontaneous in their answers.[29] Hence, the aim was to make the interview become a

[27] Graham Smith, 'Oral History – Making History'. *Institute of Historical Research*, London (2008). Accessed: 19 April 2020.
[https://archives.history.ac.uk/makinghistory/resources/articles/oral_history.html]
[28] Ibid.
[29] De Nardi, '"No One Had Asked Me About That Before"', p.76; David K. Dunaway, 'Method and Theory in the Oral Biography', *Oral History*, Vol.20, No.2 (1992): p.42.

conversation of open thoughts, seeking to discover topics that had not previously been considered even though they may not be immediately related to this dissertation.

After the first interview with a legal counsel, it became clear that the interviews with those who worked in the legal profession needed to be more structured. Notably, historians who were interviewed discussed their courtroom experiences more openly and in-depth. By contrast, most of the legal counsels would only answer the question that was put to them and would not elaborate, and one legal counsel requested that the questions were sent in advance. The impact that the different professions had on the interview content can be seen in the interview lengths. All of the interviews that were conducted with historians who had appeared as expert witnesses were between two to four hours long, whereas interviews with legal counsels ranged between thirty minutes to one hour.

Whilst the interviews with historians allowed a detailed engagement with their experiences as an expert witness, their role as 'performers' within the courtroom does raise some weaknesses with the interview testimony. Richard Wallace uses the term 'professional recollectors' to refer to an individual who presents well-rehearsed anecdotes. Such recollections produce complete and detailed moments of interest and relevance for the interviewer 'exhibiting a high level of clarity and coherence'.[30] However, such refined performances often lack a level of spontaneity that allows the interviewee to truly reflect upon their lived experiences.[31] Arguably, the testimony of expert historians can be classed as 'professional recollections'. For example,

[30] Richard Wallace, "We Might Go into Double Act Mode": "Professional Recollectors", Rehearsed Memory and Its Uses', *Oral History*, Vol.45, No.1 (2017): p.55.
[31] Ibid.

Browning was able to provide answers on his experiences and make links between the three trials generally without guidance. However, given his experience as an expert witness providing refined testimony, he anticipated what I wanted to hear and was able to recite his experiences as such.

Further weaknesses when conducting interviews, such as the memory of the individual (Browning was recalling his experiences in the 1988 *Zündel* trial thirty-one years after the event) and the personal bias of the interviewee (only stating what they want to recall and their interpretations) are also raised in oral history literature and are valid for this dissertation.[32] Hence, these comparisons must be taken with caution due to the personal courtroom experiences of each expert and the different socio-political contexts that surround each trial. However, whilst it is correct to record the different lived experiences of each expert, general consistencies were noted by the expert witnesses: the definition and duty of the expert witness; the content of an expert report; and the judge ruling on expert testimony. Moreover, where possible, the interviews were corroborated against other sources. This method enabled the author to gain confidence with the validity and reliability of the interview content. For instance, Browning's interview is used on an equal platform with the transcripts available of his evidence given in the *Zündel* (1988), *Sawoniuk*, and *Irving* trials. Using these sources together, provides an in-depth analysis of the role of the expert historian by demonstrating how historians have understood their expert role alongside their

[32] Smith, 'Oral History'; Dunaway, 'Method and Theory', pp.41-42; Elaine Batty, 'Reflections on The Use of Oral History Techniques in Social Research', *People, Place & Policy Online*, Vol.3, No.2 (2009): p.111; Corinna M. Peniston-Bird, 'Oral History: The Sound of Memory', in *History Beyond the Text: A Student's Guide to Approaching Alternative Sources*, eds. Sarah Barber and Corinna M. Peniston-Bird (London: Routledge, 2009), pp.106-110.

relationship with the law, thus addressing the first and third research questions of this dissertation.

There are three main strengths regarding the use of interviews within this dissertation. Firstly, the interviews have helped mitigate other methodological limitations. For example, there are no existing trial transcripts for the *Sawoniuk* trial. Consequently, without the interviews there would have been a large gap in understanding the trial and it is likely that the *Sawoniuk* chapter would not have occurred. Secondly, by interviewing both historians and legal counsels it has allowed further engagement with the differing perspectives surrounding the use of expert historians in the courtroom. When one compares the arguments presented in historical and legal literature, all professions mostly concur that expert historians should not be involved in trials. However, the justifications differ depending on the discipline. Within legal literature, expert historians are not seen as adding to the legal purpose of the trial, with preferences for historical context to be presented through documents.[33] Comparatively, historians emphasise the epistemological differences that exist between history and law and the subsequent damage this can have on the wider historical narrative. The interviews thus provided an avenue to understand the justification behind the differing disciplinary arguments. Finally, the interviews have furthered the research conducted for this dissertation by providing a unique insight into the experiences within Holocaust trials. Indeed, when seeking to understand the experience of Raul Hilberg, interviews with Hilberg's colleagues at UVM provided an understanding into his character outside of the courtroom. Such observations support

[33] See chapter four for the post-trial reflections of the Frankfurt-Auschwitz trial by Presiding Judge Hans Hofmeyer.

the argument that preparation is essential before entering the courtroom. In the case of Hilberg, it transpired that trials can often transform someone who is composed outside of the courtroom, into someone who becomes exasperated under ferocious cross-examination. As Paul Thompson has noted, '[t]he use of the human voice … [breathes] life into history.'[34]

Terminology

Whilst this dissertation has an interdisciplinary focus, it is primarily a historical dissertation that seeks to establish an understanding of the relationship between history and law. Historians as expert witnesses have frequently encountered limitations with their testimony because of their use of non-legal terminology. For example, during his testimony at the Frankfurt-Auschwitz trial, Hans Buchheim used 'abstract' language as opposed to legally precise terms.[35] As Buchheim contested during a meeting in 1966 after the trial's conclusion in 1965, due to the extent of interpretation within the historical discipline, historical terminology is 'altogether different' from the language used in court. Thus, according to Buchheim, 'it is better for an historian to understand little about the world of legal expressions, since there is a great danger in their misuse.'[36] The use of legal language in this dissertation is unavoidable due to the focus on trial proceedings, however legal terminology (specifically when concentrating on murder statutes, criminal charges, and

[34] Anne Karpf, 'The Human Voice and The Texture of Experience', *Oral History*, Vol.42, No.2 (2014): p.51.
[35] Mathew Turner, *Historians at the Frankfurt Auschwitz Trial: Their Role as Expert Witnesses* (London: I. B. Tauris, 2018), p.97.
[36] Ibid.

jurisprudential differences) will only be used when it is appropriate to avoid the 'infiltration of legal jargon' into the historical assessment.[37]

Historians such as Devin Pendas have noted that the legal efforts to 'punish crimes committed under the auspices of the Nazi regime' should be referred to as 'Nazi trials', with other connotations such as 'war crime trials' being an historically 'inaccurate' term of reference.[38] However, within this dissertation, the phrase 'Holocaust trials' has been chosen as it encompasses all forms of Holocaust-related trials.

Periodisation

When concentrating on the postwar period, there is no consensus amongst historians as to how the time frame should be divided. Mark Mazower presents the immediate postwar 'brutal peace' as the years 1943-1949, whereas Keith Robbins assesses the year 1945 on its own before concentrating on the beginning of the 'cold division' from 1945-1953.[39] Dan Stone offers a clearer structure for the postwar period. Rather than considering the Western and Eastern postwar bloc narratives together within each time frame as Robbins does, thereby complicating his attempt at a 'concise' study of the postwar period, Stone establishes three time-frame sections (1944/45-1953; 1953-1975; 1975-1989) and assesses the Western and Eastern European postwar developments as separate discussions.[40] It is worth noting that these examples are

[37] Ibid.
[38] Devin O. Pendas, 'Seeking Justice, Finding Law: Nazi Trials in Postwar Europe', *Journal of Modern History*, Vol. 81, No. 2 (2009): p.349; István Deák, 'Introduction', in *The Politics of Retribution in Europe: World War II and Its Aftermath*, eds. István Deák, Jan Gross, and Tony Judt (Princeton, New Jersey: Princeton University Press, 2000), p.12.
[39] Mark Mazower*, Dark Continent: Europe's Twentieth Century* (London: Penguin Books, 1998); Keith Robbins, *The World Since 1945: A Concise History* (Oxford: Oxford University Press, 1998).
[40] Dan Stone, *Goodbye to All That? The Story of Europe Since 1945* (Oxford: Oxford University Press, 2014).

historical studies which have focused on the wider cultural, societal, and political changes of the postwar period as opposed to a specific focus on Holocaust trials. However, it serves to demonstrate that whilst such postwar studies generally frame their work from 1943-1989 (the fall of the Berlin Wall), followed by a concluding chapter or afterword concentrating on re-building European relations post 1989, the time segments within this period are not rigidly defined.

Periodisation of Holocaust historiography has been split into two distinct groups: the first considering the different time frames of Holocaust literature; and the second focusing on Holocaust trial categories as a separate entity.

When considering Holocaust historiography from a Jewish perspective, Dan Michman argues that there are two chronological waves with the first period dating from the late 1940s to the mid-1950s. According to Michman, the second period occurs from the 1970s to the 1980s, with the comprehensive historiographies produced providing substantially more conceptual and philosophical interdisciplinary depth than prior publications as a result of an increasing access to primary material on the Holocaust.[41] Furthering Michman's periodisation of the Holocaust, I argue that there is an emerging third period extending from the 1980s to the present, defined by the rise of comparative assessments of Holocaust trials as events. This proposed third period is examined below.

[41] Dan Michman, *Holocaust Historiography, A Jewish Perspective: Conceptualizations, Terminology, Approaches, and Fundamental Issues* (London: Valentine Mitchell, 2003), p.11.

Within the periodisation of Holocaust trials, Michael Marrus has identified six types of Holocaust trials: the International Military Tribunal (IMT); Allied trials held after the IMT (NMT); trials of Nazi criminals conducted in successor regimes across Europe; trials 'of Jews by other Jews'; third party proceedings (which Marrus defines as 'actions taken against alleged war criminals identified in countries that were not directly involved in Nazi-sponsored wartime action against the Jews'); and finally, Holocaust denial trials.[42] Whilst Marrus focuses on the different types of Holocaust trials that have presented themselves over the postwar period, Norbert Frei argues that the history of Holocaust trials can be split into three phases.[43] Firstly from 1945-1949 there was an intense period of prosecution, largely led by the Allied powers. The second phase, particularly during the 1950s, was 'marked by clemency and amnesties'. As noted below, antifascism together with the wider socio-political context in European countries such as within West Germany and East Germany, came to have a large influence on the scale of Nazi prosecutions. Finally, the third phase began during the 1980s and can be seen as a response to the second phase, with many Holocaust trials occurring as a reaction to the 'moral and legal deficits' of the 1950s and 1960s, with trials now responding to the domestic criticism regarding inaction against Nazi perpetrators (such as the *Sawoniuk* trial).[44]

It is worth noting that Holocaust trials and Holocaust historiography have an intertwined relationship. Just as Holocaust historiography is influenced by the primary material and trial narratives that are produced during Holocaust trials; the narratives

[42] Michael R. Marrus, 'History and the Holocaust in the Courtroom', in *Lessons and Legacies V: The Holocaust and Justice*, ed. Ronald Smelser (Evanston: Northwestern University Press, 2002), pp.215-239.
[43] Pendas, 'Seeking Justice', p.357.
[44] Ibid, pp.357-366; Rebecca Wittmann, *Beyond Justice: The Auschwitz Trial* (Cambridge, Mass.: Harvard University Press, 2005), p.31.

that dominate Holocaust trials are also shaped by contemporary Holocaust historiography. However, given the centrality of trials within this dissertation, a structural periodisation dictated by trials rather than historiography is better suited. Consequently, this dissertation will follow Marrus's model of postwar Holocaust trials, starting from 1947, with the *Hostage* Case, through to 2000 with the *Irving* trial, whilst incorporating the phases as defined by Frei into the overall periodisation structure of this dissertation.[45]

Structural Summary

This dissertation is structured chronologically into five parts arranged by the above historiographical periodisation. Part one concentrates on the above-mentioned research methodology and the relevant historiography of both Holocaust trials and the historian as an expert witness (chapter one). Chapter two builds upon this context, historicising the role of the expert witness before specifically focusing on the development of the expert historian and the interdisciplinary relationship between history and law.

Parts two, three, and four focus on the case studies of this dissertation. The chapter structure remains largely the same across all of the case studies: introduction of the trial; existing literature review; trial context (such as legal actors, indictment, and socio-political context); historical expert witness analysis (expert preparation, reports, and testimony); closing speeches; and trial judgement. This structure will provide the

[45] Assessing the evolution of the historian as an expert witness from 1945-present day would be too broad within the constraints of this dissertation. However, the Conclusion will reference more recent Holocaust trials to bring the discussion of the expert historian up to date.

context, and clearly establish the trial dynamic and its impact on the expert historian, and enable comparisons to be drawn between the findings from each trial.

Part two focuses on the immediate postwar era and comprises solely of chapter three which considers the 1947-1948 *Hostage* Case and explores the unique dual role of the historian as both an eyewitness and a historical expert. Establishing the dual role of the historian provides a point of comparison to discuss the evolution of the expert witness throughout the rest of this dissertation.

Part three addresses the professionalisation of the historian expert witness in West Germany during the 1950s-1960s. During the Frankfurt-Auschwitz trial, examined in chapter four, expert witnesses were employed to present historical expert knowledge based on expert reports. Establishing the professionalisation of the expert historian provides the context needed to understand the role of the expert witness in the case studies assessed in part four.

Part four focuses on Holocaust trial proceedings that were held between 1985 and 2000 and comprises of three chapters. Browning's testimony during the *Zündel* (1988), *Sawoniuk*, and *Irving* trials forms the basis of a comparison of historical expert testimony in different legal settings assessed throughout part four. Chapter five will emphasise the methodological limitations of the interdisciplinary differences of 'truth' through the Holocaust denial trial framework of the 1988 *Zündel* trial. Chapter six will draw upon the discussions relevant to the contemporary historical perpetrator trials through the evaluation of the *Sawoniuk* trial, 1999. Chapter seven (*Irving* trial) expands the debates raised in chapter five and discusses the importance of the historical

narrative in a Holocaust denial (civil libel) trial setting. Holocaust denial trials form a unique avenue of debate concerning the interdisciplinary relationship: whilst such trials are held in a legal setting, it is historical 'truth' that is being contested. A comparison will be drawn from chapter five, six and seven between Browning's role as an expert witness and the way his testimony is utilised due to the different jurisprudential settings. Finally, part five concludes this dissertation drawing upon the observations noted throughout the case study assessments. It also reflects back on the research aims of the dissertation, forming considerations for historians as expert witnesses in contemporary trial settings.

Two alternative structures were considered for this dissertation. A chronological structure was chosen in preference to thematic structure as it would provide a better representation of the developing Holocaust trial context and the evolving role of the expert historian, thereby addressing the research objectives by studying these issues through a comparative methodology, in a rational, time-ordered sequence. A chronological structure would enable the origins of any learning to be followed and analysed that may subsequently contribute to the evolving role of the expert historian, and potentially provide guidance to future historians who adopt the expert witness role.

Arguably, a thematic structure may have provided a more direct comparison between perpetrator trials, denial trials and legal jurisdictions; hence allowing a clearer assessment of the developing interdisciplinary relationship within the courtroom. However, a thematic structure would result in the trials being studied in isolation, potentially leading to unexplained advancements in the development of the expert witness and legal relationship. Consequently, a thematic approach risks producing

gaps in the contextual narrative, thus making the overall development of the expert witness harder to assess.

Historiography Periodisation

The analysis of historiography seen below is structured around a hybrid of Michman's and Marrus's periodisation, together with an additional period as a result of the research conducted within this dissertation, acknowledging the continuation of Holocaust-related trials beyond 2000.

The first historiographical time frame, 1945-1961, has been chosen because it deals with the immediate postwar legal narratives spearheaded by trials such as the IMT and NMT, as well as the early Jewish historical narratives of the Holocaust.

The second period starts in 1961 with the *Eichmann* trial, a turning point within Holocaust historiography, and ends in 1985 with the start of the proceedings of the first *Zündel* denial trial. The impact of wider European geopolitics and the Cold War on Holocaust trial narratives and its historiography, such as the Frankfurt-Auschwitz trial, will be considered within this second period.

The third trial period will be from 1985-2000, signified by two prominent Holocaust denial trials (1985 *Zündel* trial and *Irving* trial). This period will also begin to deal with the emergence of literature specifically concerning the historian as an expert witness in Holocaust trials.

Though trials post-2000 are excluded from the scope of this dissertation, assessing the trend of comparative Holocaust interdisciplinary literature will demonstrate an understanding of where the comparative nature of this dissertation fits into wider academia.

HISTORIOGRAPHY

Historiographical Debates

Just as the broader historiography of the Holocaust boasts a vast bibliography with several works systemically identifying the full extent of such histories, Pendas's analysis of the 'explosion' of historiography surrounding the history of war crime trials demonstrates how extensive research has become on the relationship between history and law.[54] Given that an entire article can now be dedicated to trial historiography, it is fair to assert that historians have entered a new sub-genre of historical inquiry: studying war crime trials as historical events in themselves.[55]

War Crimes Trials Historiography

Though an assessment of the relationship between history and law within modern international tribunals is beyond the scope of this dissertation, it is necessary to draw upon the debates that have dominated war crime trial historiography which provide the

[54] Pendas, 'Seeking Justice', pp.349-353; Michael Marrus, *The Holocaust in History* (London: Penguin Books, 1989); Friedlander, ed., *Probing the Limits*; Dan Stone, ed., *The Historiography of the Holocaust* (Houndmills: Palgrave Macmillan, 2004); Dan Stone, *Histories of the Holocaust* (Oxford: Oxford University Press, 2010); Tom Lawson, *Debates on the Holocaust* (Manchester: Manchester University Press, 2010).
[55] David Fraser, *Daviborshch's Cart: Narrating the Holocaust in Australian War Crimes Trials* (Lincoln, Nebraska: University of Nebraska Press, 2010), pp.9-10.

context to the research conducted within this dissertation. In his assessment of the historiographical legacy of war crime trials, Donald Bloxham argues that prosecutors go beyond the 'traditional remit' of their profession by trying to assert historical and 'moral' lessons throughout trials and consequently establish themselves as historical authorities.[56] Moreover, Pendas notes the historical emphasis on the wider context of an event and the law's attempt to try perpetrators in isolation of such causation. Within the context of Holocaust trials, '"[i]n a court-room there is no system on trial, no history or historical trend … but a person; and if the defendant happens to be a functionary, he stands accused precisely because even a functionary is still a human being, and it is in this capacity that he stands trial'".[57] Such an instance is symptomatic of the law seeking to follow traditional legal standards that were not designed to deal with extraordinary defendants and case context.

War Crime Trials and Expert Witnesses

Within these war crime trial narratives, the role of the historian as an expert witness comes to the fore as a contentious topic. Rousso's text *The Haunting Past* leads the debate that surrounds the historian as an expert witness. Rousso provides an insight into the dangers of the interdisciplinary relationship through the pitfalls of cross-examination and the judicialisation of history. Rousso concludes that even those who participate in criminal trial proceedings with the best intentions have paved the way for a 'strong involvement' of politicians 'in this [historical] field'.[58] Conversely, Robert Jan

[56] Donald Bloxham, *Genocide on Trial: War Crimes Trials and the Formation of Holocaust History and Memory* (Oxford: Oxford University Press, 2001), p.222.
[57] Devin O. Pendas, '"Eichmann in Jerusalem", Arendt in Frankfurt: The Eichmann Trial, the Auschwitz Trial, and the Banality of Justice', *New German Critique*, No. 100 (2007): p.88.
[58] Rousso, *Haunting Past*; Henry Rousso, 'Intellectuals and the Law', *Modern & Contemporary France*, Vol. 17, No. 2 (2009): p.157.

van Pelt and Peter Longerich, following their involvement as historical expert witnesses for the Defence in the *Irving* trial, attest to the research undertaken for the trial acting as a catalyst for furthering academic knowledge.[59] Yet as chapter two addresses, Rousso's stance remains the most dominant within such debates.

Coinciding with the rise of Holocaust denial prosecutions, it has only been over the last forty years that the focus on the historian's role as an expert witness has developed within historiography. However, oversights remain regarding the role of the historian as an expert witness in the immediate postwar trials such as the *Hostage* Case. In order to understand the expert historian witness, relevant historiography needs to be discussed chronologically: firstly, to demonstrate an understanding of the changing narratives concerning the Holocaust within academia; and secondly, to demonstrate the impact that Holocaust historiography has on the historian's expert testimony in trials conducted within similar time periods.

1945-1961: Postwar Trial Historical Narratives

Polish-Jewish Historiography

As chapter five shows, the 1960s was pivotal in generating a Holocaust narrative, distinguishing the Holocaust from the other political and military crimes of the Third Reich. In particular, the Prosecution during the trial of Adolf Eichmann (1961) placed survivor testimony and thus the Holocaust, at 'the central place' of the Court's narrative, differing from earlier Holocaust trials whereby the Jewish status of the Nazi

[59] See chapter seven for the research conducted by Longerich and van Pelt, and their contribution to Holocaust Studies.

victim was not ignored, but likewise did not dominate trial proceedings.[61] However, the emphasis that the *Eichmann* trial and subsequent Holocaust trials have placed on survivor testimony, acting as spokespeople for the Holocaust, has led to a popularised misconception that narratives documenting the Holocaust only occurred after 1960.[62] This misconception became apparent through the growing attention that survivor testimony received towards the end of the twentieth century as a result of several large-scale testimony projects. The emphasis that was given to survivors as 'bearers of history' generated a distorted image that all survivor testimony was belated.[63] This 'myth of silence' has been contested by numerous scholars, including David Cesarani. Cesarani argues that despite the transnational character of the destruction of European Jewry, as a result of Jewish survivor memoirs either being written in the 'wrong' language such as Yiddish or Polish, published in the wrong place, or being perceived to be too patriotic or antifascist, their exclusion from early postwar literature has led to a 'false impression of silence'.[64] Similarly, Laura Jockusch's research on immediate postwar grassroots Jewish historical commissions and documentation centres as a form of trauma documentation, seeks to dispel the belief that survivors remained silent concerning their victimisation.[65] Jockusch has spearheaded the re-

[61] *Trial of Adolf Eichmann* (TAE). Judgement. Accessed: 5 June 2020. [http://www.nizkor.com/hweb/people/e/eichmann-adolf/transcripts/]

[62] Laura Jockusch, '*Khurbn Forshung* – Jewish Historical Commissions in Europe, 1943-1949', *Simon Dubnow Institute Yearbook*, Vol. 6 (2007): p.441.

[63] Laura Jockusch, *Collect and Record! Jewish Holocaust Documentation in Early Postwar Europe* (New York: Oxford University Press, 2012), pp.10-11.

[64] David Cesarani, 'Challenging the "Myth of Silence": Postwar Responses to the Destruction of European Jewry', in *After the Holocaust: Challenging the Myth of Silence*, eds. David Cesarani and Eric J. Sundquist (London: Routledge, 2012), pp.17-23.

[65] Underground ghetto archives were established for survivors who chose to write down their experience under the Nazis. The most distinguished of these archives was the Oyneg Shabes organised by Emanuel Ringelblum in the Warsaw Ghetto. Though criticised for being influenced by his politics and ideology, Ringelblum's commitment to objective scholarship has been praised, firstly through the 'fair' tone of the Oyneg Shabes, which draws upon all Jewish social dimensions of ghetto life, and secondly due to his belief that Jews in documenting their suffering were aiding a wider national mission through presenting the Jewish tragedy as part of a universal history as opposed to just a Jewish narrative. Laura Jockusch, 'Historiography in Transit: Survivor Historians and the Writing of Holocaust History in the Late 1940s', *Leo Baeck Institute Yearbook*, Vol. 58 (2013): pp.76, 91-92; Laura Jockusch, 'Chroniclers of

introduction of early postwar survivor narratives into contemporary Holocaust historiography. Given the centrality of research undertaken by survivor historians such as Philip Friedman and his emphasis on the importance of cross-border networks and historical narratives, Jockusch rightly concludes that despite being overlooked, historical commissions and documentation centres created the blueprint for the field of contemporary Holocaust Studies from a purely Jewish perspective.[66]

1945-1948: Postwar Trial Historical Narratives

As David Engel argues, despite the richness of survivor commissioned archives and early postwar narratives, the perception of a lack of an immediate Jewish 'Holocaust' narrative continues to exist within contemporary Holocaust academia.[67] One explanation can be found in the narratives presented by the immediate postwar trials. Looking at the Belsen trial (held in Lüneburg, Lower Saxony in 1945), Donald Bloxham emphasises that throughout the proceedings and press reports, the British sought to play down the extent of the persecution of Jews within the camps, almost generating a denial narrative, because they could not, or did not want to, grasp the full extent of atrocities that had been committed.[68] Inge Marszolek agrees with Bloxham on the media's coverage of the Belsen trial and its impact on the British public's initial

Catastrophe: History Writing as a Jewish Response to Persecution Before and After the Holocaust', in *Holocaust Historiography in Context: Emergence, Challenges, Polemics and Achievements*, eds. David Bankier and Dan Michman (Jerusalem: Yad Vashem, 2008), p.136; Samuel D. Kassow, *Who Will Write Our History? Emanuel Ringelblum, the Warsaw Ghetto, and the Oyneg Shabes Archive* (Indianapolis: Indiana University Press, 2007), pp.7-8.

[66] Jockusch, '*Khurbn Forshung*', p.443; Cesarani, 'Challenging the "Myth of Silence"', pp.17-18; Philip Friedman, 'Polish Jewish Historiography Between the Two Wars (1918-1939)', *Jewish Social Studies*, Vol. 11, No. 4 (1949): pp.377-401.

[67] David Engel, *Historians of the Jews and the Holocaust* (Stanford, California: Stanford University Press, 2010).

[68] Bloxham, *Genocide on Trial,* pp.97-101.

understanding of the Holocaust.[69] However, to claim that the British established a 'denial narrative' is erroneous. Indeed, the Prosecution's closing speech stated clearly that the Nazis had planned 'the deliberate destruction of the Jewish race.'[70] Though the focus of race was not at the forefront of the trial proceedings, the British certainly did not deny or diminish the 'racial' dimension of the Holocaust.

In terms of Allied media reports on early Holocaust trials, contemporary reviews of the Dachau trials (1945-1948) have also highlighted the impact that distorted American press reports had on the public's understanding of the nature of concentration camps as opposed to extermination camps.[71] Such narratives align with Mark Mazower's argument that since the Nazi empire was 'a nightmarish revelation of the destructive potential in European civilisation', the Allies sought to forget as quickly as possible after 1945.[72] Indeed, during the proceedings of the IMT, the Allies chose to emphasise the link between waging an aggressive war (the 'jurisdiction of the tribunal') and 'crimes against humanity', and downplay the term 'genocide'.[73] Consequently, 'crimes against humanity' did not extend to crimes committed during peacetime. By adopting this line of argument, the Allied powers (particularly Britain with its colonies, the United States [USA] with its controversial history with the Native Americans, and Soviet

[69] Inge Marszolek, 'Coverage of the Bergen-Belsen Trial and the Auschwitz Trial in the German Nordwestdeutscher Rundfunk (NWDR/NDR): The Reports of Axel Eggebrecht', in *Holocaust and Justice: Representation & Historiography of the Holocaust Post-War Trials*, eds. David Bankier and Dan Michman (Jerusalem: Yad Vashem, 2010), pp.133-156.
[70] *Law Reports of Trials of War Criminals*. Volume II. p.106. Accessed: 18 March 2019. [https://www.loc.gov/rr/frd/Military_Law/pdf/Law-Reports_Vol-2.pdf]
[71] Bloxham, *Genocide on Trial,* pp.95-97.
[72] Mazower, *Dark Continent,* p.xiii.
[73] In contrast to 'crimes against humanity' which focuses on the crime of killing an individual, Raphael Lemkin's concept of 'genocide' sought to provide legal protection for 'national, ethnical, racial or religious group[s]'. Whilst Lemkin pressed the Prosecution during the proceedings of the IMT to use the term 'genocide', the concept was not officially adopted until 9 December 1948. *Convention on the Prevention and Punishment of the Crime of Genocide*. United Nations General Assembly. 9 December 1948. Created: 16 August 1994. Last Edited: 27 January 1997. Accessed: 17 March 2019. [http://www.hrweb.org/legal/genocide.html]

Russia with its forced deportations of 'punished peoples') protected themselves from possible incrimination.[74] The Allies were not seeking to generate a historical narrative of the Holocaust despite some survivor witnesses testifying to the camp atrocities. Rather, attention was directed towards the prosecution of Nazi war criminals.[75] M. Cherif Bassiouni contests that to admit to these weaknesses is the 'best testimony' that scholars can give to the validity of the IMT's legal ambition.[76] Similarly, Michael J. Bazyler and Frank M. Tuerkheimer's evaluation of the 1945 Dachau trial, concluding that the Allied powers (despite wider political influences) were fair in their proceedings, strengthens the argument that both the Prosecution and Defence counsels remained dedicated to their legal obligations within the courtroom.[77]

IMT (1945-46) and NMT (1946-1949): Witnesses

Notably no historians appeared as expert witnesses during the IMT. Yet as chapter three establishes, three witnesses who identified their civilian occupation as a historian (one for the Prosecution and two for the Defence), testified as eyewitnesses. No records exist that examine the testimony of these three witnesses. Instead, Christian

[74] When speaking about crimes against humanity, Justice Robert Jackson (USA lead prosecutor) referenced the source of 'lingering concern' of the American government: '[w]e have some regrettable circumstances at times in our own country in which minorities are unfairly treated.' William A. Schabas, 'The Law and Genocide', in *The Oxford Handbook of Genocide Studies*, ed. Donald Bloxham and A. Dirk Moses (New York: Oxford University Press, 2010), p.126; Nicolas Werth, 'The Crimes of the Stalin Regime: Outline for an Inventory and Classification', in *The Historiography of Genocide*, ed. Dan Stone (Houndmills: Palgrave Macmillan, 2010), pp.400-419; Nicolas Werth, 'Mass Deportations, Ethnic Cleansing, and Genocidal Politics in the Later Russian Empire and the USSR', in *Oxford Handbook of Genocide Studies*, ed. Bloxham and Moses, pp.386-406.

[75] Lawrence Douglas, *The Memory of Judgment: Making Law and History in the Trials of the Holocaust* (New Haven: Yale University Press, 2001), p.41; Lawrence Douglas, 'Film as Witness: Screening Nazi Concentration Camps before the Nuremberg Tribunal', *The Yale Law Journal*, Vol. 105, No. 2 (1995): p.453.

[76] M. Cherif Bassiouni, *Crimes Against Humanity in International Criminal Law,* Second Edition (The Hague: Kluwer Law International, 1999), p.87.

[77] Michael J. Bazyler and Frank M. Tuerkheimer, *Forgotten Trials of the Holocaust* (New York: New York University Press, 2014), p.99.

Delage's focus on survivor and perpetrator evidence is reflective of the extent of research on witnesses used in the IMT.[78]

Despite the exclusion of historians as expert witnesses during the IMT and subsequent historiography, the NMT *Hostage* Case (case seven) contains the most interesting testimony by expert historians.[79] Ruth Bettina Birn provides a comparative evaluation of the testimony of SS General Erich von dem Bach-Zelewski in The *Hostage* Case, The *RuSHA* Case (NMT case eight), and the *Ministries* Case (NMT case eleven), assessing the impact that Bach-Zelewski's attitude had on his treatment by the Prosecution and his performance in court.[80] However, there is minimal literature examining the witness testimony in general during the *Hostage* Case. Kevin Heller and Kim Priemel offer the only two works on the *Hostage* Case, however both draw upon the legacy of the trial's 'hostage' ruling within international criminal law.[81] Indeed, within the wider historiography of the NMT, the majority of literature seeks to either understand the cases within their own context, compare the cases against the conduct of the IMT, or evaluate the implications of the NMT within the wider historical legacy of Holocaust trials.

[78] Christian Delage, 'The Judicial Construction of the Genocide of the Jews at Nuremberg: Witnesses on Stand and on Screen', in *Holocaust and Justice*, eds. Bankier and Michman, pp.108-113.
[79] The NMT involved a total of twelve cases, each addressing different dimensions of the Nazi structure.
[80] For further analysis, see chapter three. Ruth Bettina Birn, 'Criminals as Manipulative Witnesses: A Case Study of SS General von dem Bach-Zelewski', *Journal of International Criminal Justice*, Vol. 9 (2011): pp.441-474.
[81] Kevin Jon Heller, *The Nuremberg Military Tribunals and the Origins of International Criminal Law* (Oxford: Oxford University Press, 2011), pp.393-394; Kim Christian Priemel, *The Betrayal: The Nuremberg Trials and German Divergence* (Oxford: Oxford University Press, 2016), pp.330-333.

Hilary Earl's analysis of the *Einsatzgruppen* Case (NMT case nine) is an exception to this observation.[82] Earl presents a three-fold focus on the presiding judge Michael Musmanno, lead defendant Otto Ohlendorf, and chief prosecutor Benjamin Ferencz. Whilst these figures are not historians, their conduct does present learning points relating to the experience of the expert historian. The role of Musmanno in the trial has been acknowledged by other scholars, however Earl utilises her analysis of the three figures uniquely to help shed light on the distinctively complex social setting of the trial.[83] Focusing on the cross-examination performance by Musmanno, Ferencz, and Ohlendorf, Earl highlights the transformation of the trial into a stage where different 'actors took their turn to perform'. In particular, Ohlendorf's confidence on the stand demonstrated the impact that the art of orality can have when giving testimony and being under intense cross-examination.[84] As chapter two and seven demonstrate, the behaviour of an expert witness contrasts between those who are well-received by the courtroom and those who perform poorly under cross-examination.

Nonetheless, due to the minimal literature surrounding the NMT, historiography is still establishing the fundamentals. Hence, there is a clear gap in the historiographical literature for the NMT concerning the general examination of the role of the expert historian.

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[82] The *Medical* Case (NMT case one) has also been researched more than other NMT trials. Paul Weindling, *Nazi Medicine and the Nuremberg Trials: From Medical War Crimes to Informed Consent* (Houndmills: Palgrave Macmillan, 2004).

[83] Heller, *Nuremberg Military Tribunals*, p.100; Bazyler and Tuerkheimer, *Forgotten Trials*, p.187; Hilary Earl, 'A Judge, A Prosecutor, and a Mass Murderer: Courtroom Dynamics in the SS-Einsatzgruppen Trial', in *Reassessing the Nuremberg Military Tribunals Transitional Justice, Trial Narratives, and Historiography*, eds. Kim C. Priemel and Alexa Stiller (New York: Berghahn Books, 2012), p.48.

[84] Earl, 'A Judge, A Prosecutor, and a Mass Murderer', p.64; Hilary Earl, *The Nuremberg SS-Einsaztgruppen Trial, 1945-1958: Atrocity, Law, and History* (New York: Cambridge University Press, 2009), p.297.

1961-1985: Historical Narrative Shift

Contextual Focus: Geopolitics and Law

From 1945, postwar politics became entwined with the historical narratives of justice that war crime trials pursued. However, it was not until 1961 that Otto Kirchheimer first published his analysis of the 'political trial'. Though legal objectivity is supposed to limit political influence, for Kirchheimer, the new dynamics of the postwar period saw war crime trials used to mobilise a particular public opinion or historical narrative. Consequently the original goal for the judiciary (authentication of truth) was often superseded.[85] Through this analysis Kirchheimer addressed the contentious issue of the interdisciplinary relationship between history and law: how does political justice situate itself within the purpose of history?[86] Kirchheimer's understanding of the relationship between history and law transpired into his identification of the three categories of political justice and his conclusions against the IMT and its 'successor justice' pursued through its 'retrospective and prospective intentions'.[87] This geo-political-legal relationship was exacerbated within the climate of the Cold War and denazification process. Within the context of Holocaust trials, the Cold War impacted the historical narratives that trials sought to present.[88] For Stone, despite the abuse of antifascism under communism, the impact of the Cold War not only sped up the denazification process within the Western zones, it also altered the West German

[85] Otto Kirchheimer, *Political Justice: The Use of Legal Procedure for Political Ends* (Princeton: Princeton University Press, 1961), p.7.
[86] Ibid, p.19.
[87] Kirchheimer's categories for political trials were a common crime committed for a political purpose and conducted with an understanding of the political benefits that could arise following a successful prosecution; the 'classic' political trial by a regime attempting to incriminate its competitor and remove them from the political scene; and the derivative political trial, where regimes used claims of defamation, perjury, and contempt to bring disrepute against a political competitor. Ibid, pp.46, 8.
[88] Stone, *Goodbye to All That?* p.6.

perception of the postwar trials.[89] In 1945, the existence of many people who were vulnerable to the charge of 'perpetrator' or 'collaborator' was 'a shameful reminder of the Nazi New Order', with their removal seen as essential to make a clean-break from the blot on Western Europe's past.[90] In the immediate postwar period, coalition governments demonstrated their dedication to a fresh start by embarking on new judicial investigations of collaborators with show trials. However, few ended with severe punishments and by the early 1950s most judicial investigations had been closed.[91]

Within the Eastern bloc, as Gabriel Finder and Alexander Prusin note, Nazi criminal trials that supported the Soviet narrative of the Cold War were reported more within the media than those that under-cut state approved narratives.[92] Finder and Prusin compare the lack of media attention given to the Polish 1954 trial of Paul Otto Geibel against the widely reported 1958-1959 trial of Erich Koch, also held in Poland. Geibel was a senior Nazi official of the Warsaw District, however the trial judgement challenged the Soviet narrative of the Warsaw Uprising. Comparatively, Koch was the *Reichkommissar* of Ukraine. Throughout Koch's trial, the Allies were publicly condemned for granting 'immunity' to Nazi criminals in the West.[93] The contrast of trial narratives and subsequent media attention demonstrates that whilst the postwar trials of Nazi criminals differed from the Soviet show-trials that typified the Stalin era, the trials existed within a politically and ideologically loaded postwar context. [94]

[89] Ibid, p.11.
[90] Mazower, *Dark Continent,* p.233.
[91] Ibid, p.235.
[92] Gabriel N. Finder and Alexander V. Prusin, *Justice Behind the Iron Curtain: Nazis on Trial in Communist Poland* (Toronto: University of Toronto Press, 2018), pp.3-11.
[93] Ibid.
[94] For research on Holocaust trials held in Eastern Europe, see: László Karsai, 'The People's Courts and Revolutionary Justice in Hungary, 1945-46', in *The Politics of Retribution in Europe*, eds. Deák, Gross, and Judt, pp.233-251; Bradley Abrams, 'The Politics of Retribution: The Trial of Joszef Tiso in

During the period between 1960 and 1970 the impending statute of limitations saw an increase of Holocaust trials delivering harsher punishments. Denazification was tackled differently within each geographical zone. The Soviet bloc employed denazification as a means to destroy the pre-existing economic and social base. Comparatively in the Western zone, denazification was achieved in part through case-by-case judicial investigations. As a result of the Cold War's influence on attitudes towards denazification, the legal narratives in cases such as the Frankfurt-Auschwitz trial and thus, the presentation of expert historical evidence to the Court during the closing speeches and judgement, sought to heavily influence both the West and East German public perception of 'failed' war crime justice.

The Eichmann Trial, 1961

Within the legal-historical narrative, the role of witnesses in Holocaust trials is discussed as a sub-genre of broader historiographical and geo-political themes.[95] For example as Lawrence Douglas noted, the *Eichmann* trial was instrumental in producing a narrative that would appeal to a broader public rather than a small circle of survivor-historians.[96]

For lead prosecutor Gideon Hausner, whilst it would have been possible to achieve a conviction through documents alone, following this stance meant that the IMT

the Czechoslovak Environment', in *The Politics of Retribution in Europe*, eds. Deák, Gross, and Judt, pp.252-290.

[95] Recent historiography has sought to address survivor testimony within the public sphere and the traumatic history behind 'the era of the witness'. See: Michal Givoni, *The Care of the Witness: A Contemporary History of Testimony in Crises* (New York: Cambridge University Press, 2016); Carolyn J. Dean, *The Moral Witness: Trials and Testimony after Genocide* (Ithaca: Cornell University Press, 2019).

[96] Lawrence Douglas, 'The Eichmann Trial Fifty Years On', Forum in *German History*, Vol. 29, No. 2 (2011), p.272.

proceedings 'failed to reach the heart of men.'[97] Hausner consequently sought to present an abundance of survivor testimony during the proceedings of the *Eichmann* trial, using the trial as a platform on which the Israeli population could claim their own identity and define the Holocaust as a distinct event.

In one instance, Adolf Berman used his testimony to add a living dimension of atrocity to the trial: producing a pair of shoes that belonged to children who had died within the gas chambers.[98] However, Hausner's memoir also highlights the limitations that arise when survivors are asked to testify. Hausner recounts: '[m]any people, once they agreed to tell their story, did not want to be limited', thus failing to meet the legal requirement for concise credible and admissible evidence.[99] Moreover, the need for clear and coherent testimony was brought into question because 'the narrative, which had been precise and lucid up to this point, became detached and obscure. They found it difficult to describe in concrete terms, phenomena from a different world.'[100] Hannah Arendt is particularly critical of Hausner's emphasis on survivor testimony arguing that through the 'testimonies of suffering', Hausner brought the realms of law too close to the irritational and emotional, risking turning the proceedings into a 'show trial'.[101]

[97] Gideon Hausner, *Justice in Jerusalem* (London: Thomas Nelson and Sons Ltd, 1966), p.291.
[98] Berman was a leader of the Jewish underground in the Warsaw Ghetto, the general secretary of Żegota (an underground Polish Council seeking to aid and rescue Jews) and the Central Association for the Care of Orphans. Berman immigrated to Israel in 1950 and became chairman of Israel's Organization of Anti-Nazi Fighters and a member of the World Organization of Jewish Partisans and former Nazi Prisoners. TAE. Session 26. 3 May 1961. Accessed: 3 July 2020. [http://www.nizkor.com/hweb/people/e/eichmann-adolf/transcripts/Sessions/Session-026-02.html]
[99] Hausner, *Justice in Jerusalem*, p.294.
[100] Ibid.
[101] Hannah Arendt, *Eichmann In Jerusalem: A Report on the Banality of Evil* (New York: Penguin Books, 1963), pp.2-8.

Whilst the creation of a victim narrative is certainly correct, other historians have begun to consider different motives for the trial. Douglas argues that the Prosecution sought to create a narrative of heroic memory through the utilisation of survivor witnesses.[102] Similarly, Shoshana Felman poses that the *Eichmann* trial presented a monumental contemplation of the past, providing the stimulus for people to begin analysing events by their effects and not by their causes.[103] However, for Ruth Bettina Birn, the inadmissibility of the testimony offered during the trial resulted in historical inaccuracy.[104] When discussions focus on the generation of historical memory and the trial as a platform for trauma therapy, the *Eichmann* trial cannot be perceived as anything other than a success. Yet, when attention is turned to the legal achievements of the trial, fewer than a quarter of the witnesses were able to shed light on the criminality of Eichmann's actions or testify to the charges with which he was indicted.[105] Such limitations, as well as the different arguments set out by Douglas, Felman, and Birn, demonstrate the struggle that existed during the *Eichmann* trial between history and law.

The Frankfurt-Auschwitz Trial, 1963-1965

Similarly, there has been a re-focus in academia on the Frankfurt-Auschwitz trial.[106] Some of the early efforts to address this gap in research include Hermann Langbein's, two-volume documentation and reflection on the trial (drawing upon his involvement

[102] Douglas, *Memory of Judgment*, p.156.
[103] Shoshana Felman, *The Juridical Unconscious: Trials and Traumas in the Twentieth Century* (Cambridge, Mass.: Harvard University Press, 2002), p.114.
[104] Ruth Bettina Birn, 'Fifty Years After: A Critical Look at the Eichmann Trial', *Case Western Reserve Journal of International Law*, Vol. 44, No. 1-2 (2011): p.471.
[105] Douglas, *Memory of Judgment,* p.129.
[106] Hermann W. Von Dunk, 'German Historians and the Crucial Dilemma', *European Review*, Vol. 14, No. 3 (2006): pp.376-380; Alan Steinweis, 'West German *Zeitgeschichte* and the Holocaust: The Importance of an International Context', *Historisches Forum*, Vol. 2 (2004): pp.48-49.

in both the pre-trial phase and as a trial witness), and the German government collection *Auschwitz: Zeugnisse und Berichte* (*Auschwitz: Testimonies and Reports*).[107] More recent research into the trial has focused on three areas: the political nature of the trial; the narrative and experience of the survivors who testified at the trial; and the judicial confrontation with the past.[108] Such research follows the wider trend of historiography concentrating on the history of West German Holocaust trials.[109] Pendas and Rebecca Wittmann have produced two of the most detailed pieces of literature on the Frankfurt-Auschwitz trial. Pendas asserts that the Frankfurt-Auschwitz trial 'has to be understood as a political trial' although he is quick to state that this does not mean that the trial was 'an illegitimate attempt to use legal forms to pursue extra-legal ends'.[110] Whilst he does consider all areas of the trial, his research seeks to emphasise the political dimension within the trial itself and the impact that the Cold War had on its proceedings. Pendas does address the testimony of Jürgen Kuczynski, the expert historian called by East German adjutant prosecutor Friedrich Karl Kaul whose testimony was later disallowed by the Court. However, Pendas's assessment of Kuczynski's testimony is part of Pendas's wider argument that the Frankfurt-Auschwitz trial was a political trial. Conversely, Wittmann emphasises the use of survivor testimony and its influence on the public's understanding of Auschwitz and the Holocaust.[111] Both Pendas and Wittmann share a meta-narrative throughout

[107] Langbein was the Secretary of the International Auschwitz Committee. Hermann Langbein, Hans Günther Adler, and Ella Lingens-Reiner, eds. *Auschwitz: Zeugnisse und Berichte* (Frankfurt am Main: Europäische Verlagsanstalt, 1962).
[108] Wittmann, *Beyond Justice;* Devin O. Pendas, *The Frankfurt Auschwitz Trial, 1963-1965: Genocide, History, and the Limits of the Law* (New York: Cambridge University Press, 2006). Chapter four summarises the trial's proceedings and legal aspects recorded within literature.
[109] For Pendas, on West German Holocaust trial historiography can be split into three phases: the 1960s which focused on the trials legal and political nature; secondly,the 1980s, where attention was given to provide an overview of the trials; finally, during the twenty-first century, effort has been made to pursue archivally based trial analysis. Pendas, *Frankfurt Auschwitz Trial,* pp.3-4.
[110] Ibid*,* pp.2-3.
[111] Wittmann, *Beyond Justice*, pp.144, 160, 189-190.

their research where they consider how the legal counsels' respective approaches affected the German public's ability to come to terms with their Nazi past. Additionally, René Wolf's evaluation of the West and East German radio reports about the Frankfurt-Auschwitz trial also concentrate on the ideological battle between the two geographical zones and its impact on the inter-German dialogue during the trial's proceedings. As Wolf notes, the desire for Germany to regain its 'honourable' status within Europe was consistent across West and East German radio broadcasts.[112] Yet, 'culpability was a matter of personal examination.'[113] Thus, the radio stations sought to politically engage with the Frankfurt-Auschwitz trial through reports that would favour the relevant geographical political ideology. However, whilst these publications are important for establishing detail about the Frankfurt-Auschwitz trial and its relationship to the wider political context of the time, none have a specific focus on the role of the expert historian.

Recent literature has begun to expand upon the relationship between the prosecutor and the historian within the Frankfurt-Auschwitz trial. Dieter Pohl concentrates on the pre-trial investigative stage, focusing on the interdisciplinary relationship within the context of postwar Holocaust trials in West Germany. Whilst Pohl is correct in asserting that the Ludwigsburg prosecutors during the early 1960s were 'almost the only ones who used the broad Polish and Yiddish publications', institutes such as the *Institut für Zeitgeschichte* (IfZ, Institute of Contemporary History) were essential in spearheading discussions over the policies of the Third Reich.[114] As chapter four

[112] René Wolf, *The Undivided Sky: The Holocaust on East and West German Radio in the 1960s* (Houndmills: Palgrave Macmillan, 2010), p.99.
[113] Ibid.
[114] The IfZ was the first institution for academic research and scholarship on the Nazi dictatorship. Dieter Pohl, 'Prosecutors and Historians: Holocaust Investigations and Historiography in the Federal Republic', in *Holocaust and Justice*, eds. Bankier and Michman, pp.118-127.

shows, literature such as *Anatomy of the SS State,* a pivotal work documenting the expert reports produced for the Frankfurt-Auschwitz trial, became fundamental in shaping historiographical discussions throughout the postwar period. Without the Frankfurt-Auschwitz trial, *Anatomy* may not have been published, or indeed the focus of research conducted for *Anatomy* may have taken a different form. Thus, as noted above, developments in Holocaust historiography and the research produced for Holocaust trials are intertwined.

Pendas argues in his review of *Anatomy* that the historians and their reports during the trial were 'simply background information'.[115] As chapter two establishes, the purpose and duty of expert reports and testimony is to provide the court with the historical context of an event. However, whilst this information may be seen as 'contextual', without such background information, the Courts would not have been able to reach an informed and educated verdict. Nonetheless, the level of analysis that has been given to historians as expert witnesses in the Frankfurt-Auschwitz trial only serves to reflect the contextual use of their testimony. In his account of the trial, Bernd Naumann only mentions the testimony of the expert historians briefly, noting 'the experts of the Munich Institute for Contemporary History have made available to the court their finding about the composition and structure of this instrument of National Socialist terror.'[116] As Wittmann notes, survivor testimony proved to be an invaluable form of evidence in the Frankfurt-Auschwitz trial, reconstructing an image of Auschwitz accessible to the public. Given the historiographical significance of *Anatomy*, it is striking that the role of the historian in helping to generate this Holocaust historical

[115] Devin O. Pendas, '"Political Tyranny and Ideological Crime": Rereading "Anatomy of the SS State"', *Zeithistorische Forschungen: Studies in Contemporary History*, Vol. 5 (2008): p.477.
[116] Bernd Naumann, *Auschwitz: A Report on the Proceedings Against Robert Karl Ludwig Mulka and Others Before the Court at Frankfurt*, trans. Jean Steinberg (London: Pall Mall Press, 1966), p.84.

narrative within the Cold War context only commenced after 2018 (as discussed below).[117] This dissertation seeks to contribute towards this historiographical gap.

1985-2000: Historical Reassessment

Denial and the Reassessment of Trial Historical Narratives

Following the collapse of the Berlin Wall in 1989, there was a surge of reassessments of old historical narratives. Access to material that had previously been unavailable to academics aided new research. Whilst comparative literature emerged that sought to document these new Holocaust perspectives, such as Saul Friedlander's pivotal compilation of essays *Probing the Limits of Representation*, other more inaccurate reassessments of the Holocaust emerged through the label Holocaust 'revisionism' (denial). In 1979, Holocaust survivor Primo Levi commented that 'the very enormity of genocide 'nudges us toward incredulity, toward denial and refusal'.[118] However during the final quarter of the twentieth century, 'Holocaust denial' became a topic of scholarly attention with several of the immediate postwar trial legacies being scrutinised.[119] For example, in 1997 Michael Marrus produced a reassessment of the IMT, defending the impact its judgement had on contemporary international tribunals in response to Holocaust deniers criticising the Tribunal's verdict. Marrus concluded that whilst the IMT had its limitations, he rejected deniers' claims that the Allies had engaged in their

[117] The research conducted for the Frankfurt-Auschwitz trial, and conclusions reached in the expert reports, were fundamental in the development of the 'intentionalist' v. 'functionalist' interpretative debate that emerged during the 1980s. Chapter four provides analysis of the arguments presented by the intentionalists and functionalists, and the role of the Frankfurt-Auschwitz trial within the debate.
[118] Berel Lang, 'Six Questions On (Or About) Holocaust Denial', *History and Theory*, Vol. 49, No. 2 (2010): p.157.
[119] See chapter five for a discussion on the definitions of Holocaust denial, as well as Lawrence Douglas's critique of the concept of a 'criminal denial trial'.

own form of Holocaust denial, reasserting that the IMT deserved its status as a watershed event within international criminal law.[120]

Interdisciplinary Relationship Literature

A consequence of Holocaust denial trials is a renewed focus on the relationship between history and law. Carlo Ginzburg has attested to the similarities between the expectations placed upon the historian and the lawyer in relation to their arguments and presentation of evidence used.[121] However, he also notes the damage that moral and political judicial models can have on historiographies: it can encourage historians to focus on specific events, yet it also resists a historiographical approach that is based on an explanatory framework. Whilst Browning attests that the historical study and judicial investigation of the Holocaust have been intertwined, for Browning there remains a difference between the historian's awareness of a spectrum of attestable fact and pure interpretation, and the legal profession's reliance upon the establishment of proven facts.[122] Drawing upon his experience as an expert witness in the 1988 *Zündel* trial, Browning observed that the questions posed by each of the counsels in the examination-in-chief of their witnesses and the cross-examination, can impact the

[120] After the First World War, Wilhelm II and other German officials were considered for war crimes. However, the Leipzig trial (1921) became a 'debacle', with no major figures standing trial, contributing towards the destabilisation of the interwar Weimar Republic. During the creation of the IMT, the mistakes of past war crime trials were thus considered to achieve justice and produce a stable postwar society. Michael R. Marrus, 'International Law: The Nuremberg Trial, Fifty Years After', *The American Scholar*, Vol. 66, No. 4 (1997): pp.563-569; Wittmann, *Beyond Justice*, p.18.

[121] Carlo Ginzburg, 'Checking the Evidence: The Judge and the Historian', *Critical Inquiry*, Vol. 18, No. 1 (1991): p.80. See also: Arnold I. Davidson, 'Carlo Ginzburg and the Renewal of Historiography', in *Questions of Evidence: Proof, Practice, and Persuasion Across the Disciplines*, eds. James Chandler, Arnold I. Davidson, and Harry Harootunian (Chicago: The University of Chicago Press, 1994), pp.304-320. For Ginzburg's response to Davidson, see: Carlo Ginzburg, 'A Rejoinder to Arnold I. Davidson', in *Questions of Evidence*, eds. Chandler, Davidson, and Harootunian, pp.321-324.

[122] Browning, 'German Memory', p.34.

narrative of a trial.[123] It becomes problematic when a historical narrative of the Holocaust is founded upon the specific questions directed by the lawyer, to which the historian must answer, and not through a collaboration between the disciplines.[124]

Ginzburg and Browning's interpretations of the dynamic between history and law demonstrate the depth of awareness concerning the interdisciplinary relationship. Yet this engagement is not reflected in late twentieth century literature that focuses on the historian as an expert witness. Concerning the historiography of the first *Zündel* trial (1985), the testimony of prosecution expert witness Raul Hilberg has only been assessed in terms of its relationship to the performance of Defence counsel Douglas Christie. Christie attacked history and memory by seeking to dispel both the testimony of Hilberg and the survivor witnesses.[125] Comparatively, the testimony of Browning as the Prosecution's historical expert witness in the 1988 *Zündel* trial is yet to be comprehensively examined. Relaying his experiences of cross-examination under Christie, Browning pays particular attention to Christie's focus on the relationship between history and law concentrating on the type of evidence that both history and law rely upon, as well as how such evidence is used.[126] The fact that the few texts produced by Browning are the only in-depth analysis of his testimony within the existing historiography of the 1988 case, demonstrates that a gap remains in understanding the historian's developing role as an expert witness in the postwar period.

[123] Ibid, p.31.
[124] Ibid, p.34.
[125] Douglas Christie attacked the testimony of Rudolf Vrba and Arnold Friedman, reducing their narratives to hearsay, thus demonstrated the dangers of having survivors testify and bear witness to personal and harrowing events within a Holocaust denial setting. Douglas, *Memory of Judgment,* p.228.
[126] Christie's cross-examination of Browning is examined in chapter five. Browning, 'Law, History, and Holocaust Denial', pp.202-203.

The Sawoniuk Trial, 1999

Towards the end of the twentieth century, perpetrator trials occurred in response to wider issues. For example, the *Sawoniuk* trial was held as a result of the introduction of the 1991 War Crimes Act, itself a response to allegations that the UK had become a haven for war criminals.[127] Publications that cite *Sawoniuk*, deal only with a summary of the proceedings. David Hirsch, Bazyler, and Tuerkheimer provide the most detailed studies of the *Sawoniuk* trial, focusing on the struggle over admissible documentary evidence and thus the overwhelming weight placed on eyewitness testimony.[128] As Hirsch notes, the testimony presented by survivor witnesses was moulded by the rules and requirements of a criminal trial: the survivor is no longer in control of the presentation of their memory, and the Court subsequently transforms an original narrative into what they consider to be evidence.[129] When research cites trial evidence in *Sawoniuk*, Browning's name is mentioned alongside his task of providing historical context to the Court, but with no additional detail.[130] This dissertation develops the understudied nature of the *Sawoniuk* trial and Browning's role within it.

2000 Onwards: Comparative Interdisciplinary Texts

Following the rise of academic engagement with the interdisciplinary relationship demonstrated by Ginzburg and Browning, literature since the turn of the century has begun to engage directly with Holocaust trials, emphasising the memory of justice.

[127] David Cesarani, *Justice Delayed: How Britain Became a Refuge for Nazi War Criminals* (New Hampshire: Heinemann, 1992); David Hirsch, 'The Trial of Andrei Sawoniuk: Holocaust Testimony Under Cross-Examination', *Social & Legal Studies*, Vol. 10, No. 4 (2001): p.532.
[128] Bazyler and Tuerkheimer, *Forgotten Trials*, pp.275-302.
[129] Hirsch, 'The Trial of Andrei Sawoniuk', p.530.
[130] Ibid, p.537.

Contemporary works such as Rivka Brot's research into the Jewish Displaced Person (DP) legal system in the American Occupation Zone illustrates the struggle for justice for the Jewish people. The Jewish DPs' struggle against American military law served as an act of defiance against not being recognised as a legitimate national community. Furthermore, Michael J. Bazyler concluded regarding the Jewish *kapo* trials in Israel under the Israeli Nazi Crimes and Collaboration Law, that *kapos* cannot be judged under common criminal law or normal 'standards of decency' due to the context and different civilisation norms within Auschwitz.[131] Texts such as Brot's and Bazyler's aid our understanding of the different forms of Holocaust trials that exist outside of the international tribunal dimension.

Through his comparisons between the IMT, the trial of Klaus Barbie (1987), the *Eichmann* trial, and the first *Demjanjuk* trial (1986), Douglas presents a three-fold set of legal filters that impact the presentation of history and memory within law. Firstly, the rules of evidence in a trial, demonstrated by the various mediums that history may enter the trial as evidence, such as the testimony of an expert witness or 'hard' documents, provides the court with a flexible avenue for history and memory. Secondly, the crimes with which the accused is charged can frame the courtroom's historical narrative. Finally, the principles of accountability, for example the concept of 'joint criminal enterprise' (that is, the accused was part of a common plan), can aid the Prosecution in convicting individuals for crimes they did not physically commit and thus expanding the historical narrative that they are able to present.[132] If one considers the

[131] Rivka Brot, 'Conflicting Jurisdictions: The Struggle of the Jews in the Displaced Persons Camps for Legal Autonomy', *Dapim: Studies on the Holocaust*, Vol. 31, No. 3 (2017): pp.171-199; Bazyler and Tuerkheimer, *Forgotten Trials*, pp.215, 195-225; Primo Levi, *The Drowned and the Saved*, trans. Raymond Rosenthal (New York: Simon & Schuster Paperbacks, 1986).
[132] Lawrence Douglas, 'The Didactic Trial: Filtering History and Memory into the Courtroom', *European Review*, Vol. 14, No. 4 (2006): pp.515-518.

political and historical circumstances surrounding a trial, the representation of history becomes susceptible and can be shaped by many factors. The role of the historian as an expert witness is used to stop the wider historical context of the Holocaust from being forgotten. However, as Douglas notes, the fact that the narrative of history and memory within the courtroom can be shaped by these three legal filters demonstrates that history is jeopardised when prosecutors decide to use a specific representation to aid their legal narrative. Thus, returning to Browning's observation regarding the impact that research questions can have on an argument, Holocaust trials are therefore susceptible to a consciously selective historical representation.

Hanna Yablonka and Moshe Tlamim maintain this stance in their assessment of Holocaust trials and their influence on Holocaust perception in Israel. Through the comparison of the IMT and the *Eichmann* trial, they argue that as a consequence of the Court being susceptible to the influence of politics, thus impacting the politics of memory, the representation of history within law became even more distorted.[133] As Yablonka and Tlamim address, the framework and proceedings of the IMT were based on German documents that reflected how the Germans had perceived the war and the Holocaust. Hence, the Jews were seen as objects of German activity, failing to generate any kind of self-examination or reappraisal that could lead to a transformation in consciousness.[134] The *Eichmann* trial was a watershed for Holocaust research in that Jewish witnesses testified directly about it, thus giving legitimacy to Jewish

[133] Bloxham, *Genocide on Trial*; Pendas, 'Seeking Justice', pp.347-368; Lawrence McNamara, 'History, Memory and Judgment: Holocaust Denial, The History Wars and Law's Problems with the Past', *Sydney Law Review*, Vol. 26, No. 3 (2004): pp.353-394; Fraser, *Daviborshch's Cart*; David Fraser, 'Shadows of Law, Shadows of the Shoah: Towards a Legal History of the Nazi Killing Machine', *Oxford Journal of Legal Studies*, Vol. 32, No. 2 (2012): pp.401-419.

[134] Hanna Yablonka and Moshe Tlamim, 'The Development of Holocaust Consciousness in Israel: The Nuremberg, Kapos, Kastner, and Eichmann Trials', *Israel Studies,* Vol. 8, No. 3 (2003): pp.8-9.

documentation and accounts.[135] Consequently, in correlation to Shoshana Felman's conclusions that the law often blurs the lines between private and public trauma, though the *Eichmann* judges gave greater weight to the documents presented in the trial than the oral testimony, it was the opportunity for the witnesses to testify and present their stories that shaped the Israeli collective memory.

Historians as Expert Witnesses

Amongst this scholarly engagement with trials, there has been a rise in literature focusing specifically on the role of the historian as an expert witness and whether Holocaust trials in particular can produce 'good history'.[136] Lynne Humphrey argues that the use of law to succinctly present the findings of the expert witnesses, particularly during the *Zündel* trials and *Irving* trial, demonstrates that the law can produce 'good history' by dispelling Holocaust denial and through '"empiricist-analytical" demands and techniques'. As Humphrey concludes, a 'narrative-linguistic' theory demonstrates that by generating 'good history', courtrooms 'proved to be no more flawed a methodology, or form of historical inquiry, than academic historiography'.[137] As mentioned above, even historical expert testimony that has had a profound impact on Holocaust historiographical literature, such as the expert reports produced by Hans Buchheim, Martin Broszat, Helmut Krausnick, and Hans-Adolf Jacobsen for the Frankfurt-Auschwitz trial, have only begun to be assessed in relation to their role as expert witnesses. Prior to Mathew Turner's work *Historians at the Frankfurt Auschwitz Trial* (2018), contemporary studies on the Frankfurt-Auschwitz

[135] Ibid, p.19.
[136] Lynne Humphrey, 'The Holocaust and the Law: A Model of "Good History"?' *Rethinking History*, Vol. 24, No. 1 (2020): pp.94-115.
[137] Ibid.

trial only dealt with the involvement of Buchheim, Broszat, Krausnick, and Jacobsen from a contextual perspective within the wider framework of the trial.[138] Like other academics who have studied the historian as an expert witness and the interdisciplinary relationship between history and law, Turner argues that the research scope was severely limited due to the Prosecution's instructions to the expert historians and the legal restrictions on the types of evidence that were permitted in court.[139] However, Turner's research considers the role of the expert historians only in the context of the Frankfurt-Auschwitz trial, limiting the scope of his findings. According to Turner, when the Frankfurt-Auschwitz trial began, the role of the historian as an expert witness was in its infancy, having only had five years to develop since the *Ulm* Trial in 1958. In fact, as chapter three demonstrates, the historian as an expert witness had been involved in Holocaust trials since the *Hostage* Case, eleven years earlier than the *Ulm* Trial. Turner's limited assessment reaffirms the need for a comparative evaluation of the experiences of historians as expert witnesses within the wider context of other Holocaust trials.

Excluding Turner's work, literature produced on historians as expert witnesses is predominantly written by those with first-hand experience. Rousso places the presence of memory within Holocaust trials in the centre of his argument. Rousso argues that the testimony provided by historians served as a 'pretext' for an instrumentalisation of historical interpretations, which could be elaborated and formulated into other contexts chosen by the Court, hence distorting the historical narrative that expert witnesses seek to present.[140] Thus, in 'trials of memory',

[138] Turner, *Historians at the Frankfurt Auschwitz Trial,* p.73.
[139] Ibid, pp.2-3.
[140] Rousso, *Haunting Past*, p.86.

historians abandon part of their academic authority, with the Court manipulating the historical version of the past into a judicial narrative.[141] Even historians who have contributed towards successful prosecution outcomes support Rousso's argument. Browning comments that despite the historian having control over what they may say, they cannot influence how, or even if, their testimony will be used in the final verdict.[142] Despite Browning's support of historical expert testimony in trials that deal with issues such as Holocaust denial, he still views the courtroom as an area of contention for historians and an improper forum to debate or resolve issues surrounding historical interpretation.[143]

SUMMARY

Historiography that examines the historical narratives presented in war crime and Holocaust trials highlight the interdisciplinary limitations that can occur when history enters the courtroom, and the influence that the wider socio-political context can have on the historical narratives pursued during a trial. Moreover, recent instances of contemporary Holocaust denial trials mean that the trial context itself is proving to be a challenging environment for survivor testimony and thus is beginning to dictate the type of witnesses that should be called. As Martin Dean noted, 'every single trial is quite different in terms of how historians are used … it does depend on the Prosecution's case and how they feel that the historians are going to fit in there'.[144]

[141] Rousso, 'Intellectuals and the Law', p.157.
[142] Christopher R. Browning (plenary), 'Historians and Holocaust Denial in the Courtroom', in *Remembering for the Future: The Holocaust in the Age of Genocide*, ed. John K. Roth and Elisabeth Maxwell (Hampshire: Palgrave, 2001), pp.777-778.
[143] Ibid.
[144] Martin Dean (Historical Consultant at Babyn Yar Holocaust Memorial Center), interviewed by Amber Piece, Washington, DC, 5 April 2019.

Certainly, when dealing with the extraordinary nature of the Holocaust within an ordinary setting such as a domestic courtroom with established legal standards, the impact of the legal desire to win a case risks distorting the established historical narrative of the Holocaust in preference to the broader court proceedings.

Issues that were found to be problematic in the early stages of the historian's role as an expert witness (as chapter two establishes) continue to be a hindrance and are applicable to expert witnesses across all professions. Conceptual issues such as the extent of evidence interpretation brought into question most noticeably through cross-examination, can leave an expert witness feeling as if their academic status is being undermined. Seen from this perspective, it cannot be denied that the role of the historian as an expert witness is a challenging one, particularly given their vulnerability within a Holocaust trial context and the impact that a legal counsel's chosen questions and subsequent argument can have on the historical narrative produced during the trial. However, but for historians' involvement in Holocaust trials, courts would not be able to reach informed verdicts that are based upon the established historical narrative; important historiographical texts such as *Anatomy* would not have been produced; and significant legal victories, such as the *Irving* trial, would not have been achieved. For these reasons, the expert historian plays a fundamental role within Holocaust trials.

II

Historicising the Role of the Historian as an Expert Witness

> He is not a witness in the ordinary sense, unless called merely to testify to some fact which he has observed, - and then he is not an expert. His position and office is that of sworn interpreter of science to the court.
>
> William L. Foster, 1897[1]

INTRODUCTION

As William L. Foster noted, expert witnesses have been present in the courtroom since at least the late nineteenth century. However, the role of the historian as an expert witness in Holocaust trials has only begun to develop since the beginning of the twenty-first century. As Foster defines, whereas a layman witness must testify to what they have personally seen or heard, an expert witness can testify on any academic matter that falls outside the knowledge of the Court, thereby aiding the jury or judge to reach an informed verdict. Whilst an expert witness is permitted to offer their opinion on matters that have been deemed to be admissible evidence, they are not allowed to provide their opinion upon the legal aspects of the trial.[2]

Foster's definition of the scientific expert witness is equally applicable to the role of the expert historian: all expert witnesses have the same duties towards the Court in their presentation of objective evidence. However, for the historian, the level of

[1] William L. Foster, 'Expert Testimony, Prevalent Complaints and Proposed Remedies', *Harvard Law Review*, Vol. 11, No. 3 (1897): p.185.
[2] Jean Hall and Gordon Smith, *The Expert Witness* (Reading: The College of Estate Management, 1998), p.3.

interpretation within the historical discipline means that historical expert testimony can be considered to be subjective when assessed against the legal evidentiary standards, such as the criminal requirement to prove guilt 'beyond reasonable doubt'. As the case studies within this dissertation demonstrate, the legal need to engage with the exceptional circumstances arising from the history and memory of the Holocaust means that the role of the expert Holocaust historian is distinctive within the wider role of the expert historian. This chapter provides an introduction to the role of the historian as an expert witness in Holocaust trials, and explains the contexts surrounding the selected case studies.

This chapter commences by defining the role of the expert witness in general, followed by establishing the expert's legal duties and the definition of an expert report. The chapter then historicises the role of the expert witness, focusing on the pivotal ruling within *Folkes v Chadd* (1782) and its impact in establishing the expert witness as the provider of expert opinion evidence. The chapter then proceeds to historicise the historian as an expert witness, considering the role of the historian in criminal and civil trials, and the implications of the historian expert witness within the courtroom. The third section of this chapter examines the earliest use of historians in Holocaust trials, with attention given to the *Ulm* trial (1958) and its influence in the development of the historian as an expert witness in Holocaust trials. Finally, the interdisciplinary relationship between history and law is analysed, focusing on the debates within existing literature, the different jurisprudential traditions, and their subsequent impact on the use of historical expert testimony.

THE EXPERT WITNESS

The definition of an expert witness has developed since the sixteenth century, culminating in Lord Mansfield's judgement in *Folkes v Chadd* (1782) where for the first time, expert evidence was officially ruled upon. This section will highlight which aspects of the historian's experience within the courtroom are unique, and which are consistent across expert witnesses of all disciplines, by establishing the definition and duties of the expert witness and addressing the relationship between the courtroom and the expert.

Definition

Despite the geographical range of jurisdictions of the case studies in this dissertation (international criminal law, UK criminal and civil law, Canadian criminal law, and the German Code of Criminal Procedure [StPO]), the definition of an expert witness is consistent. Within the UK Criminal Procedure Rules, an expert witness provides the Court with an 'objective and unbiased' opinion and actively assists the Court 'in fulfilling its duty of case management'.[3] The StPO states that expert testimony 'shall apply if experienced persons have to be examined to prove past facts or conditions the observation of which [require] special professional knowledge.'[4] Similarly, the Appeals Chamber in *Prosecutor v Popvic et al.* (2015), part of the International Criminal Tribunal for the former Yugoslavia (ICTY), defined that 'an expert witness

[3] The Criminal Procedure Rules. 19.2. October 2015. Amended: April 2018 and April 2019. Accessed: 25 March 2020. [https://www.justice.gov.uk/courts/procedure-rules/criminal/docs/2015/crim-proc-rules-2015-part-19.pdf]

[4] The German Code of Criminal Procedure (StPO). Section 85. Published: 7 April 1987. Amended: 23 April 2014. Accessed: 14 May 2020. [https://www.legislationline.org/download/id/6117/file/Germany_CPC_1950_am_2014_en.pdf]

offers a view based on specialised knowledge regarding a technical, scientific or otherwise discrete set of ideas or concepts that is expected to fall outside the lay person's ken'.[5]

Expert Duties[6]

The UK Civil Rules and Practice Directions state that the experts duty to the Court 'overrides any obligation to the person from whom experts have received instructions or by whom they are paid.'[7] The UK Criminal Procedure Rules list four specific duties of the expert witness: to define the expert's area or areas of expertise; to draw the Court's attention to any question to which the answer would be outside the expert's area or areas of expertise; to inform all parties and the Court if the expert's opinion changes; and to disclose to the legal counsel for whom the expert is appearing for any information that the expert is aware of, or any detail that the counsel would be required to give the Court notice about.[8]

Expert Reports

Under the UK Civil Rules 'expert evidence shall be given in a written report unless the court directs otherwise', with an expert only to attend a hearing if 'it is necessary to do so in the interests of justice.'[9] Though the UK Criminal Procedure Rules do not explain

[5] *Prosecutor v Vujadin Popović, Ljubiša Beara, Drago Nikolić, Radivoje Miletić, Vinko Pandurević*. IT-05-88-A. Appeals Chamber: Judgement. 375. 30 January 2015. Accessed: 14 May 2020. [https://cld.irmct.org/assets/filings/Judgement-Popovic-reduced.pdf]
[6] Though the duties of an expert witness stated below are all UK based, they apply across all jurisdictions.
[7] Civil Rules and Practice Directions. 35.3. Accessed: 13 May 2020. [https://www.justice.gov.uk/courts/procedure-rules/civil/rules/part35]
[8] Criminal Procedure Rules. 19.2.
[9] Civil Rules and Practice Directions. 35.5.

the use of expert reports over expert testimony, the Criminal Procedure Rules provide a detailed requirement for an expert's report (Appendix A).[10]

For the historian expert witness, attention should be drawn to the Criminal Procedure Rules item (f)(i) stipulating that 'a range of opinion' within an expert report would be permissible. For the Holocaust historian, item (f)(i) allows the expert to engage with different interpretations, for example when the order for the Final Solution was given or the debates regarding a 'Hitler Order'. Consequently, item (f)(i) allows the expert historian to verify that despite their differences, most interpretations are based on the available evidence and accepted facts of the historical event under question. Whilst the treatment of expert reports under the UK Criminal Procedure Rules apply to expert reports across all disciplines, the focus on the potential 'range of opinion' within a report is particularly relevant for historians producing expert reports that seek to address the differing interpretations that opposing counsel may otherwise use to undermine the validity of a particular historical argument.

Historicisation

There is some disagreement concerning the first use of expert witnesses, with Robert Jan van Pelt commenting that courts have used expert testimony 'since the late eighteenth century'.[11] Comparatively, Christopher M. Milroy and Tal Golan cite *Buckley v Rice* (1554) as the first recorded use of medical expert witnesses in a

[10] Criminal Procedure Rules. 19.4.
[11] Robert Jan van Pelt, 'A Jack-of-all-Trades in the Witness-Box', in *Mapping the 'Forensic Turn': Engagements with Materialities of Mass Death in Holocaust Studies and Beyond*, ed. Zuzanna Dziuban (Vienna: New Academic Press, 2017), pp.40-41.

courtroom.[12] Déirdre M. Dwyer dates the first use of expert witnesses even earlier, arguing that English courts had been hearing expert evidence 'since at least the middle of the fourteenth century in criminal matters'.[13] However, Dwyer does not give a specific example of expert witness evidence during the fourteenth century criminal trials.[14] The earliest citation of an expert witness in Dwyer's study of expert evidence from 1550-1800 in civil matters is similarly *Buckley v Rice*. Van Pelt discusses the history of the expert witness within the context of *Folkes v Chadd* (1782). Given that the definition of an expert witness, as defined in *Folkes*, is the foundation for the contemporary definition of expert witness testimony, it is likely that van Pelt referenced the late eighteenth century as the first use of an expert witness as contemporary historians and other expert witnesses would now understand the role. However, in 1554, Justice Thomas stated that 'the Judges of our law used to be informed by surgeons … because their knowledge and skill can best discern it'.[15] Consequently, even in the sixteenth century courtrooms recognised that certain judgements relied upon knowledge from other disciplines for the Court to form an educated verdict.

Milroy, Golan, and Dwyer all address the development of the expert witness since 1554, both in terms of court usage and the requirements of the expert witness role. As Milroy notes, throughout the eighteenth and nineteenth century, trials using medical evidence or autopsy reports increased. For example, between 1759-1768, only 17.9%

[12] Christopher M. Milroy, 'A Brief History of the Expert Witness', *Academic Forensic Pathology*, Vol. 7, No. 4 (2017): p.519; Tal Golan, *Laws of Men and Laws of Nature: The History of Scientific Expert Testimony in England and America* (Cambridge, Mass.: Harvard University Press, 2004), p.18.
[13] Déirdre M. Dwyer, 'Expert Evidence in the English Civil Courts, 1550–1800', *The Journal of Legal History*, Vol. 28, No. 1 (2007): pp.93-94.
[14] Within common law, Dwyer cites *Buckley v Rice* as the first use of expert testimony. Within Chancery law, experts were first used in *Foubert v de Cresseron* (1698). For ecclesiastical law, expert testimony is first recorded c.1575, though the case is unknown. The first ecclesiastical trial, with a case name, is *Andrews v Powis* (1728). Finally, in the court of admiralty, experts were used in *Leighton v Moore* (1600). Dwyer, 'Expert Evidence', pp.102-107.
[15] Milroy, 'A Brief History of the Expert Witness', p.519.

of trials had an autopsy report, with forty-seven having no medical witness, and twenty-two having no autopsy report.[16] In contrast, between 1809 and 1818, 40.8% of trials had an autopsy report, and by 1869-1878 only ten of 251 trials had no medical evidence presented.[17] Both Dwyer and Golan note three options to bring expert knowledge into the courtroom between the sixteenth and eighteenth centuries: the court-instructed adviser; the party-instructed witness; and the special jury (a jury made up of particularly wealthy jurors or a jury consisting of jurors of particular knowledge or expertise).[18] During the sixteenth century, primarily when expert witnesses were grammarians instructed to inform the Court on the correct construction of Latin texts, experts were confined to answering questions with limited depth.[19] By the eighteenth century, experts began to be appointed by individual legal parties and questions for expert witnesses became more detailed, subsequently requiring experts to apply their knowledge to specific cases relevant for the Court. By the trial of *Folkes v Chadd*, experts were allowed to answer questions on causation.[20]

Folkes is pivotal in understanding the origins of the contemporary definition of the expert witness. The trial centred on the construction of an embankment by Sir Martin Folkes to prevent the sea from flooding his meadows. It was argued that Folkes's embankment was responsible for the silting up of Wells harbour in Norfolk. The jury had to decide whether cutting the embankment by the harbour trustees was justified due to the damage to the harbour caused by the embankment.[21] During the second trial, civil engineer John Smeaton produced expert evidence on behalf of Folkes'

[16] Ibid.
[17] Ibid.
[18] Dwyer, 'Expert Evidence', pp.98-101; Golan, *Laws of Men,* pp.18-22.
[19] Dwyer, 'Expert Evidence', pp.100-117.
[20] Ibid.
[21] Ibid, p.109; Golan, *Laws of Men,* p.15.

lawyers.[22] The harbour trustees objected to the evidence because it was believed that the jury's verdict should be 'based on fact and not opinion'.[23] The objection was accepted and the trial went to the Appeal Court before William Murray, 1st Earl of Mansfield. Lord Mansfield addressed that Smeaton's opinion evidence 'is deduced from facts which are not disputed'.[24] Moreover, Lord Mansfield stated that he considered Smeaton's evidence 'as a matter of science'.[25] Lord Mansfield ruled that only Smeaton could judge the scientific details of the case, due to his expert knowledge: '[t]herefore we are of opinion that his judgment, formed on facts, was very proper evidence.'[26] Van Pelt, Golan, and Milory all agree that Lord Mansfield's judgement concerning the admissibility of Smeaton's testimony established the basic understanding of hearing opinion evidence within common law jurisdictions.[27] *Folkes* continues to influence the role of the expert witness. *Daubert v Merrell Dow Pharmaceuticals, Inc.* (USA, 1993) and *R. v Mohan* (Canada, 1994) , similarly show that an expert's testimony is admissible as long as the foundation of the testimony is based on a well-recognised scientific principle.[28]

[22] The first trial was dismissed on the basis that the harbour trustees and opposing counsels were 'surprised' after the jury ruled in favour of Folkes. Golan, *Laws of Men,* pp.25-26.
[23] Dwyer, 'Expert Evidence', pp.109-110.
[24] Van Pelt, 'A Jack-of-all-Trades', p.41.
[25] Ibid.
[26] Ibid.
[27] See Glossary for a definition of common law. Ibid; Milroy, 'A Brief History of the Expert Witness', p.18; Golan, *Laws of Men,* p.6.
[28] In *R. v Mohan* (1994) the Canadian Supreme Court stated that expert evidence was applicable if the evidence demonstrated:

(a) relevance of the evidence;
(b) the necessity of the evidence in assisting the trier of fact;
(c) the absence of any exclusionary rule to the reception of evidence; and
(d) the proposed expert being properly qualified.

Van Pelt, 'A Jack-of-all-Trades', pp.41-42; Milroy, 'A Brief History of the Expert Witness', p.521.

Relationship Between the Expert and the Court

Dwyer correctly notes that historicising the role of the expert witness is important because understanding the development of the role from 1554 until *Folkes* reinforces the significance of Lord Mansfield's ruling within the contemporary definition of an expert witness.[29] Historicising the role demonstrates that the arguments cited as evidence of interdisciplinary tension between historians and lawyers, such as a differentiation between fact and truth, and the Courts' arguable control of an expert's testimony, are not unique to the expert historian. Rather, they can be viewed across all disciplines.

Court Control

Since the late nineteenth century, judges have been able to appoint an expert witness depending on whether they deem the need for expert testimony appropriate to the trial.[30] Judicial appointment of expert evidence is maintained within modern criminal and civil courts.[31] However, whilst the judge has the responsibility to ensure that the expert has recognised professional knowledge of their subject, the Court's influence over expert testimony depends on the trial jurisdiction.[32] Within the StPO, section

[29] Dwyer, 'Expert Evidence', p.111.
[30] Foster, 'Expert Testimony', pp.179-180.
[31] StPO. Section 73; Criminal Procedure Rules. 19.7; Civil Rules and Practice Directions. 35.4.
[32] In the 1988 *Zündel* trial, Judge Ronald Thomas refused expert witness status to Defence witness Fred Leuchter on the grounds that his 'basic … college level' qualifications in math, chemistry, physics, and toxology, and Bachelor of Arts degree in history, did not meet the requirements for Leuchter to be considered an 'expert' engineer and offer an opinion on the existence and structure of the Auschwitz gas chambers. Deborah Lipstadt, *Denying the Holocaust: The Growing Assault on Truth and Memory* (New York: Penguin Books, 1993), pp.164-165; Elizabeth Butler-Sloss and Ananda Hall, 'Expert Witnesses, Courts, and the Law', *Journal of the Royal Society of Medicine*, Vol. 95 (2002): p.432; Hall and Smith, *The Expert Witness*, p.3; Expert Witness Institute. Guidance on Professional Conduct. London: EWI, 2017. Accessed: 15 May 2018. [http://www.ewi.org.uk/international/usefuldocuments/codeofconduct].

seventy-eight stipulates that '[t]he judge shall guide the experts' participation, so far as he deems this necessary'.[33] Section seventy-eight is included to ensure that the expert produces objective evidence that is relevant to the trial, as well as to allow the Court to request expert evidence, as seen during the Frankfurt-Auschwitz trial.

The UK Civil Rules and Practice Directions state '[w]here a party has disclosed an expert's report, any party may use that expert's report as evidence at the trial'.[34] Within common law jurisdictions, such as the UK, USA, and Canada, the process of disclosure is customary. However, as demonstrated through the closing speeches of the selected case studies, though the disclosure of an expert report is not itself problematic for the expert witness, each counsel may selectively use and interpret an expert report to present their strongest argument. Consequently, an expert witness of any discipline, could be left feeling that their expert evidence has been misrepresented within the courtroom by legal counsels seeking to win their case, rather than looking for the 'truth'.

Expert Testimony Limitations

During the late-nineteenth century and early-twentieth century, there was a perceived 'crisis' within the courtroom regarding the extent of disagreement between expert witnesses called by different counsels. As Foster noted in 1897, 'the most frequent … complaint concerning expert testimony is the want of agreement upon the same subject and in the same case'.[35] Even though expert testimony must remain objective

[33] StPO. Section 78.
[34] Civil Rules and Practice Directions. 35.11.
[35] Foster, 'Expert Testimony', p.186.

and present an honest representation of their opinion and assessment of the available evidence, some disagreement between experts can be expected. Yet, Dwyer argues that expert witnesses during the nineteenth century were used as 'weapons of combat rather than sources of information'.[36] This conflict was first observed during the trial of *Lord Abinger v Ashton* (1873), where Sir George Jessel noted that rather than providing objective expert testimony, expert witnesses were more 'paid agents' of the counsel that called them.[37] Foster argued that, 'expert testimony is admitted … in accordance with a rule of law which requires the production of the best evidence.'[38] However, the evidence presented by the expert must be trustworthy and truly objective to serve the function of the court. Within this context, the above definition in the StPO for the Court to dictate the direction of expert research, if required, can be justified.

Understandably, the behaviour of an expert witness can lead to tension between the expert and their lawyers. Golan notes that during the first trial of *Folkes v Chadd*, the 'arrogant performance' of civil engineer Robert Mylne (appearing for Folkes) 'backfired'.[39] During the trial, Mylne made a 'hasty speculation' concerning the rich materials that were brought into the harbour due to the tides. This speculation was criticised by the opposing counsel and presented to the Court as an example of the unreliability of Mylne's evidence.[40] Not only did Mylne's behaviour weaken the argument presented by Folkes' lawyers, Mylne was not relied upon for the second trial of *Folkes* due to the perceived risk by Folkes' lawyers that Mylne may undermine their case again. Within the context of historical expert testimony in Holocaust trials,

[36] Milroy, 'A Brief History of the Expert Witness', p.520.
[37] Dwyer, 'Expert Evidence', p.118.
[38] Foster, 'Expert Testimony', p.176.
[39] Golan, *Laws of Men,* p.25.
[40] Ibid.

Christopher Browning noted the differing approaches in behaviour between himself and Raul Hilberg during the *Zündel* trials in 1985 and 1988. Hilberg appeared as an expert witness for the Prosecution in the first *Zündel* trial, however Hilberg declined to appear for the 1988 re-trial due to the intense cross-examination he experienced by Defence counsel Douglas Christie in 1985. Browning therefore appeared as the sole expert witness for the Prosecution in the 1988 *Zündel* trial. When one looks at Hilberg's responses to Christie's line of questioning in 1985, answering emotionally and negatively to personal attacks made against Hilberg's research, Hilberg does not appear in control of his testimony. Rather, the fact that Hilberg appeared easily rattled whilst testifying contributed to Christie's dominance within the courtroom. As Browning observed, learning from the 1985 trial transcripts and correspondence with Hilberg, the key to successful testimony was to 'seem as unflappable as possible'.[41] Within this, the ability by an expert witness to defend both their expert conclusions and themselves is essential. Lead prosecutor John Pearson during the 1988 *Zündel* trial noted that he would not object to Christie's questions during Browning's cross-examination. To do so would suggest to the jury that Browning could not defend himself.[42] Pearson's decision is a technique that has since been confirmed by behavioural psychologists, with research proving if an expert witness relies too much on their legal counsel, it can imply that the lawyer is giving instructions or leading their witness during cross-examination.[43] This is an area of research that requires

[41] Christopher Browning (Frank Porter Graham Professor Emeritus, History), interviewed by Amber Pierce, Pacific Lutheran University, Tacoma, Seattle, USA, 16 August 2019.
[42] Ibid.
[43] Marcus T. Boccaccini, 'What Do We Really Know About Witness Preparation?' *Behavioral Sciences and the Law*, Vol. 20, No. 1-2 (2002): p.166.

exploration and can have a considerable impact on both the experience and the efficacy of the historian as an expert witness.[44]

Cross-Examination

Judges actively regard it is as their duty to deter 'ferocious' cross-examination in favour of 'information-seeking dialogue'.[45] Nonetheless, the argument presented by the opposing counsel in *Folkes*, that expert evidence should be based upon fact and not opinion, is a regular objection seen within the case studies assessed in this dissertation. In the *Hostage* Case (1947), lead prosecutor Theodor F. Fenstermacher objected to the Defence's use of expert testimony: '[i]t is my understanding that there can be no expert witnesses as to [the] facts.'[46] Fenstermacher's criticism of an expert witness reiterates the interdisciplinary differences over what is defined as 'truth'. By using the word 'facts' instead of 'truth', Fenstermacher makes a dual distinction: firstly, he emphasises Browning's argument made in chapter one, that whilst 'truth' may differ between history and law, the two disciplines can always agree on the 'facts'; secondly, by identifying 'fact' and 'truth' as separate, Fenstermacher is demonstrating his belief that you have to search for the truth (such is the process of a criminal trial), whereas the 'facts' are undebatable. Consequently, for Fenstermacher, the Defence did not

[44] Studies in psychology note the impact that verbal and non-verbal communication can have on how the judge and jury receive an expert's testimony, and thus the weight that is placed on the expert testimony in the overall verdict, see: Stanley L. Brodsky and Thomas G. Gutheil, *The Expert Expert Witness,* Second Edition (Washington, DC: American Psychological Association, 2016); Jamie Chamberlin, 'Take the Stand: Strategies for Effective Testimony', *Monitor on Psychology: American Psychological Association*, Vol. 48, No. 1 (2017): p.56. For non-verbal behaviour, see: Boccaccini, 'What Do We Really Know About Witness Preparation?', pp.161-189. For verbal communication, see: Joel A. Dvoskina and Laura S. Guy, 'On Being an Expert Witness: It's Not About You', *Psychiatry, Psychology and Law*, Vol. 15, No. 2 (2008): pp.202-212.

[45] Butler-Sloss and Hall, 'Expert Witnesses', p.432; Walton, *Witness Testimony Evidence,* p.266.

[46] *United States v Wilhelm List et al.* Tribunal V. Nuremberg. 6 October 1947. p.3,761. Accessed: 9 September 2018.
[http://nuremberg.law.harvard.edu/transcripts/4-transcript-for-nmt-7-hostage-case?seq=3112]

need an expert witness for the facts, because the 'facts' are not exclusive information only available to experts based on their interpretations and academic qualifications. Given that over 200 years ago, a similar line of objection occurred demonstrates two conclusions. Firstly, the arguments presented against expert testimony does not differ between disciplines. *Folkes* dealt with scientific evidence, in contrast to the *Hostage* Case with historical expert testimony relating to the history of the Balkans. Secondly, the identical arguments presented by the opposing counsel in *Folkes* and the *Hostage* Case demonstrate that opposing counsels always seek to undermine the opposition's expert. As Francis Wellman noted in *The Art of Cross-Examination,* originally published in 1904, the cross-examiner should be focused on bringing out specific facts 'from the knowledge of the expert as will help his own case, and thus tend to destroy the weight of opinion of the expert given against him'.[47]

It can therefore be argued that legal counsels across all forms of criminal or civil trials seek to follow precedent and arguments set by earlier trials concerning expert testimony. The debate within the *Hostage* Case about testimony is important because the legal distinction between fact, opinion, and truth, reflects arguments presented by Holocaust deniers later in the twentieth century. Fundamentally, this is not a limitation of the role of the historian as an expert witness, but more with the law's ability to deal with historical events whilst trying to abide by standard criminal procedure.

[47] Francis L. Wellman, *The Art of Cross-Examination*, First Edition (Frankfurt am Main: Outlook Verlag GmbH, 2018), p.44.

THE HISTORIAN AS AN EXPERT WITNESS

As previously mentioned, the historian as an expert witness is held to the same legal standards as expert witnesses from other disciplines. However, interdisciplinary differences such as the criminal evidentiary standard for proving an argument 'beyond reasonable doubt' and the degree of interpretation within the historical discipline, have led to academic debates regarding the place of the expert historian within the courtroom.[48]

Duties

All academics agree that the primary role of the historian as an expert witness is to provide the Court with the relevant historical context.[49] This duty of the historian as an expert witness has remained consistent throughout the second half of the twentieth century. In *Anatomy of the SS State*, Krausnick and Broszat note that '[t]he task of the historical expert is to assist the Court by painting as clearly as possible a picture of

[48] Historians have acted as a provider of expert knowledge in other roles outside of the courtroom. Henry Rousso and Richard Evans note their involvement in roundtable discussions and advisory panels (respectively),emphasising their preference for these platforms for historical expert knowledge compared to the courtroom, arguing that the discussion within these forums does better 'justice' to the historical narrative. Paul Blew recorded his involvement in the 'Bloody Sunday' political inquiry during 1998 to 2002, providing a series of reports based upon expert historical knowledge of the event. Historians have also been called upon to act as expert researchers in cases investigating slavery's relationship to Brown University (USA). Rousso, *Haunting Past,* pp.74-80; Richard J. Evans, 'History, Memory, and the Law: The Historian as Expert Witness', *History and Theory,* Vol. 41, No.3 (2002): pp.328-329; Paul Blew, 'The Bloody Sunday Tribunal and The Role of The Historian', *Contemporary History on Trial: Europe Since 1989 and the Role of the Expert Historian*, eds. Harriet Jones, Jjell Östberg, and Nico Randeraad (Manchester: Manchester University Press, 2007), pp.63-68.On the research into Brown University's relationship with slavery, see: 'The Public History of Slavery and Justice: An Introduction', *The Public Historian*, Vol. 29, No. 2 (2007): pp.13-14; 'Excerpts from Slavery and Justice: Report of the Brown University Steering Committee on Slavery and Justice', *The Public Historian*, Vol. 29, No. 2 (2007): p.22; James T. Campbell, 'Slavery and Justice: A Q&A with James T. Campbell', *The Public Historian*, Vol. 29, No. 2 (2007): pp.15-16.

[49] Browning, 'Law, History, and Holocaust Denial', p.198; Evans, 'History, Memory, and the Law', p.329; Turner, *Historians at the Frankfurt Auschwitz Trial*, p.4.

this background.'[50] However, Krausnick and Broszat also distinguish between the role of the historian versus the role of the Court: whilst the expert historian was to 'provide a picture of the historical landscape in which each individual occurrence took place', the expert 'is not there to concern himself with the case of any particular accused.'[51] Rather, the '[i]nvestigation into the circumstances of each individual case and pronouncement of guilt or innocence is exclusively the prerogative of the court'.[52]

Rousso critically assesses the duty of the expert historian within the context of the interdisciplinary relationship between history and law. For Rousso, the presence of the expert historian and their research is 'calculated as part of legal strategies'.[53] Rousso presents the expert historian as an individual whom the Court 'passes off' the work of establishing contextual evidence.[54]

By contrast, Wolfgang Scheffler draws upon the similarities between the goals of historians and the Court: 'to introduce knowledge and sources into the trial, and to bring the knowledge of all participants to an equal level'.[55] Similarly Robert Donia notes

[50] The expert reports produced by Hans Buchheim, Martin Broszat, Helmut Krausnick, and Hans Adolf Jacobsen for the Frankfurt-Auschwitz trial (1963-65) gave in depth accounts of the SS, concentration camps, persecution of the Jews, and the Nazi actions in the Soviet Union. Helmut Krausnick and Martin Broszat, *Anatomy of the SS State*, trans. Dorothy Long and Marian Jackson (London: Granada Publishing Ltd, 1965), pp.13-14.
[51] Ibid.
[52] Ibid.
[53] Rousso, *Haunting Past*, p.59.
[54] Ibid.
[55] Scheffler was a prominent West German historian and 'the most knowledgeable Holocaust historian in Germany at the end of the 1960s'. Scheffler acted as an expert witness in over fifty Holocaust trials from the mid-1960s and throughout the 1970s,. In the second Treblinka trial (1970), Scheffler submitted an expert report estimating the total number of persons killed in Treblinka to be around 900,000 victims. Scheffler also acted as an expert witness in later Holocaust trials, including the first hearing of John Demjanjuk in 1977. Scheffler's testimony was referenced by Browning during the *Irving* trial and demonstrates both the historiographical significance of Scheffler's work and the pivotal historical research that can occur due to historians acting as expert witnesses in Holocaust trials Pohl, 'Prosecutors and Historians', pp.123-129. The creation of the Central Office of the State Justice Administrations for the Investigation of National Socialist Crimes was pivotal in the rise of prosecution against Nazi perpetrators from the late 1950s onwards, and hence the increasing need by German prosecutors to utilise the knowledge and research of expert historians. The Central Office, established

within the context of the ICTY, through the testimony provided by the expert witnesses, the Court develops a reassuring 'familiarity' of the historical context surrounding the trial by 'being aware of [regional] history and culture.'[56]

Douglas R. Littlefield adds that the historian 'has a fundamental responsibility to be as truthful and objective as possible'.[57] Littlefield's emphasis on the objectivity of the witness reflects the nineteenth century crisis concerning biased expert testimony addressed above. Drawing upon the development of the role of the expert witness in general, Littlefield asserts that expert historians are not 'hired guns who defend the party line of those who are paying them'.[58] Rather, as established in the legal definitions of an expert witness, though the expert historian may be called by a particular legal counsel, their historical research is to primarily assist the court. For Richard Evans, this duty of the expert historian means that if the expert finds details that disprove the case, 'the expert is not at liberty to suppress it'.[59] Fundamentally, the expert historian is able to keep to the truth of the historical record, thus allowing the judge or jury to serve an accurate and reasonable verdict.[60]

The similarities between the duties of the expert historian and expert witnesses from other disciplines demonstrates that the expert historian is not unique in the definition

in 1958, was the main agency within Germany responsible for research and completing preliminary investigations for prosecutions relating to Nazi war crimes. Indeed, the Sobibor trial (1965-66) in which Scheffler testified was a result of the efforts of the Central Office. Browning also cited Scheffler in the *Irving* trial, see chapter seven. Turner, *Historians at the Frankfurt Auschwitz Trial,* p.4.

[56] Robert J. Donia, 'The Witness Who Saw Nothing: The ICTY through the Eyes of an Expert Witness on History', Presentation at the Master Class *Law, History, Politics and Society in the Context of Mass Atrocities* (Inter-University Center, Dubrovnik, 2014). Unpublished.

[57] Douglas Littlefield, 'The Forensic Historian: Clio in Court', *The Western Historical Quarterly*, Vol. 25, No. 4 (1994): p.509.

[58] Ibid.

[59] Evans, 'History, Memory, and the Law', p.330.

[60] Helen Hornbeck Tanner, 'History vs. the Law: Processing Indians in the American Legal System', *University of Detroit Mercy Law Review*, Vol. 76, No. 3 (1999): p.708.

of their role and their responsibilities to the Court. Yet, expert duties such as gathering evidence to support their opinion may seem more important for the expert historian: the more primary sources supporting their research, the reduced likelihood that large holes may be constructed in the overall historical record presented following an opposing counsel's attempt to block admission of documents (as is customary to weaken the opposing case).[61] As Littlefield notes, if the judge is cooperative, opposing counsel could be so successful in their dismissal of evidence 'that historical testimony may become almost meaningless.'[62] The dismissal of documents by opposing counsel is not unique to the expert historian. However, when discussed within the context of Holocaust trials, it is clear that having gaps within a historical report can have a detrimental impact not only on the judge's verdict, but also the narrative of history that is presented to the public as a result of the trial.

Existing Literature

The development of the expert historian's role has begun to be considered in works such as Vladimir Petrović's *The Emergence of Historical Forensic Expertise: Clio Takes the Stand* (2017).[63] Petrović's research traces the role of the historian as an expert witness from the 1890s to the present day and provides a comprehensive assessment of both the interdisciplinary relationship between history and law, as well as the wider development of the historian as an expert witness across all forms of trials. Though Petrović is right to focus on specific case studies that defined the evolution of the expert historian, his broad assessment of trials means that specific

[61] Littlefield, 'The Forensic Historian', p.509.
[62] Ibid.
[63] Petrović, *The Emergence of Historical Forensic Expertise*.

patterns of the historical treatment of evidence and use of expert historians unique to certain types of trials (such as Holocaust trials or the ICTY) is absent.

Whilst Petrović's work is key for anyone seeking to understand the development of the historian as an expert witness, observations concerning the development of the expert historian can be seen in literature since the 1980s. In 1984, J. Morgan Kousser noted that following the popularisation of the historian expert witness during the 1950s, the historian became not only a provider of historical knowledge, but could also influence the organising of cases, especially relating to the trial research.[64] In the case studies assessed for this dissertation, it is only from the 1988 *Zündel* trial that the influence of the expert historian in dictating the courtroom strategy is first recorded.

For Ramses Delafontaine, the increased role of the historian as an expert witness has led to the 'globalisation' of the expert historian. Delafontaine identifies five categories that have contributed to this 'globalisation'.[65] Firstly, transnational justice that sought to operate across national boundaries (such as the IMT) fundamentally changed international law and the wider public engagement with international justice. Secondly, the expert witnesses that took part in Holocaust trials within Israel (*Eichmann* trial, 1961, and the first trial of John Demjanjuk, 1986-1988), Germany (such as the *Ulm* Trial, 1958, and the Frankfurt-Auschwitz trial), and in France (such as the trial of Maurice Papon in 1997), all served to have a major impact on the perception of the research that expert historians had to produce for trials where national history underlined the trial narrative. A third category for Delafontaine is Holocaust denial

[64] J. Morgan Kousser, 'Are Expert Witnesses Whores? Reflections on Objectivity in Scholarship and Expert Witnessing', *The Public Historian*, Vol. 6, No. 1 (1984): p.17.
[65] Ramses Delafontaine, *Historians as Expert Judicial Witnesses in Tobacco Litigation: A Controversial Legal Practice* (New York: Springer, 2015), pp.45-46.

litigation. The expert testimony heard during the *Irving* trial in 2000 (discussed within chapter seven), heavily influenced both the legal and the historical professions' concept of the judicial use of expert testimony. Indeed, Lawrence McNamara's article discussing the 'History Wars' within Australia regarding the country's colonial history, argues how defamation libel law within certain contexts can successfully use expert testimony to rule on historical disputes.[66] Delafontaine's fourth category is the use of expert testimony in post-colonial trials concerning the rights of native peoples in former settler colonial countries such as Australia. The final category is 'litigation-driven history' within civil American litigation.[67]

According to Delafontaine, 'litigation-driven history' has the most bearing on the historical practice today, concluding that there is no single geographical narrative within which one can discuss the role of the historian as an expert witness. However, within the context of Holocaust trials, it can be argued that Delafontaine's third category of Holocaust denial litigation has had the biggest impact within the development and the perceived role of the expert historian and the interdisciplinary relationship between history and law. Though Delafontaine rightly emphasises the success and impact of the expert testimony heard during the *Irving* trial, the judgement of the trial and the concept of the 'objective historian' has become a source of debate within academia.

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[66] Both academics and the European Court of Human Rights have condemned the impact that British libel judgements can have on free speech. McNamara, 'History, Memory and Judgment', pp.369-379. For a wider critique against libel law, see: Richard Evans, *Telling Lies About Hitler: The Holocaust, History and the David Irving Trial* (London: Verso, 2002), pp.264-265; Geoffrey Wheatcroft, 'Lies and Libel', *The Guardian* (18 March 2000). Accessed: 21 January 2020 [https://www.theguardian.com/comment/story/0,3604,181813,00.html]. On reforming British libel law, see: James Libson and Anthony Julius, 'Losing was Unthinkable. The Rest is History', *The Independent* (17 April 2000). Accessed: 24 January 2020. [http://www.independent.co.uk/news/uk/crime/losing-was-unthinkable-the-rest-is-history-266723.html]

[67] Delafontaine, *Historians as Expert Judicial Witnesses*, pp.45-46.

In the *Irving* judgement, Mr Justice Charles Gray defined an 'objective historian' as a historian who was 'fair-minded' and 'even-handed' in their use of the available material.[68] Gray's judgement sparked discussions concerning firstly whether history can be 'objective' and secondly the implications of a judge ruling on the standard that historians should follow in the historical discipline. Arguing against Gray's definition of the 'objective historian', Michael Shermer and Alex Grobman assert, '[a] historical analysis is *an* interpretation, not *the* interpretation' [emphasis in original].[69] Indeed, the differing interpretations presented by Peter Longerich and Browning (both appearing as historical expert witnesses for the Defence) regarding whether the order for the Final Solution occurred before or after the Wannsee Conference (1942) during the *Irving* trial, serves as evidence that history cannot be 'objective' due to the level of interpretation when undertaking research. Similarly, Anna McElvoy in *The Independent* argued that Gray's judgement was 'marshy ground' and demonstrated that 'legal minds do not always grasp the pitfalls referring matters to the deceptive higher court of objectivity'.[70] Wendie Ellen Schneider notes Gray's wording 'objective' can appear as both naïve and misguided.[71] For Schneider, Gray's use of the term 'objective' must be held within the context of the trial and the specific aim of the Defence to prove that no objective, reasonable historian could have come to the same conclusions as Irving upon assessment of the available evidence. Hence, Gray's standard according to Schneider should not be used to settle wider scholarly disputes, due to its specific application and context.[72]

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[68] *Irving*. Judgement. Mr Justice Charles Gray. 11 April 2000. 13.24, 13.91. Accessed: 19 February 2020. [https://www.hdot.org/judge/#]
[69] Michael Shermer and Alex Grobman, *Denying History: Who Says the Holocaust Never Happened and Why Do They Say It?* (California: University of California Press, 2000), pp.22-23.
[70] Evans, *Telling Lies About Hitler,* p.253.
[71] Wendie Ellen Schneider, 'Past Imperfect: Irving v. Penguin Books Ltd., No. 1996-I-1113, 2000 WL 362478 (Q. B. Apr. 11), Appeal Denied (Dec. 18, 2000)', *The Yale Law Journal*, Vol. 110, No. 8 (2001): p.1540.
[72] Ibid, p.1539.

Schneider does argue that Gray's standard (rebranded as the 'conscientious historian') could be useful in generating a guide with which courts can approach expert historical testimony, at least within American courtrooms.[73] In the leading USA case, *Daubert v Merrell Dow Pharmaceuticals, Inc.*, the Supreme Court ruled that a witness 'who is qualified as an expert by knowledge' may testify if:

a) the expert's … knowledge will help the trier of fact to understand the evidence;
b) the testimony is based on sufficient facts;
c) the testimony is the product of reliable principles and methods;
d) the expert has reliably applied the principles and methods to the facts of the case.[74]

For Schneider, the *Daubert* standard raises problems for historical expert testimony because it places an increased responsibility on judges to dismiss any evidence they view as questionable. Such a standard becomes problematic given that historical evidence can largely be argued as 'hearsay' (addressed below).[75] By comparison, Schneider argues that '[e]ncouraging judges to follow historians' own standards would both realise the methodological focus of *Daubert* and prevent ill-conceived exclusion of historical evidence.'[76] Schneider's argument highlights two conclusions. Firstly, standards established in other jurisdictions dealing with historical expert testimony can have a prominent transnational influence. Secondly, whilst the primary duties of the historian as an expert witness have been consistent since the 1950s, the more detailed duties of the expert historian (those not specified in legal procedure) and their transnational impact are continuously evolving.

[73] Ibid.
[74] Edward K. Cheng and Albert Yoon, 'Does Frye or Daubert Matter? A Study of Scientific Admissibility Standards', *Virginia Law Review*, Vol. 91 (2005): pp.476-477; Tal Golan, 'Revisiting the History of Scientific Expert Testimony', *Brooklyn Law Review*, Vol. 73, No. 3 (2008): p.940.
[75] Schneider, 'Past Imperfect', p.1539.
[76] Gray's concept of the 'objective historian' was based off the expert report produced by lead defence expert historian Richard Evans. Ibid, pp.1544-1545.

Historical Expert Testimony

The first recorded involvement of an expert historian can be traced back to 1898 and the Dreyfus Affair (1894-1906). In his article *J'Accuse* (1897), Émile Zola protested against the arrest of Alfred Dreyfus under the suspicion of leaking French military documents to the German embassy.[77] Following the publication of *J'Accuse*, Zola was arrested in 1898 and charged with defaming the French military. Zola's arrest prompted him to contact numerous historians, including Paul Meyer, inviting them to appear as expert witnesses for the Defence at his trial.[78] Meyer's invitation to appear in court, along with other experts such as the paleographer Auguste Molinier, can be viewed as the earliest example of historians acting as expert witnesses. The role that Meyer and Molinier adopted in 1898 was different to the more contemporary role of the historical expert witness.[79] As Delafontaine argues, Meyer and Molinier only reached conclusions regarding the falsification of a single document, as opposed to providing their expert opinion on a historical subject.[80] Delafontaine is correct to note the distinction between the roles adopted by Meyer and Molinier, and the contemporary refined use of expert testimony and expert reports. However, the use of Meyer and Molinier in 1898 not only provides a base for the development of the historian as an expert witness, it is also the first recorded use where expert historical knowledge was considered useful to a court's verdict.

[77] Émile Zola. 'J'Accuse', *L'Aurore* (13 January 1898). Accessed: 30 May 2018. [https://www.marxists.org/archive/zola/1898/jaccuse.htm]
[78] Petrović, *The Emergence of Historical Forensic Expertise*, p.27.
[79] Delafontaine, *Historians as Expert Judicial Witnesses*, p.37.
[80] Ibid.

The *Zola* trial was a defamation case, making it a civil trial held under French jurisdiction. However, as Dieter Pohl observes, when assessing the use of historians as expert witnesses in criminal trials, it is difficult to establish the first criminal court where a historian is asked to testify.[81] Nonetheless, historians have sought to address why the Courts' use of expert historical testimony has increased since the 1950s. Within USA civil rights law, as more trials were brought to court, the role of the historian as an expert witness developed from an advisor in 1954, to testifying in court during the 1980s. Though historians did not appear in court and provide expert testimony, Delafontaine and David Rothman both comment on the influence of historians acting as consultants in the construction of the historical narrative in the watershed trial of *Brown v Board of Education* (USA, 1954).[82] Kousser asserts that certainly within civil rights cases, the expert historian can 'tell the truth and do good at the same time', drawing upon his experience as an expert witness during civil rights trials in the 1980s.[83] Kousser adds that his purpose as an expert witness during the trials (largely focusing on voting rights) was to serve mainly 'educational purposes', providing both 'full period coverage' and context with which the discriminatory intent behind specific Jim Crow laws and constitutions could be discussed.[84] However, whilst it was 'useful' to provide a general historical background with which the Court could debate supporting the legal details of the trials, the knowledge provided by Kousser also reminded judges 'of social facts which they might otherwise prefer to forget'.[85] Thus, for Kousser, the role of the expert historian proved crucial both to the judges reaching

[81] Pohl, 'Prosecutors and Historians', p.118.
[82] Delafontaine, *Historians as Expert Judicial Witnesses*, p.72; David J. Rothman, 'Serving Clio and Client: The Historian as Expert Witness', *Bulletin of the History of Medicine*, Vol. 77 (2003): pp.25-30.
[83] Kousser, 'Are Expert Witnesses Whores?' p.7.
[84] Ibid, p.10.
[85] Ibid.

informed verdicts and also educating the Court concerning the history of racism within the USA.

Helen Tanner comes to a similar conclusion regarding the importance of historical expert testimony through her experiences of testifying in Indian law (Native American law).[86] Yet, her findings are a result of the 'remarkably inconsistent' treatment of historical evidence in cases of Indian law, rather than the profound impact that expert testimony appears to have on a courtroom.[87] Tanner notes the degree of involvement by the expert historian is heavily dependent on the individual trial context and the Court's attitude towards expert historical evidence.[88] Tanner's critique of the use of historical material stems from her wider disdain at the use of common law to address Indian law disputes. As Tanner notes, within American common law, '[t]he focus is on controversy and the adversarial roles of the people in the court'.[89] By contrast, 'Indian people have had their own methods for achieving justice. They strive to restore harmony, to find a common ground, to make accommodations.'[90] For Tanner, if the American courts do not 'put the "Indian" back into Indian law', then the only suitable alternative to do justice to Indian history is to fully utilise historical material effectively, including historical expert testimony.[91]

[86] Other trials dealing with Native American history where historians as expert witnesses have contributed include disputes over the use of canals and Native Americans' claims about their former territories (both USA). Leland R. Johnson, 'Public Historian for the Defendant', *The Public Historian*, Vol. 5, No. 3 (1983): pp.69-73; Carl M. Becker, 'Professor for the Plaintiff: Classroom to Courtroom', *The Public Historian*, Vol. 4, No. 3 (1982): pp.71-76.
[87] Tanner, 'History vs. the Law', pp.695-697.
[88] Ibid.
[89] Ibid, p.706.
[90] Ibid.
[91] Ibid.

Comparatively for Donia, the trials of the ICTY successfully employed historical expert testimony from the start, even if the judgements may not have referenced the historical evidence produced. Donia notes that as the ICTY developed, the contribution of the historian expert witness was shaped by the Court's familiarity with expert historical testimony. Donia appeared in fifteen trials for the Prosecution throughout his sixteen years as an expert witness at the ICTY. Donia observed that in the earlier trials, prosecutors called expert witnesses primarily to inform judges about the historical background of the alleged crimes with no expert reports being produced.[92] With this focus, Donia's testimony was more 'an extended lecture on regional history than court testimony'.[93] Richard Wilson has coined this 'monumental history', whereby expert historians presented a history of a particular region that covered centuries.[94] However as the ICTY developed, judges became increasingly familiar with the historical background to the conflict. Consequently, judges sought to limit expert reports (now standard in ICTY proceedings) to historical detail immediately surrounding the specific crimes in the indictment.[95] For Wilson, this development meant that historical expert testimony transitioned from monumental histories to presenting micro-histories.[96] Due to the judiciary's increasing demand for specific evidence, Donia concludes that his reports and testimony evolved in three distinct areas: relevance, documentation, and methodology.[97] The fact that Donia's role as an expert witness changed from a macro to micro history during the life of the Tribunal is unique in the broader story of the historian as an expert witness. Donia's experience could be explained as a factor of

[92] Robert J. Donia, 'Encountering the Past: History at the Yugoslav War Crimes Tribunal', *The Journal of the International Institute*, Vol. 1, No. 2-3 (2004). Accessed: 22 May 2020. [https://quod.lib.umich.edu/j/jii/4750978.0011.201?view=text;rgn=main]
[93] Ibid.
[94] Wilson, *Writing History*, pp.119-128
[95] Donia, 'Encountering the Past'; Robert J. Donia (Visiting Professor, University of Michigan), interviewed by Amber Pierce, Skype, 30 July 2019.
[96] Wilson, *Writing History*, pp.120-121.
[97] Donia, 'The Witness Who Saw Nothing'.

testifying within a specific setting, with a rotating set of judges. Indeed, most trials that call expert historians occur in isolation of one another, and consequently, similar historical contexts have to be continuously established.[98]

THE HISTORIAN AS AN EXPERT WITNESS IN HOLOCAUST TRIALS

The above analysis of the expert witness demonstrates that Holocaust trials are part of a continuum in the broad use of historians as expert witnesses: their legal role and purpose remains the same as expert witnesses from other disciplines, albeit with a specific focus on providing historical knowledge and testimony on an emotive subject. Moreover, the debates that surround the degree of historical interpretation exist in all cases that utilise expert historians.

The use of trials that are outside the case studies of this dissertation to document the developing role of the historian expert witness are important in contextualising the experience of expert historians in Holocaust trials. As addressed throughout this chapter, the distinctiveness of Holocaust trials needing to engage with the popular history and memory of the Holocaust, as well as the guilt of the defendant, can exacerbate problems that other expert witnesses may experience within the courtroom.

[98] For assessment of the uniqueness of the ICTY historical interpretations, specifically the judgements of the trials of Duško Tadić and Radislav Krstić, see: Richard Wilson, 'Judging History: The Historical Record of the International Criminal Tribunal for the Former Yugoslavia', *Human Rights Quarterly*, Vol. 27, No. 3 (2005): pp.908-942.

Development of the Expert Historian, Holocaust Historiography, and Holocaust Trials

Rousso identifies three 'stages' of involvement for the historian as an expert witness within the tandem development of Holocaust historiography and Holocaust trials. According to Rousso, the involvement of the expert historian began during the early 1950s helping lawyers to collect and collate evidentiary documents. The immediate post-war trials, such as the IMT, NMT, Belsen, and Dachau trials, had a notable impact on the public's understanding of the atrocities committed during the Second World War. Historians as expert witnesses in early Holocaust trials were mainly used by lawyers in the Federal Republic of Germany (West Germany) and took place within the wider context of the West German public coming to terms with the weight of guilt linked to Nazism and the Holocaust.[99] As Martin Dean notes, it was the context provided by the expert historians that 'really [made] these Holocaust trials rather than just criminal trials'.[100] For Rousso and Dean, it was the wider context of the trials that defined their distinctiveness, with both historians and lawyers working together to seek a truth that would do justice to the historical record.[101]

Rousso establishes the 'second stage' as beginning in the 1960s,continuing throughout the 1970s. It is significant because it draws attention to the tandem development of Holocaust historiography and its relationship with trial narratives and Holocaust memory. Rousso emphasises this period as key for Holocaust historians in breaking free of legal and political historical narratives, focusing on the war crimes committed by the Nazis established during the 1950s 'in order to move forward'.[102]

[99] Rousso, *Haunting Past,* p.66.
[100] Dean, Interview.
[101] Ibid; Rousso, *Haunting Past,* p.66.
[102] Rousso, *Haunting Past,* p.67.

From the 1960s, there was a shift in the narratives produced within Holocaust historiography focusing on the Jewish victim group and the mentality of the perpetrator. Raul Hilberg's *The Destruction of the European Jews* (1961) was the first academic text that reviewed the dynamics within the Third Reich and the steps adopted by the Nazis to achieve genocide. However, the significance of the text within the public memory of the Holocaust is often overshadowed by the *Eichmann* trial, also held in 1961. Whilst Hilberg's text is pivotal within historiographical debates, the *Eichmann* trial was the first Holocaust trial that presented a legal narrative specifically focusing on the Nazi treatment of the Jews. The *Eichmann* trial generated the public narrative of the Holocaust as a synonym for the persecution of the Jews by the Nazis, whereas previous Holocaust trials had only referenced the persecution of the Jews. The *Eichmann* trial initiated further debates exploring the mentality and motivation behind a perpetrator, the most well-known being Hannah Arendt's *Eichmann in Jerusalem*, 1963. The 1960s was a defining decade for Holocaust historiography because of the research conducted for the Frankfurt-Auschwitz trial (1963-1965). During the trial, differing historical interpretations of the Holocaust emerged that would later be defined as 'intentionalist' and 'functionalist'. *Anatomy* was also a historiographically pivotal text due to the detailed research undertaken by the expert historians. For example, Martin Broszat's report on the concentration camps was the first in-depth review of the camp system for both historians and the public, establishing the use of the camps within the wider genocidal policy. Importantly not all Holocaust trials demonstrate a relationship between trial narratives and subsequent historiography. The *Eichmann* trial and the Frankfurt-Auschwitz trial should be considered as two crucial cases in demonstrating the impact that Holocaust trials can have on Holocaust historiography. Indeed, the 1960s narratives provided the

foundation for more nuanced debates and shaped polarisation between historiographical fields during the 1970s and 1980s.

Rousso contends that because of this second stage, 'a third stage intervenes'.[104] The 1980s saw the introduction of Holocaust denial trials alongside the wider trend of postmodernism. Within Holocaust historiography, postmodernism challenged previously accepted historical narratives of the Holocaust, following the belief that there is only interpretation, rather than objective truth.[105] Whilst legal narratives in Holocaust perpetrator trials became reliant on the polarisation between the intentionalists and functionalists, terms coined by Timothy Mason in 1981, denial trials engaged with the practice of the historical discipline. For Rousso, perpetrator trials conducted within the third stage, such as the *Barbie* trial (1987) and the *Papon* trial (1997) in France occurred under a 'belated character'.[106] Following the development of Holocaust historiography in the 1970s, courts during the 1980s and 1990s were able to draw upon established historical knowledge. The intentionalist and functionalist arguments generated an arguable 'black and white' historical narrative that a judge or jury could engage with, aligning with the criminal standard of 'beyond reasonable doubt'. Moreover, both the Court and the public (through trial newspaper reports) gained an awareness of Holocaust historiography, whilst not needing to engage with the full extent of the nuanced debates. One of the clearest examples of historiographical arguments used by legal counsels was observed in the *Sawoniuk* trial (1999). The legal counsels in *Sawoniuk* maintained the intentionalist and functionalist arguments whilst making explicit references to Holocaust academia. The

[104] Rousso, *Haunting Past,* p.67.
[105] Robert Eaglestone, *The Holocaust and the Postmodern* (Oxford: Oxford University Press, 2004).
[106] Ibid, p.68.

Prosecution challenged the jury to decide whether the defendant was a 'willing executioner' within the Holocaust, referencing Daniel Goldhagen's *Hitler's Willing Executioners* (1996). The Prosecution thus subtly engaged with the wider academic debate between the differing interpretations of Goldhagen and Christopher Browning's *Ordinary Men: Reserve Police Battalion 101 and the Final Solution in Poland* (1992) regarding the extent of perpetrator and bystander complicity within the Nazi Regime.

The language used by the Prosecution in 1999 highlights the shifting relationship between Holocaust historiography and trial narratives. During the 1960s it was arguably Holocaust trials that acted as catalysts for historiographical research. However, by the 1980s and 1990s, Holocaust historiography had advanced to the extent that academic arguments had begun to shape legal narratives. Rousso argues that the trials' belatedness and the development of historiography from the 1970s, meant that expert historical knowledge was essential to the court proceedings as lawyers 'were no longer in a position to generate [the historical evidence] themselves.'[107] The arguments presented in the *Sawoniuk* trial surrounding the degree of choice that the defendant had would not have been able to occur during the 1960s, given existing research on the Holocaust at that time. Moreover, the end of the Cold War triggered the availability of the Soviet archives which have proved critical to Holocaust historiography, trial narratives, and the content of expert testimony. As David Fraser notes, within the context of Australian war crime trials, the Holocaust trials held during Rousso's third stage were defined by the 'virtually unfettered' access to previously restricted Soviet archives.[108]

[107] Ibid.
[108] Fraser, *Daviborshch's Cart*, pp.8-9.

New forms of evidence, and thus new historical interpretations, mean that even if Holocaust trials are not historiographically significant, they are still part of wider Holocaust historiography because legal counsels rely on historical narratives. Such narratives continue to have a significant impact on the public's engagement with the Holocaust. As this dissertation argues, if Holocaust trials were to present historical interpretations that differed from accepted historiography, it would have a detrimental impact on the memory of the Holocaust.

Historicisation

Dieter Pohl notes that in 1946, Dr. Hans-Günther Seraphim was asked by the IMT Defence to support them as an expert.[109] However, the records of the IMT do not refer to Seraphim as testifying for the Defence. Moreover, in 1958 Seraphim made no reference to appearing for the IMT Defence but said rather that he was a 'member of the editorial committee of the "Blue Edition" of the IMT'.[110] Consequently, it is more likely that Seraphim acted as a consultant or advisor than as a historical expert witness. The distinction between whether Seraphim testified at the IMT or acted as an adviser is not to downplay the role of Seraphim. Seraphim did appear as an expert witness in 1948 during the *Einsatzgruppen* Case of the NMT and became an established expert witness throughout the 1950s in trials held by West Germany.[111] However, the distinction over Seraphim's role in 1946 is important because it furthers the uniqueness of the research conducted for this dissertation concerning the role of

[109] Pohl, 'Prosecutors and Historians', p.118.
[110] 'The Blue Series' is the official record of the IMT. Petrović, *The Emergence of Historical Forensic Expertise,* p.108.
[111] Pohl, 'Prosecutors and Historians', pp.118-119; Vladimir Petrović, *Historians as Expert Witnesses in the Age of Extremes*, PhD Thesis. Central European University (2009), p.116. Accessed: 29 May 2020. [https://www.niod.nl/sites/niod.nl/files/hphpev01.pdf]

expert witnesses in the *Hostage* Case (1947). The differing dates concerning the first involvement of historians, highlights that additional research is required into the early use of historical expert testimony in Holocaust trials.

Remer Trial (1952)

The *Remer* Trial was a libel case held in West Germany against Otto Ernst Remer, a German Wehrmacht officer during the Third Reich. Remer claimed that the individuals involved in the 20 July 1944 bomb plot (attempted assassination of Hitler) had committed treason.[112] Remer played a significant role in stopping the plot. However, he was standing trial for 'defying and sabotaging democracy' rather than his involvement in the plot.[113]

Turner notes that the *Remer* Trial is recognised as one of the first trials in which expert historians provided reports (or *Gutachten*) at the request of prosecutor Fritz Bauer (later the Attorney-General of Hesse and advocate for the inclusion of expert historians during the Frankfurt-Auschwitz trial).[114] Seraphim in particular produced a report and testified on the motives of the resistance in the July 1944 plot as well as outlining the course of the plot and Remer's role within the events.[115] Alongside Seraphim's report, other expert historians submitted reports containing details on the teachings of the Churches resistance against tyranny; the soldier's oath and the limits of a soldier's

[112] Turner, *Historians at the Frankfurt Auschwitz Trial*, p.51.
[113] During the coup against Hitler, Remer had been instructed to arrest Minister of Propaganda Joseph Goebbels. However, Goebbels called Hitler as evidence that Hitler was still alive. Hitler spoke to Remer and ordered Remer to crush the plot in Berlin. Norbert Frei, *Adenauer's Germany and the Nazi Past: The Politics of Amnesty and Integration*, trans. Joel Golb (New York: Columbia University Press, 2002), pp.267-268; Ernst Friedlaender, 'Dead Men on Trial', *The Spectator* (28 March 1952). Accessed: 26 May 2020. [http://archive.spectator.co.uk/article/28th-march-1952/7/dead-men-on-trial]
[114] Turner, *Historians at the Frankfurt Auschwitz Trial*, p.52.
[115] Pohl, 'Prosecutors and Historians', p.119.

allegiance to a 'ruthless ruler'; and Germany's military position in July 1944.[116] As Ernst Friedlaender set out in his report of the trial, '[i]t all came down to expert opinion on the question of whether the plotters had been heroes or traitors.'[117]

As demonstrated in chapter three, the expert historians did not produce reports during the *Hostage* Case, rather they only testified to the historical context based upon their personal experience with the defendants. Moreover, the expert testimony was only briefly mentioned in the *Hostage* Case judgement. By comparison, in 1952 the Court ruled not only in favour of the Prosecution but also adopted the arguments presented by the expert witnesses.[118] From this perspective, the *Remer* Trial is distinctive within the use of historians as expert witnesses because it marks a shift with the Court requiring expert reports as well as testimony.

Ulm Trial (1958)

The shift in the Courts' reliance on expert testimony was affirmed in the *Einsatzkommando* Tilsit Trial (otherwise known as the *Ulm* Trial). The *Ulm* Trial was the largest Holocaust trial to be held in a West German court at the time, with ten defendants indicted for the murder of several thousand Jews in Lithuania in 1941.[119] The guilty verdict of all ten defendants in the *Ulm* Trial meant that the trial was pivotal

[116] Friedlaender, 'Dead Men on Trial'.
[117] Ibid.
[118] Ibid.
[119] The defendants were Bernhard Fischer-Schweder, Hans Joachim Böhme, Werner Schmidt-Hammer, Edwin Sakuth, Gerhard Carsten, Werner Kreuzmann, Pranas Lukys, Harm Harms, Werner Hersmann, and Franz Behrend. Patrick Tobin, *Crossroads at Ulm: Postwar West Germany and the 1958 Ulm Einsatzkommando Trial*, PhD Thesis. University of North Carolina at Chapel Hill (2013), p.18; Petrović, *The Emergence of Historical Forensic Expertise,* pp. 106-107; Rebecca Wittmann, 'The Wheels of Justice Turn Slowly: The Pretrial Investigations of the Frankfurt Auschwitz Trial 1963-65', *Central European History*, Vol. 35, No. 3 (2002): p.349.

in discussions within West Germany concerning the responsibility to prosecute perpetrators from the Nazi era.[120] For this reason, the *Ulm* trial is regularly cited within existing literature as a turning point in the history of Holocaust trials with the trial paving the way 'for a kind of cooperation between historians and prosecutors.'[121]

The *Ulm* trial Prosecution called two expert historians: Helmut Krausnick and Seraphim.[122] Krausnick and Seraphim produced expert reports on the *Einsatzgruppen* and the argument of 'superior orders' (respectively).[123] Within the wider field of Holocaust Studies, Seraphim's expert report in the *Ulm* trial also marked the impact that expert reports produced for Holocaust trials could have on the wider narrative and historiography of the Holocaust. Seraphim's report was the first time an expert historian had researched the question over whether refusing to follow orders to execute civilians put a soldier at risk despite the defence of 'superior orders' being ruled against in earlier Holocaust trials. Seraphim's argument that there was not 'a single case that would permit the conclusion that the refusal by an SS officer to execute an extermination order would have led to consequences damaging to his life and limb', became key in later discussions surrounding perpetrator responsibility.[124]

The decision to use historians as expert witnesses by lead prosecutor Erwin Schüle in 1958 proved definitive in the overall verdict. The verdict included a long description of

[120] Tobin, *Crossroads at Ulm,* p.20; Turner, *Historians at the Frankfurt Auschwitz Trial*, p.34.
[121] Pohl, 'Prosecutors and Historians', pp.119-120; Pendas, *Frankfurt Auschwitz Trial*, p.19.
[122] Petrović, *The Emergence of Historical Forensic Expertise,* p.108; Tobin, *Crossroads at Ulm,* pp.216-218.
[123] The defence of superior orders refers to a plea by an individual to avoid being held guilty for actions ordered by a superior officer or an official.
[124] Seraphim produced similar reports focusing on the duty of obedience of SS leaders, particularly the implications of refusal by SS officers to comply with orders to execute those regarded as enemies of the state, throughout the 1960s. Tobin, *Crossroads at Ulm,* p.218; Michael Bazyler, *Holocaust, Genocide, and the Law: A Quest for Justice in a Post-Holocaust World* (New York: Oxford University Press, 2016), p.118; Wittmann, *Beyond Justice*, p.80; Dr. Hans-Günther Seraphim. Expert Report (1960), Collection 650, Wiener Holocaust Library.

historical context titled the 'Development of the Jewish Question' placing the crimes of the defendants within the wider context of the Holocaust. Krausnick's and Seraphim's testimony and reports were mentioned by name, consequently solidifying the influence of expert testimony within the *Ulm* trial proceedings and demonstrating 'the authority of academic research'.[125] Alongside the foundation of the Central Office of the State Justice Administrations of the Investigation of National Socialist Crimes, the utilisation of expert testimony in 1958 became the model that future Holocaust trials sought to follow.[126]

Denial Trials

The introduction of Holocaust denial trials from 1984 (*R. v Keegstra)* provides a differing focus compared to Holocaust perpetrator trials and is briefly worth addressing the impact that this change in Holocaust trial format had on the role of the historian as an expert witness.[127]

Holocaust denial trials focused on claims made by individuals that were perceived to inflict harm on a certain group within society, rather than defendants being tried for war crimes. Two notable examples were the trials of Ernst Zündel (1985 and 1988) and David Irving (2000), which are analysed later in this dissertation. During Holocaust

[125] Petrović, *The Emergence of Historical Forensic Expertise*, p.109; Tobin, *Crossroads at Ulm,* pp.284-285.
[126] Pendas notes that the narrative of a popular outcry regarding the previous inadequate attempts by prosecutors in West Germany to indict Nazi perpetrators following the *Ulm* Trial was part of a wider political strategy to establish the legitimacy of the Central Office. Annette Weinke, 'The German-German Rivalry and the Prosecution of Nazi War Criminals During the Cold War, 1958-1965', in *Nazi Crimes and the Law*, eds. Stoltzfus and Friedlander, p.161; Turner, *Historians at the Frankfurt Auschwitz Trial,* pp.35-42; Pendas, 'Seeking Justice, Finding Law', p.365.
[127] Held in 1984, James Keegstra was charged and found guilty under section 281.2(2) of the Canadian Criminal Code for presenting antisemitic views and reflecting arguments of Holocaust denial, whilst teaching Second World War to his students at Eckville High School. Alan Davies, 'A Tale of Two Trials: Antisemitism in Canada 1985', *Holocaust and Genocide Studies*, Vol. 4, No. 1 (1989): pp.77-88.

denial trials, the role of the expert historian became a fundamental part of the trial structure. As demonstrated in chapters three, four, and six, Holocaust trials typically centred on the perpetrator, as is customary within criminal trials. Within this structure, the role of the historian as an expert witness is confined to providing the court with contextual knowledge. Undeniably, during the Frankfurt-Auschwitz trial, the testimony of the expert historians was fundamental in providing the foundations upon which the Prosecution would present the rest of their evidence. Yet during Holocaust denial trials, the role of the historian as an expert witness evolved from that of a provider of contextual knowledge, to having the added role of acting as spokesperson for the practice of history.[128]

INTERDISICPLINARY RELATIONSHIP

As Evans rhetorically notes, '[i]n what other area of the law, after all, are old crimes committed half a century ago suddenly disinterred and subjected to massively expensive and time-consuming trial proceedings?'[129] Assessing the relationship between history and law in Holocaust trials will demonstrate how the role and experience of the expert historian can be impacted by a multitude of factors, and provide context for the interdisciplinary arguments raised by opposing counsel against the use of historical expert testimony within the case studies discussed in this dissertation.

[128] Browning, 'Law, History, and Holocaust Denial', p.198.
[129] Evans, 'History, Memory, and the Law', p.331. For a sample of the literature assessing the ability of law to 'write' the past, see: Rousso, *Haunting Past*, pp.2-47; Norman J. W. Goda, 'Law, Memory, and History in the Trials of Nazis', *The International History Review*, Vol. 28, No. 4 (2006): pp.798-806; Wilson, *Writing History,* pp.1-8, 132-136.

Existing Literature

Academic literature notes the different disciplinary purposes between history and law: it is the Court's role to establish the guilt of the defendant and it is the expert's role to provide historical context.[130] For Nicholas Rescher and Carey B. Joynt, legal truth is determined by the judge's 'rights and duties' to do 'justice' whilst evaluating the presented evidence.[131] Certainly within Holocaust trials, the Court's obligation to do 'justice' to the legal profession risks damaging the established historical narrative. As Donia contests, though there may be a legal and historical framework within which one searches for truth, 'it's all the same stuff basically'.[132] Just as the historian the most plausible argument based on the evidence available, the judge and jury also seek to reach a robust verdict through established and reliable facts. Thus, for Donia, the treatment of historical evidence by the Court does not risk undermining the wider historical narrative of an event. Though the duties of the historian and the Court are different, their commitment to the evidence is the same.

Nonetheless, there are more arguments within the existing literature articulating the differences faced between history and law than the similarities.[133] Some of the epistemological differences that are cited against the use of historical expert testimony

[130] Eric Haberer, 'History and Justice: Paradigms of the Prosecution of Nazi Crimes', *Holocaust and Genocide Studies*, Vol. 19, No. 3 (2005): pp.487-488.
[131] Nicholas Rescher and Carey B. Joynt, 'Evidence in History and in the Law', *The Journal of Philosophy*, Vol. 56, No. 13 (1959): pp.567-568.
[132] Donia, Interview.
[133] Disciplinary similarities include 'the idea of proof', the assessment of primary and secondary documents, use of eyewitness testimony, and exploring the details of the case whilst maintaining an awareness of the wider context. Wilson, *Writing History*, pp.7-8; Kousser, 'Are Expert Witnesses Whores?' pp. 13-19; Haberer, 'History and Justice', p.489.

are not unique to the role of the expert historian in Holocaust trials.[134] In the 1988 *Zündel* trial and the *Sawoniuk* trial, the judges addressed the respective juries that they could accept 'all, some, or none' of the expert testimony. This direction follows standard criminal practice and mirrors the treatment towards scientific expert evidence. This observation is reiterated throughout this dissertation: examples of epistemological differences will always exist because they follow standard legal practice. Furthermore, consistencies can be seen in the techniques used by opposing counsels to dismiss expert evidence. As the comparison seen between chapter three and chapter four raises, lead Defence Counsel Dr. Hans Laternser's active or dismissive engagement with expert evidence was dependent on whether the Defence or Prosecution provided the expert historians. Laternser's treatment of historical expert testimony demonstrates that opposing counsels always seek to support or dispel evidence that aids their argument. Such a treatment of evidence is not reflective of interdisciplinary tensions, as argued by the 'consensus of critique', but rather is an acute example of standard legal practice whereby counsels seek to create doubt over opposing evidence.

However, it is the legal treatment of historical evidence, despite the exceptional context of a Holocaust trial and the implications within wider Holocaust memory if established historical metanarratives are disrupted, that differentiates these experiences between expert witnesses of other disciplines and expert historians in Holocaust trials. Evans goes as far to argue that when history and law meet in the courtroom it 'does violence to the principles of both'.[135] One principle of history that

[134] For discussions relating to the 'gaming tendency' of cross-examination, see: Evans, 'History, Memory, and the Law', p.330; Kousser, 'Are Expert Witnesses Whores?' pp.15-16; Wilson, *Writing History*, p.114.
[135] Evans, 'History, Memory, and the Law', p.332.

contrasts with law is the extent of interpretation within the historian's assessment of the evidence. Interpretation and context are essential to the historical discipline: it determines the credibility of the sources available and ensures the reliability and truthfulness of the historian's conclusions. Both the legal and historical professions have procedures that deal with new evidence. Within the historical profession there is a process of continuous review, seeking to add and strengthen the probabilities that confirm or re-direct a historical narrative. By contrast, new evidence is only sought within law to change a verdict, not to confirm it. There is also the special and controversial law concerning double jeopardy, which does not feature within the historical profession.[136] As Wilson notes, law is a positivist discipline that demands 'the kind of unimpeachable facts' that will allow the Court to rule on the charges in the indictment'.[137] Mathew Turner is particularly critical of the implications of such epistemological differences. For Turner, the demand by the Court for uncontested conclusions could mean that an expert historian may 'find themselves impelled under belligerent cross-examination into adopting an interpretation more categorical than they believe the remaining evidence supports.'[138] If an expert historian was to 'impel' themselves to testify to conclusions that were not an accurate representation of the evidence, they would not be fulfilling their primary duty to assist the Court.

Both Wilson and Turner compare the legal interpretation of evidence with the practice of the 'reasonable' historian. Both Douglas Christie in the *Zündel* trials and David Irving in the *Irving* trial criticised the extent of interpretation that 'reasonable' historians employed. Their demand for the expert historians to produce evidence that specifically

[136] Double jeopardy is a defence that prevents a defendant from being tried multiple times for the same charges following a valid judgement of not guilty.
[137] Wilson, *Writing History*, p.7.
[138] Turner, *Historians at the Frankfurt Auschwitz Trial*, p.10.

proved the Holocaust mirrors other instances of evidence dismissal by judges who have discounted documents on the grounds that its origins could not be confirmed, despite the document detail corroborating with other sources.[139] The denial rhetoric seen in the *Zündel* and *Irving* trials demonstrates an exacerbated application of the 'beyond reasonable doubt' standard. Thus, the challenge of interpretation that faces a historian when entering the courtroom is also a danger when discussing Holocaust denial. This comparison demonstrates how damaging the 'beyond reasonable doubt' standard can be to subtle debates within Holocaust historiography that rely on a spectrum of attestable fact. Importantly it is not damaging to the legal discipline to engage with a broader spectrum of interpretation. The *Irving* judgement formed a more nuanced engagement with the presented expert evidence and sought to dispel Irving's claim of 'black and white' Holocaust historiography. Moreover, legal counsels compare and assess all possible evidence outside of the courtroom. However, it is the evidentiary standards within the courtroom that results in the polarisation of interpretative evidence between history and law. Tanner's experience as an expert witness within Indian law trials supports this conclusion, arguing 'courts seem predisposed to reject history', with the historians' interpretative conclusions 'often too subtle to be processed by a rigid "right or wrong" system of decision-making.'[140] Tanner's comments demonstrate that the differences between historical interpretation and the legal demand for specific evidence is not unique to Holocaust trials. However, the distinctiveness of trials engaging with the wider narrative of the Holocaust consequently means that when legal counsels seek to challenge an expert's

[139] See chapter six for the treatment of historical evidence by Justice Potts in the *Sawoniuk* trial.
[140] Tanner, 'History vs. the Law', pp.697-698.

interpretation of a historical event, they are not only challenging the expert's research, but the widely accepted and established narrative of the Holocaust.

The above arguments discussing the epistemological differences between history and law raise an important question: why do historians enter the courtroom? For Rothman, the decision is two-fold. Firstly, historians may believe it is important that they 'buttress' the operation of the legal system, and secondly, historians may wish to bring their expertise to help a case and bring justice against a person or group that has been wronged.[141] Arguably Rothman's first reason is too critical of the relationship between the historian and the lawyer, neglecting the fact that courtrooms need expert history to come to informed judgements.[142] Within this narrative, depicting expert historians as seeking to 'buttress' the legal system does not accurately reflect the relationship between the historian and the lawyer. As Evans notes, by entering the courtroom expert historians are indeed taking a risk: the experience of cross-examination and the epistemological differences between history and law can make the courtroom an unforgiving place.[143] Nonetheless, the role of the expert historian is fundamental to Holocaust trials. Eric Haberer and Evans argue that 'jurists could not do without history' particularly since Holocaust trials from 1945 until the 1980s relied upon camp survivor testimony, 'are now either very old, or no longer with us'.[144] Indeed as the available evidence changes, prior sources of interdisciplinary tensions, such as hostile cross-examination or seeking to discredit an expert's testimony, decrease, producing

[141] Rothman, 'Serving Clio and Client', p.44.
[142] Literature has argued that the relationship between the historian and the lawyer is one of 'almost complete mutual misunderstanding'. See: Buckner F. Melton Jr., 'Clio at the Bar: A Guide to Historical Method for Legists and Jurists', *Minnesota Law Review,* Vol. 83 (1998): pp.382-396; Rousso*, Haunting Past*, pp.66-71; Evans, 'History, Memory, and the Law', p.343.
[143] Evans, 'History, Memory, and the Law', p.332.
[144] Ibid; Haberer, 'History and Justice', p.487.

academic discussions of historical evidence within the courtroom. Haberer notes, the inclusion of historical expert testimony in war crime trials have meant that the histories produced from certain trials have been fundamental to the wider historical discipline and contributed towards the existing metanarrative about the history of the Holocaust. The *Ulm* trial is a clear example where the research conducted by expert historians 'led to the discovery and critical assessment of previously unknown or poorly understood documentary material', which has subsequently provided the foundation for future historical research in the field of Holocaust Studies.[145] Consequently, in spite of the differences within the interdisciplinary relationship, historians as expert witnesses play a fundamental role within the courtroom, aiding the Court in its judgement and also the wider historiography through research produced in support of the trial. This dissertation seeks to address how an expert historian can prepare for these epistemological tensions, whilst knowing that their testimony is essential in providing context for the legal arguments.

Jurisprudential Differences

It is necessary to understand the different jurisprudential traditions that will be engaged with throughout this thesis: common law, English civil law, and domestic German criminal law (German Penal Code [StGB]). An assessment of these jurisprudential differences will firstly demonstrate how the role of the defendants, the legal counsel, and the Court differ between the chosen case studies, and secondly, highlight how the different jurisprudential settings can impact the use of historical expert testimony.

[145] Haberer, 'History and Justice', p.505.

Common Law

Within the context of this dissertation, common law is practiced by international tribunals, the UK, and Canada.[146] Criminal law is practiced under the common law system where the legal counsel must prove their case to the court 'beyond reasonable doubt'.[147] Though the StPO differs from other common law standards (as addressed below), the StPO stipulates that '[a] majority of two-thirds of the votes shall be required for any decision against a defendant which concerns the question of guilt and the legal consequences of the offence.'[148] The language of the StPO therefore indicates that lawyers presenting cases in Germany must satisfy the Court to a reasonable standard.

English Civil Law

Whereas a criminal court requires proof beyond reasonable doubt, English civil courts require a 'balance of probabilities'.[149] The difference in evidence admissibility between a criminal and civil court means that expert testimony is treated differently, as demonstrated during the *Irving* trial.

In 2000, David Irving filed a libel suit in the UK, where libel law favours the plaintiff.[150] In order to establish a case of libel in the UK, the plaintiff must prove: that the

[146] Stephen A. Saltzburg, 'Standards of Proof and Preliminary Questions of Fact', *Stanford Law Review*, Vol. 27, No. 2 (1975): p.288.
[147] Canadian Criminal Code (R.S.C., 1985, c. C-46). Part IV. 136 (1) Last Amended: 18 December 2019. Accessed: 14 May 2020. [https://laws-lois.justice.gc.ca/eng/acts/c-46/page-160.html]; *Woolmington v DPP* [1935] UKHL 1. Accessed: 31 May 2020. [http://www.bailii.org/uk/cases/UKHL/1935/1.html]
[148] StPO. Section 263.
[149] Kevin M. Clermont and Emily Sherwin, 'A Comparative View of Standards of Proof', *The American Journal of Comparative Law*, Vol. 50, No. 2 (2002): p.243.
[150] Evans, *Telling Lies About Hitler,* p.33.

defendant published the allegedly defamatory statements; that the statement refers to the plaintiff; and that the claims under contention have a defamatory meaning.[151] British libel law dictates that the burden of proof rests with the Defence, in this case Deborah Lipstadt and Penguin Books, to prove the truth of the defamation claims.

As Lipstadt's claims against Irving related to his historical malpractice, historical experts were employed to prove that Lipstadt's claims were truthful, and that Irving had falsified and distorted historical evidence. Due to the civil standard of a 'balance of probabilities', the defence of justification meant that the evidence which could be regarded as a manipulation of documents, may be equally applied to both the disciplines of history and law.[152] As demonstrated in chapter seven, the 'balance of probabilities' and defence of justification meant that the legal arguments presented in 2000 were dictated more by historical expert evidence than legal guidance.

German Penal Code: Courtroom Procedure

In contrast to common law jurisdictions, the defendants under StPO adopt a more engaged role. In both common and English civil law, the defendants have the same status as other witnesses and supported by legal representatives engaging with the Court on their behalf. However, in the German court, the defendants and the Court engage in direct dialogue without the assistance of their legal counsel. Thus, the defendant is not labelled as a witness and therefore is not sworn in when he or she appears in court.[153] As Devin Pendas summarises, within the German court the

[151] Mulvihill, 'Irving v. Penguin', p.221.
[152] See chapter seven for examples of such evidence.
[153] John H. Langbein, *Comparative Criminal Procedure: Germany* (St Paul, Minnesota: West Publishing Co, 1977), p.65.

defendant is 'both an active participant in the trial, its object and its subject, an actor and a source of evidence'.[154]

Moreover, whereas judges in both criminal and civil law manage the trial and issue sentences, the presiding judge in the domestic German criminal court adopts a more inquisitive role. As the StPO states, '[t]he presiding judge conducts the trial, examines the accused, and takes the evidence.'[155]

Jurisprudential differences additionally influence the role of the legal counsel. The Prosecution and Defence counsels within common and civil law address the Court throughout the proceedings. However, due to the inquisitive role taken by the presiding judge within a German court, it is only during the closing speeches that the legal counsel are allowed to voice their opinions regarding the evidence received and the defendants' sentences.[156] There is another legal counsel in the German court, not present in common law or the English civil setting: the *Nebenkläger* (adjutant prosecutor). The adjutant prosecutor represents the interests of the injured party and can present evidence, call witnesses, and cross-examine.[158]

German Penal Code: Legal Differences

Whilst the jurisprudential differences between the roles of the legal actors can impact the relationship between the expert historian and the Court, it is the differences in the law itself that influence how an expert's research and testimony is used. For example,

[154] Pendas, *Frankfurt Auschwitz Trial,* p.97.
[155] Langbein, *Comparative Criminal Procedure,* p.62.
[156] Ibid*,* pp.64-65.
[158] Pendas, *Frankfurt Auschwitz Trial*, p.91; Naumann, *Auschwitz*, p.v.

whereas the rule of hearsay is excluded in English common law, the StGB permits hearsay, impacting the type of evidence that the expert witness can testify to.[159]

During the IMT, retroactive law was applied to the charges of war crimes and crimes against humanity. Consequently, the defendants during the IMT were charged for a crime that did not exist when they committed it. By contrast, the StGB is non-retroactive. After 1950, the German judiciary was freed from abiding by the Allied Control Council Law No.10 concerning retroactive genocide and crimes against humanity and could return to using the non-retroactive StGB. A clause against genocide was added to the StGB in March 1954 under paragraph 220a. However, due to the ban on retroactivity, the genocide statute was inapplicable to the crimes committed prior to 1954 and thus Nazi perpetrators could only be tried for murder or 'aiding and abetting' murder.[160]

Witness Preparation

Different jurisdictions employ their own legal standard for the treatment of expert witnesses, despite all jurisdictions following a universal definition of the duties of an expert witness. In the 1988 *Zündel* trial (held in Toronto), Browning noted that lead Prosecution counsel John Pearson led a 'mock-trial' cross-examination prior to the trial proceedings to prepare Browning for the tactics of Defence counsel Douglas Christie. By contrast, the expert witnesses in the *Irving* trial received minimal

[159] Langbein, *Comparative Criminal Procedure*, p.70.
[160] Paragraph 2 of the StGB also focuses on retroactivity noting that 'the punishment and its collateral consequences are determined by the law which is in force at the time of the act.' Wittmann, *Beyond Justice*, p.35; German Criminal Code. Section 1-2. 13 November 1998. Translated by the Federal Ministry of Justice. Accessed: 22 December 2018. [https://germanlawarchive.iuscomp.org/?p=752#211].

preparation for their testimony.[161] Robert Jan van Pelt (Defence expert witness) noted that lead Defence counsel Richard Rampton QC questioned him on his expert report for four to five days in the privacy of Rampton's chambers. However, van Pelt affirmed that Rampton was not allowed to prepare him further prior to van Pelt's court appearance.[162] Similarly, the UK Criminal Procedure Rules pre-trial tactics stipulate that 'the content of that discussion [expert issues in the proceedings] must not be referred to without the court's permission'.[163] By contrast, American and Canadian counsels are permitted to prepare expert witnesses for their testimony. As this dissertation will demonstrate, the benefits of trial preparation for expert witnesses are clear, particularly for experts not familiar with hostile cross-examination. However, the UK Criminal Procedure Rules demonstrate that the wider experience of an expert witness is not always an exact reflection of the interdisciplinary relationship between the historian and the lawyer, but rather can depend on particular legal jurisdictions of the country where the trial is held.

Historical Expert Testimony

Jurisprudential differences have a notable impact on the role of the historian as an expert witness within the courtroom. However, other factors such as the purpose of a Holocaust trial and the use of evidence by historians and lawyers can equally affect the nature of expert testimony and thus the Court's engagement with the historical narrative of the Holocaust.

[161] It is important to distinguish between the preparation time that expert historians receive for their reports and the preparation they receive for their testimony on the stand.
[162] Robert Jan van Pelt (University Professor, University of Waterloo, School of Architecture), interviewed by Amber Pierce, Skype, 20 February 2020.
[163] Criminal Procedure Rules. 19.6.

Trial Purpose

The purpose of a Holocaust trial, such as educational, retributive, or ideological, does not change the role of the expert witness. In all situations, the expert historian provides the Court with the historical context to the trial. However, the purpose of the trial does affect how legal counsels seek to present the historical context to the Court.

The Prosecution during the *Eichmann* trial pursued an educational and redemptive narrative.[164] In 1961 chief prosecutor Gideon Hausner sought to present a 'living record of a gigantic human and national disaster' in contrast to the 'hard documentary evidence' presented during the IMT.[165] Indeed, the Prosecution's argument was dictated by 'the demand for retribution' that 'resounded in many of the last messages bequeathed by the dead'.[166] For Tom Segev, the decision to try Eichmann under the retroactive Nazis and Nazi Collaborators Punishment Law (1950) for crimes against the Jewish people, meant that the trial served as a sort of 'national group therapy'.[168] Indeed for Segev, Hausner's decision to emphasise survivor testimony over documentary evidence meant that 'the real purpose of the trial was to give voice to the Jewish people, whom Israel claimed to speak in the ideological spirit of Zionism.'[169] Despite Hannah Arendt's criticisms of the courtroom resembling a theatre 'complete

[164] Eichmann was tried under the retroactive Nazis and Nazi Collaborators Punishment Law (1950) for crimes against the Jewish people, besides against humanity and war crimes. The focus on 'crimes against the Jewish people' added a retributive purpose to the indictment. and enabled the Prosecution to distinguish the Nazi crimes against the Jews as separate from Nazi crimes against other Nazi victim groups such as Sinti, Roma, and political prisoners. Nazis and Nazi Collaborators (Punishment) Law. 1950. Accessed: 31 May 2020. [https://mfa.gov.il/mfa/mfa-archive/1950-1959/pages/nazis%20and%20nazi%20collaborators%20-punishment-%20law-%20571.aspx]
[165] Hausner, *Justice in Jerusalem*, p.291.
[166] Ibid, p.322.
[168] Tom Segev, *The Seventh Million: The Israelis and the Holocaust*, trans. Haim Watzman (New York: Hill and Wang, 1993), p 351.
[169] Ibid, p.358.

with orchestra and gallery, with proscenium and stage, and with side doors for the actors' entrance', the use of survivor testimony by Hausner to generate a wider Holocaust narrative transformed the public perception of the survivor community, serving retributive yet educational justice.[170]

By contrast, the proceedings of the 1985 and 1988 *Zündel* trials sought to distort the established Holocaust victim narrative, where Christie politicised the proceedings with his Holocaust denial ideological focus. In 1988 Christie directly asked Browning during cross-examination 'are you telling us that you are competent to decide what is the historical truth?'[171] From the 1980s, the accepted metanarratives of the Holocaust have been challenged and affirmed more than in earlier trials. Neither the Defence in the *Hostage* Case nor the Frankfurt-Auschwitz trial sought to discredit the factuality of the Holocaust. While Defence counsels sought to downplay their client's role within the Holocaust, the Holocaust as the organised and systematic killing of six-million Jews was not contested. Comparatively, legal counsels in Holocaust denial trials have sought to misrepresent and distort historical evidence. Judge Thomas addressed Christie's politicisation of the 1988 *Zündel* trial during the judicial conclusion of the proceedings. Thomas noted that 'the trial really became a question of attempting to prove that there were no gas chambers … no Hitler order … [and] no official plan'.[172]

[170] Hausner, *Justice in Jerusalem*, p.288; Arendt, *Eichmann In Jerusalem,* p.2.
[171] *Her Majesty the Queen v Ernst Zündel*. Volume XIII. 15 February 1988. pp.2955-2956. Christopher R. Browning Papers. 1967-2015. RG6.4.2. Box 9, File 5. Pacific Lutheran University, Archives and Special Collections. Tacoma, Seattle.
[172] Kalle Pihlainen and Jouni-Matti Kuukkanen comment on interpretation within history and the concept of 'historical fact'. For Pihlainen, 'narrative truth' addresses the construction of historical arguments and the relationship to the wider memory of an event. However, whilst 'representational' historical narratives do exist (those that are based on an historian's specific interpretation of the evidence) certain 'truths' exist that without which, historians cannot form just and 'good' historical narratives. Likewise, Kuukkanen argues for a ranking of historical interpretations: acknowledging that no interpretation is fully correct due to the potential for new evidence to emerge and thus interpretations change, but also a sliding spectrum of interpretation does not invite the argument (commonly used by Holocaust deniers) that 'anything goes'.. Ibid; Kalle Pihlainen, *The Work of History: Constructivism and a Politics of the*

The acknowledgement of the politicisation of the trial, acted as a public condemnation by the judiciary on the use of a courtroom to achieve political means as opposed to achieving the 'truth' and legal justice. Thomas reinforced the distinctiveness of the Holocaust trial and the sensitivity needed to approach the arguments and evidence within the courtroom by addressing the negative impact of Christie's politicisationBy comparison, as the relationship between Holocaust historiography and Holocaust trials has developed, contemporary Holocaust perpetrator trials now seek to engage with more nuanced historical arguments. Hence, every Holocaust related trial has an indirect purpose of preserving the memory of the Holocaust.

Evidentiary Use

Both law and history utilise the same forms of evidence (documentary, eyewitness or physical) and consult vast quantities of evidence to reach an overarching conclusion.[174] However, drawing upon his experience of researching evidence for expert historians in war crime trials, Dean addressed that the legal rules of evidence are one of the main problems for the historical expert witness.[175] For Tanner, applying the criminal standard of evidence onto historical research demonstrates the 'absolutely irrational rules of evidence for using historical information' within the courtroom.[176]

Tanner's observation is particularly clear when analysing the 'hearsay rule'. Hearsay is defined in the UK Criminal Justice Act (2003) as 'a statement not made in oral

Past (New York: Routledge, 2017); Jouni-Matti Kuukkanen, *Postnarrativist Philosophy of Historiography* (New York: Palgrave Macmillan, 2015).
[174] Turner, *Historians at the Frankfurt Auschwitz Trial*, p.8.
[175] Dean, Interview.
[176] Tanner, 'History vs. the Law', p.698.

evidence in the proceedings'.[177] Hence, the hearsay rule means 'that since opposing counsel cannot cross-examine the person or persons who wrote the document, it should not be admitted as evidence.'[178] Within Holocaust trials the rule of hearsay, if applied successfully to expert testimony, can result in gaps in an expert report thus distorting the historical context presented during the trial. Hearsay evidence can be made admissible if it satisfies one of the four hearsay exceptions, the most relevant of which for the expert historian is whether the Court is satisfied that it is in the interests of justice for it to be admissible.[179] Given the Courts' reliance on historical context to situate the wider legal arguments, historical expert testimony is rarely not permitted. However, the degree of interpretation within historical expert reports as a result of 'hearsay' evidence is a tactic frequently used by opposing counsels to dismiss historical evidence.

The impact that legal arguments have on the wider Holocaust narrative serves as a clear example of the risk that expert historians take when providing testimony. Hence, it is appropriate to educate and prepare future expert historians on the realities of the interdisciplinary relationship within a courtroom. However, the expert historian is required to provide the Court with knowledge that is outside the Court's remit. If lawyers do not utilise historical expert testimony, the historical narrative presented during a trial may omit key evidence, affecting existing Holocaust metanarratives.

[177] Criminal Justice Act 2003. Chapter 2. Section 114. Accessed: 18 June 2018. [https://www.legislation.gov.uk/ukpga/2003/44/part/11/chapter/2]
[178] Littlefield, 'The Forensic Historian', p.510.
[179] Criminal Justice Act 2003. Chapter 2. Section 114 (1) (c); (d).

SUMMARY

The role of the expert witness across all disciplines has developed considerably since the ruling of *Folkes v Chadd*. During the twenty-first century, historical expert evidence has moved beyond 'traditional' forms of testimony providing context for a historical event.[181]

Evaluating the broader role of the expert witness has highlighted that arguments against historians appearing as expert witnesses (cross-examination and a loss of agency) are applicable for expert witnesses across all disciplines. The cross-examination arguments presented in *Folkes* and the *Hostage* Case demonstrate that there is consistency throughout history regarding how opposing counsels treat expert witnesses. Nonetheless, using Tanner's case of judicial disparity in the treatment of her expert testimony, if the same treatment was to happen within a Holocaust trial, the impact on accepted Holocaust metanarratives could be profoundly negative.

The epistemological differences between history and law raised in the existing literature demonstrates how the role of an expert historian can prove to be a 'hostile' experience. As Rothman argues '[t]o enter the courtroom is to do many things, but it is not to do history'.[183] Indeed, the different evidentiary standards of proof as well as the arguments raised for dismissing expert evidence can lead an expert to feel as if

[181] As an example, historians have been called to testify in contemporary trials focusing on radioactivity and tobacco. . Rothman's testimony in *Emma Craft v Vanderbilt* (1996, USA) focused on the ethical standards of Vanderbilt University's parental clinic between 1945-1949. Robert Proctor published the *Golden Holocaust*, discussing the role of historians as expert witnesses in tobacco litigation notingthat the historians who testify in tobacco trials (mostly within the USA) largely testify to the 'history of tobacco and health'. Delafontaine, *Historians as Expert Judicial Witnesses,* p.72; Rothman, 'Serving Clio and Client', pp.25-33; Robert Proctor, *Golden Holocaust: Origins of the Cigarette Catastrophe and the Case for Abolition* (California: University of California Press, 2011), pp.479-481.
[183] Rothman, 'Serving Clio and Client', p.44.

their work and reputation is being undermined. Moreover, the purpose of the trial as well as the jurisprudential differences in laws and legal procedure can impact the overall use of expert testimony within the courtroom. Given the numerous factors that can affect the nature of expert testimony, it is understandable why historians such as Turner argue that the testimony and report produced by an expert historian risk becoming 'severely disfigured'.[184] Whilst such arguments certainly hold weight and should not be dismissed, the above analysis demonstrates the fundamental role of historical expert testimony both within Holocaust trials and other non-Holocaust related proceedings. For future expert historians, it is important to address that certain epistemological differences will always exist due to Courts' maintaining standard legal treatment of expert testimony. Experts should be aware of these differences whilst understanding that they are not specific to the expert historian. Rather, it is the exceptional content of a Holocaust trial that makes these tensions so contentious rather than these epistemological differences themselves. Considering the impact of history within the *Ulm* Trial and later Holocaust trials, it is no exaggeration to argue that the trials could not have occurred without historical expert testimony. Indeed, the place that Holocaust trials hold within the public memory and narrative of the Holocaust means that the absence of expert historians entirely from the courtroom would damage the historical record more than their inclusion.

[184] Turner, *Historians at the Frankfurt Auschwitz Trial*, p.13.

PART TWO

1947: A DUAL ROLE

III

Case Study One

United States of America v Wilhelm List, et al.

> [T]he conditions in the Balkans played a decisive part regarding the measures which were taken and ordered against the insurgents, the situation which confronted the occupation forces, and on which the defence bases its case has to be proved by the defence. For this purpose, I shall now call a historian as an expert witness who during the occupation in the Balkans, *dealt with circumstances prevailing there as a matter of his duty*. [emphasis added]
>
> Dr. Hans Laternser, Defence Counsel[1]

INTRODUCTION

Tribunal V heard oral testimony from sixteen witnesses called by the Prosecution, and thirty-six witnesses (excluding the defendants) called by the Defence during the proceedings of the *Hostage* Case (1947-1948).[2] Amongst the witnesses that were called, four were identified as having links to the historical discipline, two for the Prosecution and significantly, two for the Defence: Dr. Rudolf Ibbeken and Professor Georg Stadtmüller.

The use of expert witnesses in the *Hostage* Case is unique, both in terms of the roles that the expert historians adopted and the absence of trial analysis within existing literature. As chapter two highlights, the expert witness is to provide the Court with the relevant contextual knowledge, based on the expert's opinion of the evidence.

[1] *Wilhelm List et al.* 6 October 1947. p.3,761.
[2] *Trials of War Criminals before Nuremberg Military Tribunals Under Control Council No. 10*. Volume XI, 'The *Hostage* Case', p.760. Accessed: 18 August 2018. [http://www.loc.gov/rr/frd/Military_Law/pdf/NT_war-criminals_Vol-XI.pdf]

However, as Defence counsel Hans Laternser said to the court prior to the first expert witness (Ibbeken) being sworn in, these expert witnesses would not only be testifying to knowledge based on their expert opinion; their testimony would also be based upon 'circumstances prevailing … as a matter of [their] duty'.[3] Consequently, Ibbeken and Stadtmüller appeared as both expert and eyewitnesses. Such a dual role is unprecedented within Holocaust trials, and indeed, the use of historians as expert witnesses in general.[4]

The uniqueness of Ibbeken and Stadtmüller appearing as both expert and eyewitnesses meant that the courtroom experience of the two experts is different from other expert testimony presented in Holocaust proceedings from the *Hostage* Case onwards. The research within this chapter builds upon the platform established in chapter two, exploring the different levels of involvement and responsibility attributed to the role of the 'expert witness', dictated by the wider political context and the pursuit of different legal narratives. Given the dual role of Ibbeken and Stadtmüller, it could be argued that they do not satisfy the contemporary definition of an 'expert witness' as their eyewitness testimony could be more attributed to supporting the Defence's case, rather than providing impartial expert evidence to assist the legal discussions of the trial. Nonetheless, both Ibbeken and Stadtmüller provided a history of the conflict in the Balkans relevant to the case on trial and compliant with the legal requirements of expert testimony. Thus, whilst Ibbeken and Stadtmüller also provided eyewitness testimony as a result of their experiences with a number of the defendants, they were

[3] *Wilhelm List et al.* 6 October 1947. p.3,761.
[4] Professor Salo Baron, a Holocaust survivor, was an expert witness during the *Eichmann* trial (1961)However, he explicitly stated at the beginning of his testimony that he appeared solely as an expert historian rather than an expert and an eyewitness.

presented to the Court as expert witnesses and therefore, the *Hostage* Case can be identified as the first use of expert witness evidence in a Holocaust trial.

The *Hostage* Case was tried in the Palace of Justice, Nuremberg, opening on 15 July 1947 and overseen by Military Tribunal V. The trial convened for 117 days and lasted approximately nine months. The trial was conducted in two languages, English and German, with the Prosecution offering 678 exhibits and the Defence 1,025 that were received in evidence.[5] The literature covering the *Hostage* Case largely scrutinises the judgement of the trial and its influence both within subsequent NMT trials and modern international criminal tribunals.[6] As highlighted in chapter two, contemporary historians continue to believe that the role of the historian as an expert witness within Holocaust trials did not develop until the late 1950s following the proceedings of the 1958 *Ulm*

[5] *Hostage*, pp.759-760; *Law Reports of Trials of War Criminals*. Volume VIII (London: Published for The United Nations War Crimes Commission by His Majesty's Stationery Office, 1949), p.37. Accessed: 15 August 2018. [https://www.loc.gov/rr/frd/Military_Law/pdf/Law-Reports_Vol-8.pdf]

[6] Defence counsel Hans Laternser's published article, 'Looking Back at the Nuremberg Trials', deals specifically with the legal legacy of the IMT and NMT, focusing on his involvement in the *High Command* Case. The exclusion of the *Hostage* Case reiterates how understudied the case is, as well as its perceived minor role when compared to other NMT cases. See: Hans Laternser, 'Looking Back at the Nuremberg Trials with Special Consideration of the Processes Against Military Leaders', in *Perspectives on the Nuremberg Trial*, ed. Guénaël Mettraux (New York: Oxford University Press, 2008), pp.473-491.

For references to the *Hostage* Case within the *Einsatzgruppen* Case, see: *Trials of War Criminals before Nuremberg Military Tribunals Under Control Council No. 10*. Volume IV. 'The *Einsatzgruppen* Case', pp.180-185, 250-251, 380, 493-494. Accessed: 23 August 2018. [https://www.loc.gov/rr/frd/Military_Law/pdf/NT_war-criminals_Vol-IV.pdf]; *Law Reports*, Vol. VIII, p.86; Hilary Earl, 'Scales of Justice: History, Testimony and the Einsatzgruppen Trial', in *Lessons and Legacies VI: New Currents in Holocaust Research,* ed. Jeffry M. Diefendorf (Evanston, Illinois: Northwestern University Press, 2004), pp.341-342.

For references to the *Hostage* Case within the *High Command* Case, see: *Trials of War Criminals before Nuremberg Military Tribunals Under Control Council No. 10*. Volume X. 'The *High Command* Case', p.iv. Accessed: 23 August 2018. [https://www.loc.gov/rr/frd/Military_Law/pdf/Law-Reports_Vol-8.pdf]; *Law Reports*, Vol. VIII, p.80.

For references to the *Hostage* Case within international criminal law, see: Telford Taylor, 'The Nuremberg War Crimes Trials', *International Conciliation*, Vol.27, No.450 (1949): pp.341-342; Priemel, *The Betrayal,* p.333; *Prosecutor v Zejnil Delalic, Zdravko Mucic (aka "Pavo"), Hazim Delic, and Esad Landžo (aka "Zenga"), ('Celebici Case'),* IT-96-21-T, para. 372, Judgement (16 November 1998). Accessed: 17 August 2018. [http://www.icty.org/x/cases/mucic/tjug/en/981116_judg_en.pdf]; Draft Code of Crimes against the Peace and Security of Mankind. 1996. p.25. Accessed: 16 August 2018. [http://legal.un.org/ilc/texts/instruments/english/commentaries/7_4_1996.pdf\]; Heller, *Nuremberg Military Tribunals,* p.392.

trial. Given that the *Hostage* Case is the earliest recorded Holocaust trial where historians were called to testify as expert witnesses, the absence of research assessing historical expert testimony within the *Hostage* Case is particularly noteworthy.

This chapter therefore contributes to the research questions and objectives of this dissertation in two ways. Firstly, it adds to the above-mentioned gap in the existing literature and presents original new research regarding the historian as an expert witness in Holocaust trials. Secondly, in contrast to an 'experts' history' as defined by Mathew Turner, the unique dual role that Ibbeken and Stadtmüller adopted can be used as a foundation to compare the development of the historian expert witness throughout the chosen case studies, and demonstrates the early legal awareness in Holocaust proceedings of the value of expert historical evidence.[7]

In view of the fact that the *Hostage* Case is understudied, this chapter has four sections: existing literature; trial context; expert witnesses; and trial judgement. Besides reviewing the extent of the literature concerning the *Hostage* Case, the first section will also consider the academic debates relating to the NMT in general. Section two will focus on the trial context and establish the role of the historian as an expert witness within the objectives of the Defence. Section three examines the expert testimony of Ibbeken and Stadtmüller. Importantly, though eyewitness evidence was also heard, I emphasise the role of the historical evidence in providing an essential foundation for the legal debates. Section four examines the use of expert testimony

[7] 'A written work of history constructed by professional historians for an official purpose, which subsequently becomes part of historical scholarship'. Turner, *Historians at the Frankfurt Auschwitz Trial,* p.3.

by the Court in the overall judgement. The historical testimony which highlighted the situation in the Balkans was alluded to within the judgement. This demonstrates that whilst the historical expert testimony did not prove legally relevant to the overall case, the value of the historical context was understood by the Court and proved influential in situating the legal decisions of the trial.

EXISTING LITERATURE

An introduction to the early use of historians in Holocaust trials in the immediate postwar period can be seen in the testimony provided for the IMT and subsequent NMT trials. A detailed review of the existing literature will confirm the existence of a research gap. The uniqueness of the use of historians as expert witnesses in the *Hostage* Case is affirmed by examining the IMT and other subsequent trials at Nuremberg. .

Witnesses

Ruth Bettina Birn provides an evaluation of the testimony presented by Erich von dem Bach-Zelewski in three NMT trials: The *Hostage* Case (case seven), The *RuSHA* Case (case eight), and the *Ministries* Case (case eleven). Bach-Zelewski was a General of the Higher SS and Police Leader Corps, responsible for anti-partisan warfare on the Eastern Front during the Second World War. Despite his high status within the SS and *Einsatzgruppen,* he appeared as a witness for the Prosecution at the IMT as well as the abovementioned NMT trials. In March 1951, Bach-Zelewski was condemned by a Munich denazification court to ten years ‘special labour’. Bach-Zelewski was confined

to his own home in Franconia, in exchange for his testimony during the proceedings of the IMT and NMT. Bach-Zelewski was hence spared from extradition to Russia and was not charged for war crimes.[9]

Birn provides a detailed analysis of Bach-Zelewski's testimony as a prosecution witness during the *Hostage* Case. Birn notes that the Prosecution relied on Bach-Zelewski's insider knowledge and his interpretation of certain documents during the *Hostage* Case. Bach-Zelewski was called to the stand late in the proceedings demonstrating that although his testimony was not planned by the Prosecution, they believed his testimony was useful to present counterarguments to the Defence. Birn concludes that the Prosecution's need for Bach-Zelewski's first-hand knowledge, his recommendation of other witnesses, and document contributions to the *Hostage* Case, outweighed the distortions within Bach-Zelewski's testimony as a consequence of his Nazi past.[10]

Crucially, Birn asserts that within the sub-ideal conditions of the NMT existed a 'lack of knowledge of historical facts.'[11] According to Birn, the Prosecution's use of Bach-Zelewski (himself a major criminal), as opposed to an expert historical witness who could present historical interpretations of events, was a result of the Prosecution's dependence on 'inside knowledge'.[12] Certainly, while expert historians could offer interpretations of documents, they could not suggest other potential witnesses or make

[9] Birn, 'Criminals as Manipulative Witnesses', pp.459-460; 'Erich von dem Bach-Zelewski'. Holocaust Education & Archive Research Team. Accessed: 15 October 2018. [http://www.holocaustresearchproject.org/einsatz/bach-zelweski.html]
[10] Birn, 'Criminals as Manipulative Witnesses', pp.459-463.
[11] The developing Cold War and changes in the denazification process, pressed the prosecutors to bring the NMT trials to a close. The NMT as a set of trials required enormous resources and tenacity to prosecute. The longer the NMT trials took to prosecute, the more money the Allies spent. Ibid.
[12] Ibid, p.459.

their own enquiries on matters they thought would be relevant for the Prosecution as Bach-Zelewski did.[13] Birn's assessment remains the only in-depth piece of literature that deals specifically with witness testimony during the *Hostage* Case.

IMT and NMT Context

The *Hostage* Case was not the first time that historians were called to testify within international Holocaust proceedings. Both the Prosecution and Defence witnesses during the IMT included people who were historians by profession. However, they were called to testify to their personal experiences during the Second World War as opposed to providing expert testimony.[14] The use of witnesses by the Prosecution and Defence during the IMT demonstrate that there is a clear difference between people testifying, who happened to be historians, and the testimony of historian expert witnesses as custodians of historical truth.

The trend between historians as first-hand account bearers vs historians as experts continues into the use of witnesses during the NMT. Aside from the *Hostage* Case, three other NMT trials included one scholar or historian as a witness: the *Medical* Case (case one), the *Krupp* Case (case ten), and the *High Command* Case (case twelve). Interestingly, each witness appeared for the Defence, reinforcing Birn's conclusion regarding the Prosecution's dependence on 'inside knowledge'.

[13] Ibid.

[14] The Prosecution called Leon Van Der Essen (a Professor of History in the Faculty of Letters and General Secretary at the University of Louvain) to testify. The Prosecution also asked Dr. Stanislaw Lorentz (a Polish scholar of museology and history of art) and Dr. Wladislaw Tomkiewicz (a Polish historian and art historian) to provide depositions. Professor Percy Ernst Schramm and Edmund Glaise-Horstenau ('director of archives at the university [of Vienna], a historian and author') testified for the Defence. All witnesses provided first-hand accounts of their experiences during the Second World War as opposed to providing historical context as expert witnesses.

The dual role of eyewitness and historical expert that both Ibbeken and Stadtmüller adopted demonstrates that the Defence counsel during the *Hostage* Case did not separate itself completely from the prevailing trend where historians appeared as first-hand account bearers. The fact that the *Hostage* Case is the only trial within the IMT and NMT that specifically addresses two witnesses as 'experts' determines its importance as the foundation to assess the evolution of the historian expert witness in Holocaust trials.

TRIAL CONTEXT

Establishing the wider context of the *Hostage* Case assists in understanding the arguments pursued by the Defence and Prosecution counsels, and the use of historical expert testimony within their case perspectives.

Events

The wider framework of events in South-eastern Europe from 1941-1945 were the foundation of the *Hostage* Case.[15] The evidence presented during the trial determined that civilian guerrilla resistance promptly followed the German occupation in South-eastern Europe. As well as the German military position being threatened, German prisoners were captured by resistance forces and were tortured, mutilated, and killed. Coinciding with the increased attacks on German troops and acts of sabotage against

[15] The countries of South-eastern Europe in 1941 included Turkey, Greece, Albania, Romania, Yugoslavia, Bulgaria, and Hungary. The focus of the *Hostage* Case was on the crimes committed by the German troops under the command of the defendants during the occupation of Greece, Yugoslavia, and Albania. Norway was also included in the Tribunal's focus of reprisal killings committed by the defendants and their troops, despite not being part of South-eastern Europe.

transportation and communication lines throughout the summer of 1941, the German military under the orders of the defendants began shooting innocent members of the population as a means of suppressing the resistance.[16] This culminated on 16 September 1941, with Defendant Wilhelm List receiving a signed order by Hitler charging him with the task of suppressing the insurgent movements in the South East. Subsequently, on 25 September and 10 October 1941, under the authority of List, Defendant Franz Boehme issued the following orders:

> (a) For each [singular] killed or murdered German soldier or *Volksdeutsche* (men, women or children) 100 prisoners or hostages [to be killed]
>
> (b) For each wounded German soldier or *Volksdeutsche,* fifty prisoners or hostages [to be killed][17]

Terminology

The name '*Hostage* Case' references the hostage and reprisal actions committed by the defendants. The term 'hostage' referred to 'those persons of the civilian population who were taken into custody for the purpose of guaranteeing with their lives the future good conduct of the population of the community from which they were taken.'[18] In contrast, 'reprisal prisoners' were 'individuals who were taken from the civilian population to be killed in retaliation for offences committed by unknown persons within the occupied area.'[19]

[16] *Law Reports*, Vol. VIII, p.38.
[17] Ibid, pp.38-39; General Franz Boehme, 'Order by Boehme on Executions of Hostages in Serbia', pp.1-2. 10 October 1941. Translation of Excerpts of Document No. NOKW-557. The Wiener Library 1655/1810; The German Commandant, 'German Army Proclamation to the Serbian Population', p.2. Serbia, 12-31 October 1941. Translation of Excerpts of Document No. NOKW-1202. WL 1655/175; The Chief of the Security Police and the SD, 'Reports of Events in the Union of the Soviet Republic No.122', p.2. Berlin, 21 October 1941. Translation of Excerpts of Document No. NO-3402. WL 1655/1824.
[18] *Hostage*, p.1249.
[19] Ibid.

Indictment

The basic charge against all twelve defendants was the criminal act of the murder of hundreds of thousands of Yugoslav, Greek, Albanian, and Norwegian civilians.[20] These 'reprisal killings' were allegedly undertaken 'in an attempt to maintain order in the occupied territories in the face of guerrilla opposition, or wanton destruction of property not justified by military necessity'.[21] The accused were charged on four counts.[22]

Legal Actors

The defendants were: Wilhelm List; Lothar Rendulic; Walter Kuntze; Hermann Foertsch; Hellmuth Felmy; Hubert Lanz; Ernst Dehner; Ernst von Leyser; Wilhelm Speidel; and Kurt von Geitner.[23]

[20] No specific figure is stated within the indictment for the overall number of civilians killed. The indictment and Telford Taylor's subsequent summary of the NMT both state the murder of either 'hundreds of thousands' or 'many thousands' of members of the civilian population. The reprisal acts committed by the defendants were against both the general civilian population and Jewish population of South-eastern Europe. However, in the orders and reports received during 1941-1942, emphasis is placed on the reprisal execution of Jews and Communists. This racial and ideological element of the hostage and reprisal killings was not drawn upon within the testimony of the historical expert witnesses during the *Hostage* Case. General Franz Boehme, 'Reprisals for Horrible Murdering of German Soldiers by Communist Bandits', p.1. 26 September 1941. Translation of Excerpts of Document No. NOKW-1434. WL 1655/1801; General Franz Boehme, 'Report on Reprisal Execution of Jews in Serbia', 9 October 1941. Translation of Excerpts of Document No. NOKW-1211. WL 1655/1807; General Franz Boehme, 'Order from the Commanding General in Serbia Concerning Reprisal Arrests and Executions', pp.1-2. 19 October 1941. Translation of Document No. NOKW-197. WL 1655/1820; Benzler, 'Report to the German Foreign Office', p.3. 23 July 1941. Translation of Document No. NG-111. WL 1655/1714; *Hostage*, p.765; Taylor, 'Nuremberg War Crimes Trials', p.321.

[21] Taylor, 'Nuremberg War Crimes Trials', p.321; *Law Reports*, Vol. VIII, p.34.

[22] All counts were under the charge of war crimes and crimes against humanity. For details on all four counts, see: *Hostage*, pp.765-775.

[23] Only ten of the twelve defendants went to trial. Defendant Lieutenant-General Franz Boehme committed suicide after the indictment and prior to his summons to court. During the trial defendant Maximillian von Weichs (General of the Army) became ill and was declared physically unfit to continue in court prior to the Tribunal's judgement. For full details on the military roles of the defendants, see *Law Reports*, Vol. VIII, pp.34-48.

Judge Charles F. Wennerstrum (Justice of the Supreme Court of the State of Iowa) presided over the *Hostage* Case. Judge Edward F. Carter (Judge of the Supreme Court of the State of Nebraska) and Judge George J. Burke (Attorney, Member of the Bar of the State of Michigan) supported Wennerstrum as assistant judges.[24]

The Prosecution consisted of six counsels: Telford Taylor resided as the Chief of Counsel with James M. McHaney supporting as Deputy Chief of Counsel; Clark Denney and Theodore F. Fenstermacher were both Chief Prosecutors; and George B. Fulkerson and Walter Rapp were the Associate Counsel. The Defence comprised of ten Defence Counsel and eleven Associate Defence Counsel.

Opening Speeches

The opening statements of the Defence and Prosecution highlight how Ibbeken and Stadtmüller's testimony supported the Defence's argument and addresses why the Prosecution did not seek to utilise historical expert evidence.

From the beginning of their opening speech, the Prosecution emphasised the role of the *Hostage* Case within the wider Allied ambition of the NMT. Taylor announced to Tribunal V that the Prosecution sought to extend the principles of international law to prove that military men were not a 'race apart' and could not hide behind the defence of 'superior orders'.[25] The Prosecution suggested that the defendants committed their crimes because of two characteristics of the German military mind. The first was the impulse that Germany was geared to fight with a mind full of 'martial fantasies'.[26] The

[24] *Hostage,* p.762.
[25] Ibid, pp.786-787, 840.
[26] *Hostage*, p.853.

second, that the defendants' had a 'profound contempt mingled with fear of the peoples of Eastern Europe'.[27] Presiding Judge Wennerstrum commented to Hal Foust (reporter for the *Chicago Tribune*) on 20 February 1948, the day after Tribunal V announced its judgement, that Wennerstrum believed that the *Hostage* Case was indeed 'victor's justice'. Wennerstrum accused Taylor and his prosecution team of failing to 'maintain objectivity aloof from vindictiveness, [and] aloof from personal ambitions for convictions.'[28] Even as a judge, where one would expect impartiality especially considering the judge's assessment of the evidence decides the overall verdict, Wennerstrum's criticism against the role that trials have within Holocaust memorialisation is not unique. As chapter four shows, both the substitute judge, Werner Hummerich, and the presiding judge, Hans Hofmeyer, of the Frankfurt-Auschwitz trial, voiced concerns that the use of historians as expert witnesses and the wider socio and geo-political context of the trial risked jeopardising the integrity of the trial proceedings and distorted the Prosecution's assessment of what was legally relevant.[29] Moreover, Wennerstrum's argument of 'victor's justice' resonated with the growing disillusion towards the IMT and NMT. Annette Weinke notes the impact of the Cold War not only sped up the denazification process within Western Germany, it also significantly altered the German perception of the postwar trials: four years after the verdict of the IMT, a third of the German population believed the IMT to have been conducted in an unfair manner.[30]

[27] Ibid, pp.854-855.
[28] Heller, *Nuremberg Military Tribunals*, p.97.
[29] Though not published in a newspaper report, Hofmeyer's objections to the amount of attention that the 'entire scheme of historical events' received in trials of 'mass murder' were published in 1967, documenting opinions of German jurists concerning the problems of the prosecution and punishment of National Socialist crimes. Turner, *Historians at the Frankfurt Auschwitz Trial*, pp.68, 114.
[30] Annette Weinke, 'Between Demonization and Normalization: Continuity and Change in German Perceptions of the Holocaust as Treated in Post-War Trials', in *Holocaust and Justice*, eds. Bankier and Michman, p.203.

Nonetheless, Wennerstrum's criticisms acutely demonstrate the difficulty faced by Holocaust trials in having to balance justice, memory, and history. Returning to Rousso's assessment of the relationship between Holocaust trials and national memory, the presented interpretation of the past within a trial is dependent upon the current political aspirations at that time.[31] The socio-political context not only impacts how historical expert testimony is engaged with in the courtroom, but the legal interpretations and overall narrative that legal counsels present to the Court. Even the concept of 'justice' is impacted by the wider socio-political context. As chapter four reiterates, the Prosecution and the Court can have differing perceptions of what is true 'justice', with the Prosecution often seeking justice beyond the verdicts against the defendants. For Wennerstrum, the Prosecution generated a specific version of the history of Nazi crimes committed in the Balkans that supported the overall Allied focus of denazification, rather than true objective justice. Wennerstrum's criticisms against the prosecuting argument pursued during the *Hostage* Case, is thus an early demonstration of the law's struggle to engage with the extraordinary factors of the Holocaust whilst trying to follow established legal procedure.

The Prosecution's objective during the *Hostage* Case was to prove that the defendants 'inaugurated and executed a deliberate program of terror and extermination'.[32] The evidence chosen 'all set forth in orders, reports, and other documents issued and circulated by the defendants themselves' had to support and prove this aim. The appearance of the high-ranking military defendants, as well as supporting eyewitnesses, would have been more compelling to the Prosecution's argument than in-depth historical knowledge.

[31] See chapter one. Rousso, *Haunting Past*, p.57.
[32] *Hostage*, p.788.

In contrast, the Defence stated that during the proceedings they would be dealing with the 'actual situation in the Balkans.'[33] According to the Defence, led by Laternser, establishing the context of the Balkans was needed to dispute '[t]he further efforts of the prosecution to substitute … that all the measures of the German commanders were arbitrary crimes, while, on the other hand, the actions of the partisans and insurgents were patriotic acts and justifiably self-defence'.[34] Dr. Fritsch specifically addressed the need for historical expert knowledge, in his opening speech for the defence of Defendant Rendulic. Fritsch argued that for the Defence to counter the indictments, the Defence must 'describe the general conditions in the Balkans, conditions which cannot be compared with those general in Europe.'[35] He continued that 'it will be necessary, for the maintenance of historical events to refer to the former fighting and to the situation at that time in the Balkans.'[36] Several factors that were later mentioned in the historical testimony as being 'decisive' to the Balkan conflict, such as the geographical 'character' of the region and the 'peculiarity of character of the Balkan population', were briefly referenced and alluded to in the Defence opening speech.[37] Consequently, whilst the Defence highlighted other objectives, such as the validity of superior orders, the Defence demonstrated the importance of historical expert testimony as a foundation for their wider legal argument by repeatedly emphasising the need for historical contextual knowledge.

[33] Ibid, p.866.
[34] Ibid.
[35] *Wilhelm List et al.* 16 September 1947. p.3,106.
[36] Ibid.
[37] *Hostage*, p.889.

EXPERT WITNESSES

Amongst the witnesses that were called for the *Hostage* Case, four were identified as having links to the historical discipline: two for the Prosecution and two for the Defence. The two witnesses chosen by the Prosecution (Stephanos Pappas [a Second Manager at the College of Arta in Greece, teaching Ancient History, Modern, and Ancient Greek], and Constantinos Triandaphylidis, 'the historian of the EDES') again fit into the IMT and NMT trend whereby the witnesses focused on first-hand accounts rather than providing historical expert testimony.[38]

In contrast to the Prosecution, the Defence utilised the knowledge of historians as expert witnesses in defining the historical context as a foundation for the subsequent Defence legal arguments. Ibbeken and Stadtmüller's testimony will be examined by identifying the reoccurring themes within their evidence and evaluating the interdisciplinary relationship in early postwar Holocaust trials.[39] An analysis of these areas will consequently demonstrate how historical expert testimony was employed in the *Hostage* Case.

[38] The contemporary English equivalent to a 'deputy manager' in Greece is an assistant manager or vice director. The EDES stands for the Greek republican National Democratic Hero Organisation (a republican resistance movement). *Wilhelm List et al.* 18 August 1947. pp.2,083, 2,176.

[39] It could be inferred that Ibbeken and Stadtmüller had approximately two months to prepare their evidence if 10 May 1947 (indictment date) is an indicator of when the Defence began their preparations. Comparing the witness preparation time across the case studies within this dissertation may appear to demonstrate the development and weight placed on historical expert testimony. However, witness preparation time is largely determined on whether an expert report must be produced for the trial. Moreover, the use of expert reports depends on whether the legal counsel consider a need for an expert report to support their case. For example, whereas historians during the Frankfurt-Auschwitz trial produced expert reports, Christopher Browning in the 1988 *Zündel* denial trial did not, despite the expert historian having a greater role. Therefore, the witness preparation time is not a consideration in the evolving role of the expert historian.

Biographies

Dr Rudolf Ibbeken, a lecturer in Modern and Ancient History at the University of Berlin, testified on 6 and 7 October 1947.[40] However, when Ibbeken appeared in court he was no longer a historian, but instead oversaw an institute for tuberculosis in Hanover.[41] Ibbeken stated that this change in profession was a result of 'the subject of modern and middle history, in account of the German collapse, need[ing] a reconsideration and review on the part of a German historian.'[42] Laternser distinguished the dual role that Ibbeken would hold as a witness in his preamble to Ibbeken's testimony: not only was Ibbeken to appear as an expert historian, he would also draw upon his own experiences during the occupation of the Balkans where he worked with the staff of the Armed Forces Commander South-east from 1944.[43] Due to his role during the Second World War, Ibbeken stated that all his political facts 'have also been made in greater detail to a denazification chamber in the British Zone.'[44] Ibbeken added that 'the British Zone has decided that I can carry out my present occupation and that they have no objection.'[45] Ibbeken's statement addressed the wider geopolitical situation and served to discredit any attempt by the Prosecution to cast doubt over Ibbeken's testimony on political grounds.

Stadtmüller, a Professor of Balkan History at the University of Leipzig,published two works, the latter of which *Forschungen zur albanischen Frühgeschichte* (*Research in*

[40] The Defence during the *Hostage* Case would not have had historical institutions as the IfZ to provide support and recommend established historians.
[41] *Hostage*, pp.1,056-1,057.
[42] Ibid.
[43] *Wilhelm List et al.* 6 October 1947. p.3,761.
[44] Ibid. 7 October 1947. p.3,834.
[45] Ibid.

Early Albanian History, completed in 1936 and published in Budapest in 1942) is the most prominent.[46] *Research in Early Albanian History* was a result of Stadtmüller's tour of Albania in 1935, tracing the origins of the Albanian people and addressed the 'thorny' issues of Albanian ethnogenesis.[47] Stadtmüller acted as the personal Greek interpreter for defendant General Felmy during the war.[48] When establishing his credibility as an expert, Stadtmüller told the Tribunal that he could 'read a scientific book without a dictionary, [in] all the languages of South-eastern Europe, with the exception of Turkish'.[49] After the *Hostage* Case, Stadtmüller was appointed the Chair of South-east European History at the University of Munich. Stadtmüller helped to establish the 'Albania Institute' at the University of Munich in 1963. He also published *Geschichte Südosteuropas* (*History of Southeastern Europe*) in 1950 and several other works.[50]

Testimony - Dr. Rudolf Ibbeken

Fenstermacher sought to challenge Ibbeken's testimony from the moment that the Defence announced their presentation of expert evidence. Fenstermacher adopted a

[46] Robert Elsie, *Historical Dictionary of Albania,* Second Edition (Plymouth: The Scarecrow Press, Inc., 2010), p.429.
[47] Karen Schönwälder and Ingo Haar both discuss whether the political affinities and ideologies of the Nazi party resulted in academic adjustments towards research. According to Schönwälder, German historians altered the content of their work to the needs of the new Nazi regime. Stadtmüller's focus on Albanian ethnogenesis (the formation and development of an ethnic group) mirrors the wider ethnic discussions at the time concerning the German *Volksdeutsche* and approaches to the 'European Order'. Karen Schönwälder, 'The Fascination of Power: Historical Scholarship of Nazi Germany', *History Workshop Journal*, No.43 (1997): pp.135-148; Ingo Haar, 'German *Ostforschung* and Anti-Semitism', in *German Scholars and Ethnic Cleansing*, eds. Ingo Haar and Michael Fahlbusch (New York: Berghahn Books, 2005), pp.1-27.
[48] *Wilhelm List et al.* 9 December 1947. p.7,423.
[49] Stadtmüller told the Tribunal that he could speak Czech, Hungarian, Romanian, Serbo-Bulgarian, Greek, and 'a little Albanian'. Stadtmüller was not introduced to the Court as an expert witness, however he was referred to as an expert by Presiding Judge Wennerstrum. Following Fenstermacher's objection that he did not believe that Stadtmüller was qualified to describe the partisan band situation in the Balkans, Wennerstrum replied '[t]his witness has to the satisfaction of the Tribunal qualified himself as an expert.' Ibid, pp.7,424-7,423.
[50] Georg Stadtmüller, *Sozialismen, National-Sozialismus, Faschismus* (Munich: Hanns Seidel Stiftung, 1981); Georg Stadtmüller, *Geschichte der Habsburgischen Macht* (Stuttgart: Kohlhammer, 1966).

common strategy to undermine Ibbeken by highlighting the epistemological differences between history and law, and to personally discredit the expert by drawing upon some unsavoury details of the expert's past. As mentioned in chapter two, this strategy is not necessarily a reflection of the relationship between the expert historian and the lawyer, but more a demonstration of the opposing counsel seeking to strengthen their own legal argument through any means possible.

Relating to the epistemological differences between history and law, Fenstermacher objected to Ibbeken's testimony by announcing to the Court '[i]t is my understanding that there can be no expert witnesses as to [the] facts.'[51] By emphasising 'facts', Fenstermacher reiterated to the Court the accuracy of the Prosecution's argument. For Fenstermacher, the Defence's evidence could not be based on 'facts' but on interpretation, with the intention to support the defendants as opposed to finding the 'truth'. As Laternser later responded, 'the Defence maintains the point of view that the conditions in the Balkans are of decisive importance … the total conditions which the Prosecution describes as though they were normal European conditions', following another objection made by Fenstermacher over the need for historical context of the Balkans.[52] However, Fenstermacher's differentiation between 'fact' and 'truth' reflects the interdisciplinary arguments against the use of expert historical evidence within a courtroom due to the strict evidentiary standards required by international criminal law. Following Fenstermacher's request that Ibbeken offer his opinion over whether the situation in the Balkans would have been more successful 'if the methods used had been those of kindness, sympathy, and understanding rather than reprisal methods',

[51] *Wilhelm List et al.* 6 October 1947. p.3,761.
[52] Ibid, p.3,777.

Ibbeken replied that his answer would be 'merely a guess'.[53] Ibbeken concluded: 'for instance, some other day I might compare facts differently than I would today, and I don't want to submit such a vague testimony here.'[54] Combined with Fenstermacher's emphasis that there can be no experts as to the 'facts', both Ibbeken and Fenstermacher highlight the differences of interpretation between history and law, and thus how the treatment of expert evidence can be more problematic for the historian expert witness than a genetics or a ballistic expert.

Fenstermacher employed the same tactic to personally discredit both Ibbeken and Stadtmüller during cross-examination, highlighting to the Court their membership of the Nazi party and making specific reference to Hitler's policy towards the Jews and the theories of superiority and inferiority of races that were advocated by Nazi scholars such as Alfred Rosenberg.[55] Fenstermacher's insinuation was clear, by being a member of the Nazi party, one had to agree with the racial ideologies that existed within the Party:

> Isn't it true, Dr. Ibbeken, that the only reason you were allowed to teach or lecture at the University of Berlin was because you were a Party member and were considered safe to instruct the youth of Germany so far as Nazi ideology was concerned?[56]

By addressing Ibbeken's employment at the University of Berlin, Fenstermacher directly targeted Ibbeken's expert witness status by suggesting that Ibbeken was employed because he complied with Nazi academic guidelines. Ibbeken asserted that

[53] Ibid. 7 October 1947. p.3,827.
[54] Ibid.
[55] Ibid, p.3,802.
[56] Ibid, pp.3,804-3,805.

'outside of the organisation of the Party there was no chance of working at all'.[57] In fact, whilst Nazis were often well integrated into the academic community, it is unlikely that without Party membership Ibbeken would have been appointed as a university lecturer.[58]

Ibbeken's employment at the University of Berlin was one of the factors that the Defence had used to prove Ibbeken's status as an expert witness to the Court. As such, if the Prosecution were able to cast doubt over the reasons for his employment, Ibbeken's testimony as an 'expert' would have been called into question. When pressed by Fenstermacher that 'one of the main things the Nazis tried to do was influence the youth of Germany and to teach them and instruct them very carefully with Nazi ideology', Ibbeken retorted that 'this opinion prevailing in foreign countries is erroneous.'[59] When Fenstermacher responded in disbelief that Ibbeken was suggesting that 'somehow or other in spite of the Nazi emphasis on education, German historians and German universities were somehow exempt from Nazi supervision', Ibbeken merely replied 'Yes.'[60]

Similarly, at the end of Stadtmüller's cross-examination, Fenstermacher highlighted to the Tribunal that Stadtmüller used to be a member of the Nazi Party. Fenstermacher sought to prove to the Tribunal that Stadtmüller had a biased perspective of the conflict that occurred in the Balkans during the war as a result of his Nazi ideologies and

[57] Ibid, p.3,802.
[58] Schönwälder, 'The Fascination of Power', p.147.
[59] *Wilhelm List et al.* 7 October 1947. p.3,805.
[60] Ibid; 'War Diary No. 3116: Report by Army Liaison Post Belgrade', p.4. 31 July 1941. Translation of Document No. NOKW-1114. WL 1655/1720; Jürgen Matthäus, 'Anti-Semitism as an Offer: The Function of Ideological Indoctrination in the SS and Police Corps During the Holocaust', in *Lessons and Legacies VII: The Holocaust in International Perspective*, ed. Dagmar Herzog (Evanston: Northwestern University Press, 2006), p.123.

sympathies due to his party membership, despite Stadtmüller arguing that he was against the racial theories of Rosenberg and Hitler.[61] Both Ibbeken and Stadtmüller addressed that for them, membership of the Party was not founded on agreement with the racial ideologies of Nazism, but a result of a realisation that renouncing membership of the Party due to a distaste for its treatment of racial minorities 'would have been professional suicide.'[62] Karen Schönwälder highlights that whilst the change in staff from 1933 within German universities did not disrupt the 'structure' of the institutions, 'external pressures still overruled internal considerations.'[63] Indeed, membership did not always mean that an individual was convinced of the Party ideology. For many Germans, membership to the Party was a pragmatic, rather than an idealistic, choice. However, Fenstermacher's questions during cross-examination demonstrate a clear attempt to raise doubt over Ibbeken and Stadtmüller's reliability as historical experts.

Ibbeken's unease at his cross-examination is demonstrated when he was prompted by Fenstermacher to remember the content of the files that he worked with as a result of his commission in the Armed Forces Commander South-east. Fenstermacher begins this line of questioning with a snide remark, '[w]ell, now, let us see how much you remember about the files', setting the tone for the rest of the cross-examination.[64]

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[61] *Wilhelm List et al.* 10 December 1947. pp.7,476-7,477.
[62] Hermann W. von der Dunk notes that difficulty exists in distinguishing between historians 'whose compliance with the Nazi regime was forced, those whose endorsement was purely tactical, and those who shared the National Socialist mind-set'. Though Ibbeken testified that he did not agree with the racial ideology against the Jews, he added that he did agree with the removal of Jewish participation from certain 'key' aspects within the German economy as a result of an impression that the participation of the Jews compared to the rest of the total German population was 'enormously high'. Ibbeken had 'no objection' against a clause that limited the economic participation of the Jews. Ibid. 7 October 1947. pp.3,806-3,807; Hermann W. von der Dunk, 'German Historians and the Crucial Dilemma', *European Review*, Vol. 14, No. 3 (2006): p.375.
[63] Schönwälder, 'The Fascination of Power', p.147.
[64] *Wilhelm List et al.* 7 October 1947. p.3,816.

Ibbeken's apparent difficulty remembering a piece of information is demonstrated by Fenstermacher's persistence over whether Ibbeken could remember reading a document where the ratio of killing 100 hostages to one German soldier was ordered.[65] Ibbeken's flustered response serves as a reminder of why memory is not frequently relied upon in court proceedings:

> In the corridor of the Palace of Justice in a conversation, -- who was it with, -- or was it in the room of the lawyer, when I first came here, I heard about a figure of one to 100, and the fact that such orders are supposed to exist, but I don't remember that in my work on the files and from my work on the files that this figure of one to 100 remained in my memory.[66]

Ibbeken's testimony is hearsay, as he is testifying to what he has overheard as opposed to what he has experienced, rendering this part of his testimony inadmissible. Fenstermacher's decision to concentrate on memory is particularly interesting, asking Ibbeken to draw conclusions from what he read, a method that Fenstermacher had objected to earlier in Ibbeken's cross-examination. Fenstermacher's question confirms the conclusion that each legal counsel will employ or object to certain lines of questioning to aid their own argument.

Testimony - Professor Georg Stadtmüller

Stadtmüller's responses during his examination-in-chief by Defence counsel Dr. Mueller-Torgow highlight Stadtmüller's understanding of the impact that expert testimony can have towards proving the arguments presented by particular legal counsels. This awareness is acutely demonstrated by the comments made by Stadtmüller regarding the emerging Cold War. Throughout his testimony, Stadtmüller

[65] Ibid.
[66] Ibid.

consistently referred to leaders within the partisan bands in the Balkans that were identified as Communist, as well as those he encountered whilst travelling with Defendant General Felmy.[67] Stadtmüller highlights the purpose of such references to the sentiment that existed amongst the National Greeks, following the 'political desertion' by the Germans in August 1944.[68] As a result of the 'desertion', it became 'obvious' that the German troops would eventually evacuate the Greek and the Balkan area.[69] According to Stadtmüller, this caused a 'desperate situation' for the National Greeks: ' [the Greeks] did not love the Germans, but to them they still represented the protection against Communist terror.'[70] In terms of the charges made against Felmy, no mention was made in the indictment to any of the alleged crimes connected to the evacuation of Athens and thus this part of Stadtmüller's testimony is immaterial, a fact that was highlighted by both the Prosecution and the Tribunal.[71] However, Stadtmüller successfully contextualises the *Hostage* Case within its wider geopolitical climate, and thus reminds the Prosecution of the subsequent impact that their legal-historical narrative could have on the success of denazification, by emphasising that the Greeks viewed the Germans as a lesser evil when compared to Communism.[72]

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[67] Ibid. 10 December 1947. p.7,441.

[68] The phrase 'political desertion' was used by Stadtmüller when describing the German decision to withdraw north into Serbia and Croatia. In reality, the German units deployed in the southern Balkans withdrew to join force with the units defending the Eastern front as a result of the Soviet advances on the Eastern front reaching the eastern regions of Yugoslavia.

[69] *Wilhelm List et al.* 10 December 1947. p.7,457.

[70] Ibid. Support for Stadtmüller's assertion can be seen in Captain and Commander Bischofshausen's report concerning the execution of hostages in Kragujevak in October 1941. Bischofshausen notes his fears that the 'shooting of entirely innocent people in this town [Kragujevak] may … have devastating consequences' for the German Wehrmacht. Bischofshausen adds: '[t]he inhabitants of Kragujevak had hoped the German Armed Forces would remove the Communist danger and bring them into the New Order in Europe. The methods applied here will by no means enable us to win over the favourably disposed elements.' General Franz Boehme, 'Negotiations with Partisans', p.1. 8 October 1941. D-531. WL 1655/1821; Captain and Commander Bischofshausen, 'Report Concerning Execution of Hostages at Kragujevak', pp.2-3. 20 October 1941. D-531. WL 1655/1821.

[71] *Wilhelm List et al.* 10 December 1947. p.7,457.

[72] The Greek Civil War (1946-49) between the Greek government army, supported by the UK and the USA, and the Democratic Army of Greece occurred at the time of the *Hostage* Case. Whilst not all Greeks were anti-communists, Stadtmüller's comment concerning attitudes towards communism in Greece draws upon the general pan-European approach to the growing Cold War, but also the more immediate conflicts that were happening in the postwar period that needed to be resolved.

Stadtmüller's above response does raise some shortcomings concerning his duty as a historical expert witness: an expert's first responsibility is to the Court and supplying the Court with knowledge about a historical event which is beyond the Court's remit. During cross-examination, Fenstermacher attempted to get Stadtmüller to admit that:

> [the] reprisal measures which the Germans took actually forced the Greeks and the Yugoslavs to go into the hands of the bands, when you burned down the villages they had no place to go; if you executed their relatives or their friends in the course of reprisal measures, they were bound to have hate and wish to fight the German occupation troops?[73]

Stadtmüller's reply compared the actions of the defendants to acts previously committed by the Allies: '[t]hat is a psychological consideration. One could oppose this with examples from British colonial history. The British at least used as a method, the burning down of villages in the colonies, as a method of pacification.'[74] Stadtmüller's answer demonstrates his awareness of the process of cross-examination, and the intent behind Fenstermacher's line of questioning. However, Stadtmüller's response does not offer any information about the crimes of Defendant Felmy or the general historical partisan situation in the Balkans. Stadtmüller's response thus goes against his duty to the Court to produce unbiased information regardless of whether it may damage the argument of the counsel that called the expert witness.[75]

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[73] *Wilhelm List et al.* 10 December 1947. p.7,471.

[74] Ibid. For Michelle Gordon, the use of violence by the British during their colonial missions (concentrating on British Colonial Violence in Perak, Sierra Leone and the Sudan), only antagonised the indigenous peoples, contributing towards a 'lack of gratitude' felt towards the British. Fundamentally, neither the British colonial actions, nor the German military actions in South-eastern Europe endeared 'the natives' towards the occupying power, supporting Fenstermacher's assertion. Consequently, in contrast to Stadtmüller's testimony regarding the Greek's perception of a 'Communist terror'; even Greek anti-communists did not, regard the Germans in a positive light due to their violence, regardless whether they preferred German to Soviet occupation. Thus, Stadtmüller's argument only served to weaken the Defence's position. Michelle Gordon, *Extreme Violence and the 'British Way': Colonial Warfare in Perak, Sierra Leone and Sudan* (London: Bloomsbury Publishing, 2020).

[75] Whilst Stadtmüller's argument was intended to raise ethical and conceptual confusion, it should be remembered that the German forces invaded Yugoslavia and Greece following an order from Hitler to secure Germany's Balkan flank for Operation Barbarossa. Partisan warfare was not initially part of Hitler's order. However, following the ethnic tensions between the Serbs and the Croats, the German

Dual Role: Expert and Eyewitness

The questions posed to Ibbeken during his examination-in-chief and cross-examination did not always distinguish between his two roles: historian and eyewitness. This can be explained by identifying Ibbeken's role within the Armed Forces Commander South-east. Ibbeken was commissioned to develop an 'objective history' of the military conditions in South-eastern Europe from 1941-1944 and to create a manual that military commanders, particularly those that came from different areas, could use to provide them with an insight into the 'completely abnormal conditions' that existed within the Balkans.[76] Hence, Ibbeken's experience during the occupation of the Balkans reinforced his standing as a historian. Ibbeken's testimony during the *Hostage* Case was to draw primarily on his historical knowledge of the Balkans and the documents he reviewed during his commissioned military research.

By contrast, Stadtmüller's testimony made a distinction between his two roles: a historian and the personal translator for Defendant Felmy. The different expectations of an eyewitness and a historian as an expert witness were clearly established by Stadtmüller when identifying the sources he used to obtain his knowledge about the Balkans. When testifying as an eyewitness, Stadtmüller attested that he confined himself to the facts which he 'experienced with my own eyes and with my own ears, or which I remember from my immediate knowledge of the affairs.'[77] Importantly, he also makes a distinction between his own experiences and opinions, and those of Felmy or his Greek friends. As a historian, Stadtmüller noted that his knowledge came

military sought to exploit the aftermath of ethnic attacks, invading further territories and breaking up countries in the name of *Lebensraum*.
[76] *Wilhelm List et al.* 6 October 1947. pp.3,764-3,765.
[77] Ibid. 10 December 1947. p.7,427.

from ‘the basis of ... files, so far as [he could] still remember’.[78] The distinction between Stadtmüller as an eyewitness and a historical expert witness was made by Mueller-Torgow. In one instance, Mueller-Torgow asked Stadtmüller:

> Professor … I would like to talk about the band situation as you found it when you arrived in Greece. I would ask you to describe the developments of this situation also from the point of view of a historian?[79]

This statement establishes that Stadtmüller’s testimony was drawn from personal experiences. It builds upon Stadtmüller’s earlier evidence where he testified that he was in the staff of the LXVIII Corps and arrived in Athens to act as a translator on 18 June 1943. However, Mueller-Torgow’s line of questioning also blurs the distinction between ‘objective’ and ‘personal experience’. Given Stadtmüller’s status as an eyewitness and a historian, it would have been hard to answer in a way that kept the ‘scientific’ and the ‘personal’ separate. Indeed, in his response, Stadtmüller was unclear between his experiences as an eyewitness and his conclusions achieved as a result of wider historical knowledge. Stadtmüller began, ‘[i]f I am supposed to characterize the partisan situation … for me it was not surprising’.[80] By stating, ‘for me it was not surprising’, Stadtmüller goes beyond his duty as an eyewitness testifying to what he has seen, and risks offering hearsay because he may testify to evidence that had not already been submitted to the Court. Indeed, in response to Stadtmüller, Fenstermacher objected that ‘the witness is merely giving his personal conclusions.’[81] This objection was also raised later in Stadtmüller’s testimony, this time by Presiding Judge Wennerstrum. Following a question by Mueller-Torgow over whether the feuds and vendettas for revenge in Greece still existed when Stadtmüller accompanied

[78] Ibid, pp.7,428-7,429.
[79] Ibid. 9 December 1947. p.7,423.
[80] Ibid.
[81] Ibid, p.7,424.

Felmy as his interpreter, Stadtmüller replied that he had a Greek student at the University of Munich who wrote a paper on the existence of such tensions. Wennerstrum interrupted the examination-in-chief observing that:

> [I]t seems to me this witness in the capacity in which he comes here should restrict himself to his observation, rather than that which has come to him in the form of hearsay. He is here testifying as to Balkan history and Balkan background and the result of his observations and study. Necessarily we should not go into that which is purely hearsay, at least as to incidents.[82]

Whilst this confusion is a result of Stadtmüller's dual purpose as a witness, Stadtmüller's response to Mueller-Torgow's initial question could also indicate confusion over the expectation of a dual role and the level of opinion that experts are allowed to offer.

Objective History and Historical Interpretation

Ibbeken's commission for an 'objective history' relates to more contemporary debates concerning the level of objectivity within the historical discipline.[83] Objectivity, when a person is not influenced by their personal bias in considering or representing the facts, is more commonly associated with scientific disciplines than the humanities. However, Ibbeken repeatedly emphasised his 'scientific knowledge' and 'scientific research' on which his conclusions were based. Laternser asked Ibbeken to clarify whether Ibbeken's testimony was personal opinion (which would make his evidence inadmissible), or whether it was 'a scientifically recognised opinion' during Ibbeken's

[82] Ibid, p.7,425.
[83] See chapter seven for literature debating the concept of the 'objective historian' in the context of Holocaust trials.

examination-in-chief.[84] Ibbeken used this question as a platform to re-establish the origins of his witness statements. First, Ibbeken confirmed, he had drawn his conclusions from information that was provided in thousands of documents, and secondly, Ibbeken's examination of the sources was based on 'scientific knowledge'.[85] Fenstermacher objected to Ibbeken's distinction, arguing that he did not think that Ibbeken was qualified 'as an expert on scientific opinions with respect to the Balkan people.'[86] Instead, Fenstermacher suggested that Ibbeken may only testify 'to what he knows as a result of examining the documents.'[87] The fact that Fenstermacher distinguished between scientific fact and historical assessment of the documents demonstrates that he did not perceive analysis of documents to be 'scientific'. Moreover, following Ibbeken's establishment of his historical sources, Laternser asked 'what did you [Ibbeken] personally ascertain about the methods of the partisan bands?'[88] Such a question indicates that the Defence is asking the witness to provide a conclusion to the Court that is based solely on their interpretation of the evidence. Therefore, considering Fenstermacher's opposition to expert testimony, as well as Ibbeken's claim for 'scientific history', it is unsurprising that Fenstermacher objected to a question that invited an answer based on interpretation: 'I don't believe this man is competent to testify to the question he is being asked. He is asked to state his conclusions from certain material which he has read.'[89] However, Judge Carter noted that the Tribunal had experienced 'a similar situation' when prosecution witness Constantinos Triandaphylidis testified. As Carter reminded Fenstermacher, '[h]e

[84] *Wilhelm List et al.* 7 October 1947. p.3,785.
[85] Ibid.
[86] Ibid.
[87] Ibid.
[88] During the proceedings of the *Hostage* Case, the term 'bands' was used interchangeably with 'partisan movements' or 'partisan bands'. Ibid. 6 October 1947. p.3,773.
[89] Ibid.

[Triandaphylidis] gathered information in the same manner [as Ibbeken] and testified to it here.'[90] Carter's observation demonstrates that Fenstermacher's opposition to Ibbeken's interpretation was a result of Ibbeken being a defence witness as opposed to Ibbeken's testimony content.

Stadtmüller's testimony also established the distinction of 'scientific knowledge'.[91] During his cross-examination, Stadtmüller maintained that a level of 'scientific' precision exists within the historical discipline: '[i]n that sense in which one can talk about science at all, apart from natural science, history is, of course, a science.'[92] However, Stadtmüller's examination-in-chief also demonstrated the importance of interpretation in establishing the wider context of an event to support the more scientific details that lawyers seek to determine. In explaining the partisan dynamic within the Balkans during 1941 Stadtmüller begins: '[t]he experience of history shows that the character of the people and the attitude towards an occupation power is completely different.'[93] Stadtmüller's reply indicates that each experience is built through its own individual context, and it is only through interpreting the patterns presented throughout history that the development of the partisans can be explained. However, the process of development that Stadtmüller provides for the Court is produced from Stadtmüller's own interpretation of the evidence. Moreover, though addressed in separate questions, Stadtmüller was asked to compare and establish the historical foundations of the partisan band movements in Serbia and then Yugoslavia.[94] Stadtmüller drew upon the tradition of an ethnic fight against Turkish

[90] Ibid.
[91] Ibid. 10 December 1947. pp.7,428-7,429.
[92] Ibid, p.7,477.
[93] Ibid, p.7,445.
[94] Ibid, p.7,461.

domination in Serbia, and the national feeling of honour that existed in Yugoslavia. The purpose of the questions was to compare the history of the partisan band movements and uprisings in Serbia and Yugoslavia during 1941-1945, as well as to compare and contrast the surrounding context for the movements.[95] Mueller-Torgow's question and Stadtmüller's answer indicates that a level of interpretation within historical testimony is occasionally allowed, as long as it is seen to be working in accord with the objectives of the Court and is not hearsay.

JUDGEMENT

Tribunal V delivered its judgement on 19 February 1948. The Law Report for the NMT summarised that the sentences imposed in the *Hostage* Case 'ranged from imprisonment for life, to imprisonment for seven years.'[96] Additionally, the Tribunal gave attention to numerous legal issues. These included: the defence of superior orders; the legality of the killing of hostages and reprisal prisoners; and the extent of the responsibility of commanding generals over the crimes committed by their subordinates.[97]

Importantly, the Tribunal noted in their judgement that 'a brief historical background is helpful in dealing with [the] issues' relating to the charges against the defendants.[98] The Tribunal gave little mention to the specific evidence provided by Ibbeken and Stadtmüller. However, the Tribunal demonstrated that it had used the historical

[95] Ibid.
[96] *Law Reports*, Vol. VIII, p.34.
[97] Ibid, p.76.
[98] *Hostage*, pp.1,261-1,262.

background established during the proceedings to consider and discuss the arguments presented by the legal counsels and the overall verdict.

The Tribunal followed their statement by establishing the origins of the tensions in the Balkans in October 1940, primarily using the historical context to demonstrate to the Court the illegality of the German invasions. When addressing the German invasion of Yugoslavia, the Tribunal commented that 'international law gave way to military expediency'.[99] The Tribunal made clear that whilst the Italian invasion of Greece resulted in Germany deeming it necessary to occupy Greece (so as to prevent any other invasions of Greece by Allied forces), the escalation of this invasion into 'neutral Yugoslavia' was beyond the remits of international law.[100] A similar situation, in terms of the Tribunal's terminology of historical events can be seen through the Tribunal's discussion of the situation in Greece following the capitulation of the Greek armies. The historical context within Greece and Yugoslavia concerning the partisan band movements dominated Ibbeken and Stadtmüller's evidence. Though the Tribunal did not refer to Ibbeken and Stadtmüller by name, the focus on the historical context within Greece and Yugoslavia demonstrated that their testimony did hold some weight within the Tribunal's understanding of the events within the Balkans.

Ibbeken and Stadtmüller's evidence did not impact the Tribunal's judgement in determining the guilt of the defendants. Rather, whilst noting that both the partisan groups in Yugoslavia and Greece employed similar methods of guerilla warfare, the Tribunal asserted that the Germans responded with 'draconian measures of terrorism

[99] Ibid.
[100] Ibid, p.1,262.

and intimidation'.[101] The Tribunal's historical narrative focused on international law, German attacks and invasions, and partisan warfare. Nonetheless, the acknowledgement by the Tribunal that establishing historical context within Holocaust trials is helpful in dealing with the legal issues, demonstrated that the need to establish the wider context due to the extraordinary nature of the Holocaust was understood by all court actors even at the earliest stages of Holocaust trial proceedings.

SUMMARY

The testimony of Ibbeken and Stadtmüller for the Defence demonstrates that contextual historical knowledge was viewed as fundamental even within the earliest postwar trials and was not exclusive to later Holocaust trials. This observation is confirmed by the use of historical context within the judgement, despite the prosecuting objections to the use of expert witnesses and existing literature focusing predominantly on the historian's role as an expert witness towards the end of the twentieth century.

Moreover, the similarities between the points raised in the Prosecution's and Defence's arguments, particularly during Ibbeken's testimony, demonstrate that it is the line and intent of questioning that differed between the two counsels. The fact that Fenstermacher permitted interpretation in the testimony of Triandaphylidis, yet objected when Ibbeken used it, highlights that a counsel's willingness to permit interpretation of the evidence is dependent on which side the witness is representing.

[101] The German Army Proclamation to the Serbian people, stated that '[t]he German Wehrmacht must and shall put an end to this activity with all means and unyielding severity to restore peace'. 'German Army Proclamation to the Serbian Population', p.1; *Hostage*, p.1,262.

Indeed, the arguments raised by Fenstermacher (differences in permitted levels of interpretation of evidence and different definitions of 'fact' and 'truth'), mirror many of the interdisciplinary limitations that historians such as Rousso, Evans, and Browning have all addressed in their analysis of the historian's role as an expert witness in more contemporary Holocaust trials. The similarities between Fenstermacher's arguments and the contemporary awareness of interdisciplinary limitations, suggest that the epistemological arguments concerning the differences between history and law, and thus the suitability of the historian as an expert witness, is fundamentally a disciplinary one as opposed to the historian's greater involvement in the courtroom.

When compared to later Holocaust trials such as the Frankfurt-Auschwitz trial (1963-1965), it becomes clear that the dual role adopted by Ibbeken and Stadtmüller as both historical expert witnesses and eyewitnesses to actions committed by some of the defendants, is a unique one. As chapter two demonstrates, after the 1958 *Ulm* trial, the role of the expert historian was professionalised, with historians providing both expert reports and expert testimony solely on the historical context of the trial. Several factors remained consistent from 1947 to 1963: the criticism raised by Fenstermacher regarding the legal relevance of an expert historian within the courtroom, the issue of interpretation within the historical discipline, and the reinterpretation of historical evidence to suit a particular narrative were reiterated during the Frankfurt-Auschwitz proceedings. Nonetheless, the acknowledgement by Tribunal V of the growing need for historical knowledge in understanding the events of the Second World War in early Holocaust trials was furthered during the late 1950s, with the expert historical testimony proving influential to the verdict of the Frankfurt-Auschwitz trial, and the trial itself acting as a catalyst for pivotal new research within the field of Holocaust Studies.

PART THREE

1950s-1960s: PROFESSIONALISATION

IV

Case Study Two

Proceedings Against Mulka and Others

> It has been thought advisable … to hear the experts *before* the witnesses, since thereby a better factual background is available to the Court against which it can measure the witnesses' statements …
>
> When presenting the history of the National Socialist period to a Court of Justice, a special effort must be made to do so rationally and dispassionately, for the facts presented are not merely the subject of an historical analysis which commits no one, but may have a decisive influence on the fate of the accused. [emphasis in original]
>
> Foreword to the Original Edition, *Anatomy of the SS State*[1]

INTRODUCTION

The Frankfurt-Auschwitz trial, officially known as the *Proceedings Against Mulka and Others*, was a watershed event within West German criminal law. Held from 20 December 1963 to 20 August 1965, the trial continued the discussions over the responsibility of the Federal German Republic (West Germany) to prosecute Nazi perpetrators established following the proceedings of the *Ulm* Trial (1958).[2] After 1949, there was a dramatic decline in convictions against Nazi crimes domestically within West Germany following what was, arguably, 'victor's justice' of the IMT and the subsequent twelve trials of the NMT.

[1] Krausnick and Broszat, *Anatomy,* pp.14-15.

[2] There is some confusion over the Frankfurt-Auschwitz trial start date. Mathew Turner argues that it began on 19 December 1963; whereas Rebecca Wittmann says 17 December; Bernd Naumann and Devin Pendas suggest 20 December. Given that Naumann was a reporter during the trial, resulting in the publication of his work *Auschwitz: A Report on the Proceedings*. I follow his date of 20 December.

Within this context, the decision made by Fritz Bauer (Attorney-General of Hesse) to include four expert historians in the Frankfurt-Auschwitz trial was pivotal, not only within an interdisciplinary context, but also from a scholarly perspective. Hans Buchheim, Martin Broszat, Helmut Krausnick, and Hans Adolf Jacobsen were asked to provide *Gutachten* (expert reports) on different elements of the Third Reich and to testify on their report findings, following the precedent set in the *Remer* Trial (1952).

As the foreword to the original edition of *Anatomy of the SS State* explains, the *Gutachten* served a dual purpose: to clearly document the process of the Nazi regime for the Court and fill the knowledge gap within professional German Holocaust literature. Without the *Gutachten* and subsequent expert testimony, the Court would not have been able to correctly 'measure' the eyewitnesses' statements.[3] The foreword does reference the epistemological differences between history and law, regarding the legal demand for factuality and objectivity. The language of a 'special effort' mentioned in the foreword suggests that it is beyond the standard principles of the historical discipline for expert historians' to produce 'dispassionate' histories. However, historians do not normally conduct research that could have an influence on the guilt of an individual. Historians produce rational arguments based on the available evidence which would normally only impact wider historiographical discussions. Consequently, the 'special effort' acknowledges that the research conducted for the

[3] 359 eyewitnesses were heard during the Frankfurt-Auschwitz trial, mostly Polish and Jewish survivors. Julie Wagner addresses the limitations of eyewitness testimony during the trial, particularly concerning memory and the 'differing concepts of truth and justice' between survivor organisations and the Prosecution resulting in an 'ambivalent relationship' with the Prosecution's 'desire for objectivity and independence [standing] in conflict with the dependence on information which only survivors … could provide'. Goda, 'Law, Memory, and History', p.804; Julie Wagner, 'The Truth About Auschwitz: Prosecuting Auschwitz Crimes with the Help of Survivor Testimony', *German History*, Vol. 28, No. 3 (2010): p.356.

expert reports would not only impact wider Holocaust historiography, 'but may have a decisive influence on the fate of the accused'.[4]

The epistemological differences addressed in the foreword of *Anatomy* resonated throughout the proceedings and particularly in the trial judgement. Hence, it was within the academic sphere, not the courtroom, that the *Gutachten* had the most profound impact. As chapter two notes, the non-retroactive nature of the StGB impacted on the charges against the defendants and thus the use of expert evidence by the Prosecution. This chapter builds upon the dual role in the *Hostage* Case (expert and eyewitness testimony), before analysing the development of the professionalisation of expert historians. Secondly, this chapter provides an analysis of the historians' *Gutachten* during the Frankfurt-Auschwitz trial which demonstrates the impact that socio-political context and preconceived epistemological differences can have on how an expert's testimony is received by the Court. The Courts' receptive engagement with expert historians from the 1980s onwards is thus contextualised through addressing the epistemological criticism raised against the experts' history in the judgement of the trial.

Following a discussion noting the methodological limitations experienced whilst undertaking the research, this chapter explores the Frankfurt-Auschwitz trial through five sections: existing literature; trial context; expert witnesses; closing speeches; and trial judgement. Having established the narratives of the trial within the existing literature and the socio-political context of the trial, sections three to five will demonstrate that despite an increasingly professional role for the expert historian

[4] Krausnick and Broszat, *Anatomy,* p.15.

within Holocaust trials, certainly during the 1960s, the influence of the expert witnesses was still restricted by the epistemological differences between law and history. The impact that the StGB had on the charges against the defendants, the use of expert testimony, and thus the overall historical narrative generated throughout the trial's proceedings, adds to the argument throughout this dissertation that it is the distinctive context of a Holocaust trial that makes standard criminal procedure contentious.

Given the judicial view on the epistemological differences between history and law, Bauer was certainly premature in claiming that the Frankfurt-Auschwitz trial would usher in a period where 'experts reign'.[5] However, the historiographical significance of *Anatomy* demonstrated that within wider culture, Holocaust trials hold the status of catalysts for historical research that in other circumstances could arguably have taken years to develop. Expert historians hold a key role within this, undertaking pivotal research in Holocaust trials that contribute to the overall historiographical debate, consequently serving both the courtroom and wider historiography.

Methodological Limitations

In contrast to material relating to other case studies within this dissertation, research conducted for the Frankfurt-Auschwitz trial was shaped by limited access to primary sources. As Devin Pendas notes, the indictment is still only available in the Fritz-Bauer-Institut archives.[6] Consequently, this chapter has used translations of the

[5] Turner, *Historians at the Frankfurt Auschwitz Trial*, p.115.
[6] Pendas, *Frankfurt Auschwitz Trial,* p.106.

indictment as published within existing scholarly literature, produced by historians such as Pendas, Wittmann, and Turner.

Most significant however is the absence of transcripts of the historical expert testimony heard during the trial. The 'lack of written transcription' is acknowledged by Wittmann and Norman J. W. Goda.[7] As Goda notes, transcription in West German criminal courts during the 1960s was prohibited by law to ensure the privacy of acquitted defendants.[8] However, audio recordings of the Frankfurt-Auschwitz trial survived. Since 2005, the Fritz-Bauer-Institut have transcribed the original trial recordings to 13,279 pages of text.[9] Whilst the transcripts are available online, there is no recording or transcription of the expert historians' testimony during the trial.[10] As William Clegg QC reflected in reference to Christopher Browning's expert report during the *Sawoniuk* trial (1999), the historical report is 'basically what [Browning] said [during his testimony]'.[11] Clegg is discussing Browning's expert report and testimony within the context of English common law. Nonetheless, although the Frankfurt-Auschwitz proceedings were tried under the StPO, arguably there are no recordings of the expert historians' testimony because the *Gutachten* were more detailed than the historians' oral evidence. Due to the absence of trial transcripts, the assessment of the expert reports to the overall trial will be based on the *Gutachten* published in *Anatomy*.

[7] Wittmann, *Beyond Justice*, p.9.
[8] Goda, 'Law, Memory, and History', p.804.
[9] *Frankfurter Auschwitz-Prozesses*. 1963-1965. Fritz Bauer Institut. Accessed: 16 January 2019. [http://www.auschwitz-prozess.de/index.php]; see Turner, *Historians at the Frankfurt Auschwitz Trial*, pp.72, 196.
[10] When possible Naumann's primary reports will be used as the first base source. After that, the works by Pendas, Wittmann, and Turner provide a foundation for the rest of the research undertaken for this chapter.
[11] William Clegg QC (Barrister, 2 Bedford Row), interviewed by Amber Pierce, London, 22 May 2019.

Given these methodical limitations, this chapter is therefore regarded as a bridging chapter. However, as seen through the following analysis of the secondary sources, the Frankfurt-Auschwitz trial does make a significant contribution to the evolution of the historian as an expert witness due to the professionalisation of the expert in comparison with the dual role observed in the *Hostage* Case.

EXISTING LITERATURE

Exploring the existing literature will illustrate the historiographical impact of the *Gutachten* produced for the Frankfurt-Auschwitz trial, consequently establishing the status of Holocaust trials as catalysts for fundamental historical research.

Anatomy of the SS State

The publication of *Anatomy* in 1965 marked a turning point in Holocaust historiography as one of the first in-depth texts made available to the public that accounted for the different dimensions of the Third Reich (the SS, concentration camps, persecution of the Jews, and Nazi actions in the Soviet Union).[12] As Dieter Pohl notes, the publication of *Anatomy* did not result in an immediate development of scholarly research on Auschwitz or the structure of the Third Reich.[13] Rather, it readdressed the debate surrounding the epistemological differences addressed in chapter two between the principles of the historical and legal disciplines. From one perspective, Jürgen Kramer argued that judges overseeing subsequent Holocaust trials could not properly assess

[12] The reports were produced by Buchheim, Broszat, Krausnick, and Jacobsen respectively.
[13] Pohl, 'Prosecutors and Historians', p.123.

the responsibility of the defendants 'without the irrefutable knowledge' presented in *Anatomy*.[14] By contrast, in 'The Contemporary Historian as Court Expert' (1965), Ernst Forsthoff argued that the 'forensic use' of *Gutachten* spelt 'the death of research in the humanities' as *Gutachten* were produced to comply with the criminal evidentiary legal standards.[15]

Nonetheless, contemporary reviews of *Anatomy* cited the 'devastating clarity' with which Buchheim, Broszat, Krausnick, and Jacobsen presented the structure of the Third Reich and the systematic persecution of the Jews through the Nazi political theory.[16] For Reuben Ainsztein, *Anatomy* would prove 'indispensable' to Holocaust Studies and the wider public's engagement with the implementation of Nazi genocide.[17] *Anatomy* signified a shift in the focus within Holocaust historiography, with historians' evidence becoming more granular due to the evidential material available through trial proceedings, thereby providing a detailed historiography of Nazi criminality and an insight into how the Third Reich operated. As Ainsztein argued, no 'serious historian' would be able to discuss the structure of the Jewish ghettos without engaging with Krausnick's work on 'The Persecution of the Jews'.[18]

Since the publication of *Anatomy,* and subsequent developments in historiography, critical reviews have become more balanced. Pendas affirms the status of *Anatomy* as a historical classic: '[i]t is precisely the book's capacity to both make ongoing

[14] Turner, *Historians at the Frankfurt Auschwitz Trial,* p.127.
[15] Ibid, p.14.
[16] Michael R. D. Foot, 'Review: The Anatomy of the SS State', *The English Historical Review*, Vol. 86, No. 338 (1971): p.210.
[17] Reuben Ainsztein, 'Review of Anatomy of the SS State', *International Affairs*, Vol. 45, No. 2 (1969): p.290.
[18] Ibid.

contributions to the study of the Third Reich and provide an important lens through which to view the 1960s in West Germany that lend it its classic status.'[19] However, Pendas also notes that amongst the 'small group' of historical classics, *Anatomy* is one of the more surprising texts. One reason for this is the abovementioned granular approach to research that was conducted whilst producing the expert reports for the trial.[20] As Pendas states, *Anatomy* is 'precisely the kind of narrowly focused, empirically based work that tends to be superseded relatively quickly by subsequent publications.'[21] Moreover, within the recent development of Holocaust Studies there has been a 'voluntarist turn' with historians seeking to stress the scale of Nazi criminality and the extent of complicity by the general German public.[22] Indeed, the controversy surrounding the works of Browning (*Ordinary Men: Reserve Police Battalion 101 and the Final Solution in Poland*, 1992) and Daniel Goldhagen (*Hitler's Willing Executioners: Ordinary Germans and the Holocaust*, 1996) can be viewed as a historiographical development of Buchheim's assessment of the SS and the 'superior orders' debate addressed in *Anatomy*.[23] The resonance that Browning's and Goldhagen's arguments have with the work of Buchheim demonstrates the underlying impact that *Anatomy* continues to have in the field of Holocaust Studies. Moreover, in subsequent articles as well as in his report for the *Irving* trial, Browning has offered his interpretation on when the Final Solution was decided relating to the Wannsee

[19] Pendas, '"Political Tyranny"', p.476.
[20] Some of the research presented in the reports was conducted prior to the expert historians' being asked to testify for the trial. For example, Buchheim's report on the SS included material used in earlier essays. Ibid, p.477.
[21] Ibid, p.475.
[22] Ibid, p.478.
[23] As mentioned in chapter two, 'superior orders' can also be debated within the context of the expert reports produced by Seraphim. Goldhagen, *Hitler's Willing Executioners*; Browning, *Ordinary Men*; Christopher R. Browning, *The Origins of the Final Solution: The Evolution of Nazi Jewish Policy, September 1939-March 1942* (London: Arrow Books, 2004).

Conference.[24] Browning's engagement with the debate can be linked to the 'functionalist' argument presented by Broszat and Mommsen addressed below. The link between the work of Broszat and Browning not only demonstrates the influence that Broszat had on Holocaust historiography, but the impact that expert reports produced for earlier Holocaust trials can have on an argument presented in subsequent expert reports. As Pendas asserts, '[i]f the recent historiography of the Holocaust has made tremendous progress, it is at least in part because it has been able to incorporate a rich understanding of the exact operation of the Third Reich.'[25]

Intentionalists and Functionalists

Within the wider field of Holocaust historiography, legal arguments presented during the Frankfurt-Auschwitz trial and *Anatomy* contributed to the rise of the intentionalist vs. functionalist debate. Coined by Timothy Mason in his 1981 essay 'Intention and Explanation: A Current Controversy About the Interpretation of National Socialism', the terms intentionalist and functionalist came to represent different schools of thought within Holocaust historiography.[26] Mason critiqued Karl Dietrich Bracher for the latter's 'intentionalist' analysis of the role of Hitler within Nazi Germany. According to Bracher, when discussing the fate of the Jews, it was Hitler's *Weltanschauung* 'and nothing else that mattered in the end'.[27] Thus for Mason, the intentionalist school of thought predominantly focused on the actions of Hitler in understanding the decision to

[24] Christopher R. Browning, 'The Nazi Decision to Commit Mass Murder: Three Interpretations. The Euphoria of Victory and the Final Solution: Summer-Fall 1941', *German Studies Review*, Vol. 17, No. 3 (1994): pp.473-478.
[25] Pendas, '"Political Tyranny"', p.480.
[26] Timothy Mason, 'Intention and Explanation: A Current Controversy About the Interpretation of National Socialism', in *The 'Final Solution': The Implementation of Mass Murder*, Volume 3, Part 1, ed. Michael Marrus (Westport, Connecticut: Meckler Publishing, 1989), pp.8-10.
[27] Karl Dietrich Bracher, 'The Role of Hitler: Perspectives of Interpretation', in *Fascism: A Reader's Guide*, ed. Walter Laqueur (California: University of California Press, 1976), p.217.

conduct the Final Solution, whilst neglecting to consider the broader context of the Third Reich, with Mason arguing that this was due to the economic situation of Germany in the late 1930s.[28]

The historical interpretation that focused on the role of Hitler within the Third Reich had existed for decades prior to Mason's introduction of the term 'intentionalism'. Indeed, the Prosecution during the proceedings of the Frankfurt-Auschwitz trial sought to present an intentionalist historical narrative to the Court. Echoing the expert report reproduced by Krausnick (focusing on the history of antisemitism both before and during the Third Reich), in the closing speeches lead prosecutor Hanns Großmann contended that the policy of extermination was the product of a deliberate and conscious plan ordered by the Nazi leadership and enacted by the defendants. Großmann argued:

> There can be *no doubt* that the *National Socialist leadership*, with Hitler, Himmler, Göring and Heydrich at the top, *had decided upon a radical Final Solution to the Question, in the sense of the physical extermination of all European Jews, before the start of the campaign against the Soviet Union in 1941*. [emphasis in original][29]

Broszat criticised Bracher's intentionalist conclusions concerning the role of Hitler within the Third Reich. Broszat developed the 'functionalist' (or 'structuralist') interpretation of Nazi Germany, alongside Hans Mommsen. According to Mommsen, Hitler was a 'weak dictator', reacting to various pressures and unfolding situations, such as the failure of the Madagascar Plan that sought to move all European Jews to the island of Madagascar, rather than acting as an absolute ruler as Bracher

[28] Mason, 'Intention and Explanation', p.18.
[29] Pendas, *Frankfurt Auschwitz Trial*, p.199.

contends.[30] Alongside Mommsen's 'weak dictator' theory, Broszat argued that a monopoly of political power existed within the Third Reich. In his 1969 book *Der Staat Hitlers* (*The Hitler State*, translated and published in English in 1981), Broszat asserted that the Third Reich was a polyocracy (a state ruled by more than one individual), as opposed to a monocracy as argued by the intentionalists. According to Broszat, the competition of individuals within the polyocracy to put themselves in favour with Hitler 'put an end to collective and regularised forms of rational policy discussion.'[31] The context of the intentionalist and functionalist debate, and its origins in the Frankfurt-Auschwitz trial, is particularly important to the historian seeking to understand the narratives that legal counsels seek to present during Holocaust trials, and its impact on the use of the expert evidence.

Expert Witnesses

As demonstrated above, the work of Buchheim, Broszat, Krausnick, and Jacobsen is fundamental to the historiography of the Holocaust, with the expert reports seen as advancing the scholarly 'awakening' during the 1960s.[33]

Whilst the contribution of the expert historians has only recently undergone detailed assessment, as chapter one addresses, the methodology of the historians working at

[30] Hans Mommsen, 'Nationalsozialismus', in *Sowjetsystem und demokratische Gesellschaft*, ed. Claus D. Kernig, in K. J. Mason, *Republic to Reich: A History of Germany, 1918-1939* (South Melbourne, Victoria: Cengage Learning Australia, 2007), p.141; Hans Mommsen, *From Weimar to Auschwitz: Essays in German History*, trans. Philip O'Connor (Princeton: Princeton University Press, 1991).
[31] In his review of David Irving's work *Hitler's War* (1977), Broszat notes that 'the physical liquidation of the Jews was set in motion not through a one-time decision but rather bit by bit'. Martin Broszat, *The Hitler State: Foundation and Development of the Internal Structure of the Third Reich*, trans. John W. Hiden (New York: Routledge, 2013, First Edition), p.xi; Martin Broszat, 'Hitler and the Genesis of the "Final Solution": An Assessment of David Irving's Theses', in *Aspects of the Third Reich*, ed. H. W. Koch (Houndmills: Macmillan Publishers, 1985), p.398.
[33] Wittmann, *Beyond Justice*, p.13.

the IfZ (Buchheim, Broszat, and Krausnick) has been debated for almost twenty years. The most notable critique of the IfZ is by Nicolas Berg. According to Berg, the IfZ historians presented selective interpretations of the Third Reich through neglecting their own 'autobiographical memory' and excluding the scholarly contributions of Jewish survivor historians such as Joseph Wulf.[34]

Berg critiques the historians and the IfZ in three main ways. Firstly, Berg addresses the personal history of the IfZ historians. Berg claims that Broszat was 'unjust' in 'hiding' his past, with Broszat belonging to the Hitler Youth and joining the National Socialist party in 1944, although his membership of the Nazi party only came out after his death in 1989.[35] Moreover as Irmtrud Wojak notes, Berg explicitly accuses Broszat and Buchheim of having a 'positively allergic [reaction] to the documentation by Jews of the National Socialists' crimes'.[36] For Wojak, Berg's assessment of Broszat alongside the IfZ's alleged neglect of Jewish survivor histories of the Holocaust, seeks to insinuate that due to Broszat's earlier experience with the Nazi Party, Broszat sought to provide 'an apologetic treatment of National Socialism'.[37] Ian Kershaw has responded to the accusations made by Berg against Broszat. According to Kershaw, 'Broszat's driving incentive was to help an understanding of how Germany could sink

[34] Wulf was a German-Polish Jewish historian and a survivor of Auschwitz. Wulf produced a three-volume work on the different structures within the Third Reich: *The Third Reich and the Jews* (1955), *The Third Reich and its Servants* (1956), and *The Third Reich and its Thinkers* (1959). When discussing the tense relationship between the IfZ (particularly Broszat) and Wulf, Berg is complimentary of Wulf's methodology and approach to research on the Third Reich. For Berg, Wulf's three-volume work (and subsequent publications) placed the Holocaust, and the experience of the Holocaust, at the centre of Holocaust historiography as opposed to 'objective' research presented by the IfZ. Nicolas Berg, *The Holocaust and the West German Historians: Historical Interpretation and Autobiographical Memory*, trans. and ed. Joel Golb (Madison: The University of Wisconsin Press, 2015), p.9.
[35] Ibid, p.14.
[36] Irmtrud Wojak, 'Nicolas Berg and the West German Historians: A Response to his 'Handbook' on the Historiography of the Holocaust', *German History*, Vol. 22, No. 1 (2004): p.112.
[37] Ibid. For discussions concentrating on the historiographical demands of German historians studying Nazism following the collapse of the Third Reich, see Dunk, 'German Historians and the Crucial Dilemma', pp.376-382.

into barbarity. That he himself had succumbed […] was central to his motivation to elucidate for later generations how it could have happened.'[38] Similarly, Alan Steinweis argues that Berg 'fails to appreciate' the extent that other scholars' supported the functionalist interpretation of the Third Reich despite having 'no personal or political reason [to]'.[39]

Steinweis's assessment of Berg's conclusions addresses the second area that Berg critiques: the functionalist interpretation. Berg is particularly critical of the argument that there is an absence of a clear plan relating to the treatment of European Jews prior to 1941.[40] Perhaps unsurprisingly Mommsen is particularly critical of Berg's assessment of the functionalist interpretation, rejecting Berg's 'political-moral approach to the history of National-Socialism'.[41] As Wojak notes, Berg's main argument against Broszat and Mommsen 'has to do with this general way of seeing things'.[42] For Berg, 'only the younger generation of historians has properly perceived the twelve years of National Socialist dictatorship … the only correct view, in other words, is the view from Auschwitz.'[43] Indeed, comparing the work of Wulf and Broszat, Berg complements the methodology of Wulf who 'in his own way wishes to see facts emerge from documents' and who 'did not develop any interpretive model' of the Third Reich 'to come to terms with these facts'.[44]

[38] Ian Kershaw, 'Beware the Moral High Ground', *H-Soz-Kult* (24 February 2004). Accessed: 16 January 2019. [https://www.hsozkult.de/debate/id/diskussionen-418]
[39] Steinweis, 'West German *Zeitgeschichte*', p.50.
[40] Berg's critique of the functionalist argument is included in the original German edition of Berg's work (*Der Holocaust und die westdeutschen Historiker. Erforschung und Erinnerung*, 2003). However, it is only briefly referenced in the American edition. Berg, *The Holocaust and the West German Historians*, pp.14-15.
[41] Ibid, p.14.
[42] Wojak, 'Nicolas Berg', p.118.
[43] Ibid.
[44] Berg, *The Holocaust and the West German Historians*, p.9.

For Berg, Wulf's methodology meant that Wulf was not 'granted a stamp of "objectivity"' by the IfZ.[45] Arguably, it is the IfZ's concentration on historical objectivity that is Berg's biggest criticism of the histories produced by Broszat, Buchheim, and Krausnick. For Berg, the IfZ was defined 'far more by research on the past than by [the] memory of it', linking to Berg's overall argument relating to the synthetic theory of memory and historiography.[46] Berg goes as far to argue that whilst *Anatomy* became the canon of historiography on the Third Reich, the extermination of Europe's Jews addressed through the expert reports was 'not conceptually grasped, [and] not perceived as a unique event'.[47] Criticism of the IfZ's objectivity is reflective of the reservations voiced against Broszat's call to 'historicise' Nazism, which as Donald Bloxham notes risked 'banalizing' the history of the Third Reich.[48] For Bloxham, '[t]aking emotion out of the equation is impossible and scarcely desirable'.[49] Nonetheless, whilst the degree of objectivity sought by the IfZ may be questioned, the research produced was fundamental throughout the proceedings of the Frankfurt-Auschwitz trial; making the wider historiography of the Third Reich accessible, and understandable to the public.

Berg presents an overly critical view of the histories produced by the IfZ during the 1950s and 1960s. Berg's critique of objective historiography arguably seeks to downplay the status of *Anatomy* within Holocaust Studies and the wider public understanding of the Third Reich. It is the objective nature of the IfZ historiography that made the research of Broszat, Buchheim, and Krausnick suitable for a trial format.

[45] Ibid.
[46] Ibid, pp.4, 117.
[47] Ibid, p.117.
[48] Bloxham, 'Streicher to Sawoniuk', p.414.
[49] Ibid.

Whilst it may be correct to argue that the Frankfurt-Auschwitz trial produced a historical narrative of the Holocaust that established the 'extraordinary' within 'ordinary circumstances', it is a criticism of the desire by the Prosecution to generate a historical narrative of the Holocaust that preserves a positive image of Germany rather than the specific research of the expert historians.[50] As explained in chapter two, an expert witness is not bound to reach a specific conclusion in their research undertaken for the trial. Consequently, the socio-political context should not diminish the significance of the research conducted by the expert historians, despite the wider context of West Germany influencing the Prosecution's failure to address the full systematic scale of the Holocaust and the individual's role within its implementation. Indeed, without the research conducted by the expert historians and the subsequent publication of *Anatomy*, Holocaust historiography would be left notably wanting.

TRIAL CONTEXT

As Pendas and Wittmann agree, the Frankfurt-Auschwitz trial was the 'most dramatic and politically resonant' trial in West Germany from 1945-1980. Though there was a surge in convictions between 1945 and 1949 (4,419 in total), the number of investigations in the 1950s dropped from 2,495 in 1950, to 467 in 1952, and only 183 in 1957.[51] The founding of the Central Office in 1958 following the *Ulm* Trial marked a

[50] Berg, *The Holocaust and the West German Historians*, p.177.

[51] A lack of manpower and qualified personnel trained to deal with the quantity of research needed to bring a Nazi perpetrator case to trial contributed to the decline in Nazi investigations. The preliminary investigation for the Frankfurt-Auschwitz trial began following the denunciation of Wilhelm Boger by Adolf Rogner, a prisoner who was awaiting trial at Bruchsal. It was only after Hermann Langbein became involved in May 1958 that investigations began. It took seven months from Rogner's denunciation of Boger to Boger's arrest on 2 October 1958. Whilst the delay was in part due to running security checks on Rogner himself (Rogner had voiced sympathies with East Germany), the time taken from denunciation to the arrest of one defendant demonstrates the struggle that existed to achieve prosecution during the 1950s. Naumann, *Auschwitz*, pp.6-7; Wittmann, *Beyond Justice*, pp.26-27.

turning point for the prosecution of Nazi perpetrators in West Germany. Indeed in 1959, the number of preliminary investigations had increased to 400 and continued to rise.[52] As Pendas asserts, 'it might therefore be more accurate to argue that the shift to a more critical juridical politics of the past was a cause of the political and cultural upheavals of the 1960s rather than a consequence.'[53]

The Frankfurt-Auschwitz trial thus belonged to a period of historiographically influential trials that dramatically altered the public understanding of Auschwitz and the Holocaust. Establishing the trial context therefore provides the framework within which the legal counsels' use of the *Gutatchen* and subsequent historical interpretations in the closing speeches and overall judgement can be understood.

German Penal Code

As defined in chapter two, the differences between the StPO and the English common law system affected the use of expert testimony within the courtroom. The non-retroactive status of the StGB provided restrictions for both the prosecutor and the historian in the research that would be required for the trial. Due to the ban on retroactivity in paragraph 103 of the StGB, the defendants during the Frankfurt-Auschwitz trial could only be charged with murder and not genocide.[54] According to StGB section 211, a murderer was:

> whoever kills a human being out of murderous lust, to satisfy his sexual desires, from greed or otherwise base motives, treacherously or cruelly or

[52] Pendas, *Frankfurt Auschwitz Trial*, pp.20-21.
[53] Pendas, 'Seeking Justice', pp.362-363.
[54] By 1960 the charge of manslaughter had fallen outside the statute of limitations. German Criminal Code. Section 212, Section 25-29.

> with means dangerous to the public or in order to make another crime possible or cover it up.[55]

The definition of murder as stipulated in the StGB is woefully inadequate, lacking the appropriate theoretical foundation to grasp the scale of the Nazis' state-sponsored scheme of mass murder. Furthermore, the proving of murderous lust (or 'bloodlust', an act done 'on the basis of an unnatural joy at the destruction of human life') became fundamental to the Prosecution's argument, as without it, defendants could only be convicted as accomplices to murder regardless of whether they knew that the act committed was illegal.[56] Section 211 meant that not only must the criminal act be proven, but the defendant's personal responsibility must also be established to determine the guilt of the individual. The need to produce extensive documents citing the chains of command that existed within the Third Reich thus became essential to West German Holocaust criminal trials. Without these historical reports, the judges could not rule on where orders ended and personal motives began.[57] Historical research would consequently have to verify the chronology of events and establish the legal intent that culminated in the defendant's criminal act. The charge of murder was, therefore, deeply problematic with prosecuting teams pursuing highly subjective 'base motives' including cruelty, treachery or maliciousness, a lust for killing, or sadism in their charges against defendants.[58]

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[55] Ibid. Section 211.
[56] Pendas, *Frankfurt Auschwitz Trial,* p.57.
[57] Turner, *Historians at the Frankfurt Auschwitz Trial*, p.5.
[58] All historians agree that the non-retroactive nature of the StGB seriously hindered the Prosecution during Nazi crime trials in West Germany. By 1992, approximately 103,823 German citizens had been investigated for Nazi crimes. However, only 6,487 were prosecuted and convicted, and 5,513 for aiding and abetting murder. According to the 1871 Penal Code, racial hatred was not central to a murder conviction. Therefore, only seven percent of the convictions related to the mass murder of Jews. Wittmann, 'The Wheels of Justice Turn Slowly', p.350; Pendas, *Frankfurt Auschwitz Trial*, p.53; Rebecca Wittmann, 'Indicting Auschwitz? The Paradox of the Frankfurt Auschwitz Trial', *German History*, Vol. 21, No. 4 (2003): pp.511-512.

Legal Actors

Defendants

The indictment initially charged twenty-four individuals with murder. However, the original lead defendant, Richard Baer, the last commandant of Auschwitz, died in June 1963, two months after the indictment was issued. The case against Hans Nierzwicki was also dropped prior to the trial's opening. Additionally, Gerhard Neubert and Heinrich Bischoff had their cases suspended for health reasons.[59] Therefore, out of the twenty-four originally indicted and the twenty-two who went to trial, only twenty faced a verdict by the Court. The defendants were: Robert Mulka; Karl Höcker; Friedrich Boger; Hans Stark; Klaus Dylewski; Johann Schoberth; Bruno Schlage; Franz Hofmann; Pery Broad; Oswald Kaduk; Stefan Baretzki; Arthur Breitwieser; Dr. Franz Lucas; Dr. Willi Frank; Dr. Willi Schatz; Dr. Victor Capesius; Josef Klehr; Herbert Scherpe; Emil Hantl; and Emil Bednarek.[60]

Judges

The presiding judge was Hans Hofmeyer. Though Hofmeyer did not object to the Prosecution's use of expert historians, the substitute judge (*Ergänzungsrichter*) Werner Hummerich was vehemently against historians entering the courtroom.[61] Hummerich's objections against historians 'interfering' in court mirrored the objections

[59] Neubert was later re-tried at the Second Auschwitz Trial (14 December 1965 to 16 September 1966). Bischoff died before his case could be re-opened. Naumann, *Auschwitz,* p.8; Pendas, *Frankfurt Auschwitz Trial,* p.1.
[60] For a full list of the defendants' roles in Auschwitz, see: Naumann, *Auschwitz,* pp.10-26; Wittmann, *Beyond Justice*, pp.131-132.
[61] A substitute judge participates in the trial's proceedings if one of the assistant judges falls ill.

made by Fenstermacher during the *Hostage* Case. Hummerich argued that the topics dealt with in court 'primarily related to facts that are proven through documents. Therefore, they [the facts] absolutely cannot be introduced into the HV [*Hauptverhandlung* or main trial] through expert witnesses'.[62] Whilst one may expect the opposing counsel to raise objections along a similar line in the hope of dismissing the expert's evidence, a judge should be impartial and refrain from expressing such views given the weight of their opinion on the overall evaluation of the evidence. As Hofmeyer was the presiding judge and accepted the place of expert testimony within the trial, Broszat, Buchheim, Krausnick, and Jacobsen were permitted to give oral evidence. However, Hummerich's objections demonstrated that whilst there was a need within the StGB to provide contextual information that documented the development of the Third Reich, the expert historians would be rendered 'generally meaningless' because they were not of direct legal relevance despite their *Gutachten* providing the Court with the foundation to understand the defendants' charges.[63]

Legal Counsel

Bauer played a key role in deciding the Prosecution's argument and evidence to be presented at the trial. However, Großmann served as lead prosecutor during the trial proceedings. Joachim Kügler, Georg Vogel, and Gerhard Wiese acted as subordinates to Großmann during the trial.[64]

[62] Turner, *Historians at the Frankfurt Auschwitz Trial*, p.68.
[63] Ibid.
[64] Ibid, pp.51-52; Pendas, *Frankfurt Auschwitz Trial,* pp.47, 90-91.

As chapter two notes, German domestic courts permit adjutant prosecutors to appear as a third legal counsel to represent the injured party with three adjutant prosecutors appearing in the Frankfurt-Auschwitz trial. Henry Ormond and his associate Christian Raabe represented fifteen relatives of Auschwitz victims from twelve different countries.[65] Fredrich Karl Kaul represented relatives of the victims of Auschwitz from the German Democratic Republic (GDR, East Germany).[66]

The Defence consisted of twenty-one lawyers.[67] Hans Laternser, Defence counsel in the *Hostage* Case, also appeared for the Defence in the Frankfurt-Auschwitz trial. As stated in chapter three, Laternser responded to the Prosecution's objection to the expert testimony by arguing that 'the conditions in the Balkans are of decisive importance [to the trial]'.[68] However, in his closing speech for the Frankfurt-Auschwitz trial, Laternser retorted that the StPO 'does not recognise the giving of lectures [by expert historians] for ignorant jurors or other trial participants.'[69] Laternser's argument against the expert historians' *Gutachten* supports the observation raised in chapter two, that objections faced by expert witnesses from opposing counsels is not necessarily reflective of the existing interdisciplinary relationship between history and law.

[65] Pendas, *Frankfurt Auschwitz Trial*, pp.91-92.
[66] Kaul's engagement with West German lawyers such as Laternser and Großmann provided the opportunity for Kaul to expose the flaws within the West German judicial system and its links to capitalism within the Third Reich.
[67] For the full list of defence counsels and who they represented, see 'Opening Decision of the District Court', *Frankfurter Auschwitz Prozesses*. Frankfurt Am Main (7 October 1963). Accessed: 20 January 2019. [http://www.auschwitz-prozess.de/index.php]
[68] *Wilhelm List et al.* 6 October 1947. p.3,777.
[69] Turner, *Historians at the Frankfurt Auschwitz Trial*, p.104.

Preliminary Investigations

Under the StPO, the court procedure is divided into three sections: the pretrial investigation, the interim proceedings, and the main proceedings. The pre-trial investigation began in 1958, in which approximately 950 individuals were investigated, twenty-two of whom went to trial in 1963.[70]

The pretrial investigation was conducted exclusively by the Prosecution. Bauer sought to tackle a frequently used defence strategy during Nazi trials: due to the demand for specific evidence established through the criminal evidentiary standard, the Defence would dissect recent historical events with the intention of discrediting accepted fact. Thus, Bauer wanted the Prosecution's evidence both to satisfy the legal arguments against the defendants as well as to firmly establish the role of the defendants' acts within the wider structure of the Third Reich.[71]

The use of historical evidence was demonstrated in the Prosecution's 'Motion to Open a Preliminary Judicial Inquiry' (submitted 12 July 1961). Though this motion was not the official indictment, it already included sixty pages of historical background on the 'development of the persecution of the Jews' and the Final Solution.[72] The contextual information in the Motion pre-empts the detail provided in Broszat and Krausnick's reports. The inclusion of historical knowledge at such an early stage demonstrates

[70] Ibid, p.72.
[71] Devin O. Pendas, 'The Historiography of Horror: The Frankfurt Auschwitz Trial and the German Historical Imagination', in *Lessons and Legacies VI,* ed. Diefendorf, p.211; Hannah Arendt, 'Introduction', in *Auschwitz: A Report on the Proceedings,* ed. Naumann, p.xvii.
[72] Wittmann, *Beyond Justice*, p.99.

that it was fundamental to address the 'base motives' of the defendants required in section 211 of the StGB.

However, the use of expert historical reports prior to the trial's proceedings readdressed the epistemological differences between history and law. Whilst Bauer later wrote an opinion piece on the 10 January 1963 arguing in favour of the 'judicial indispensability' of the *Gutachten*, he added that *Gutachten* should meet a strictly legal purpose.[73] Bauer instructed that within the historians' testimony 'an academic lecture is to be avoided'.[74] Instead, the historians were to provide 'simple' testimony suitable for the lay juror and the general public.[75] Bauer's instructions that the expert historians were not to address the specific crimes of the defendants' is standard procedure for expert reports and testimony. Within this context Ibbeken and Stadtmüller's dual role as both an expert on Balkan history and an eyewitness for specific defendants in the *Hostage* Case is reaffirmed as unique. The difference between the testimony produced by the expert historians in 1947 compared to 1963 demonstrates the progression of the historian as an expert witness over the 1950s. However, Bauer's requirement that the expert historians had to make their testimony suitable for the general public as well as the Court, demonstrates the wider purpose of the expert historians' testimony in the Frankfurt-Auschwitz trial. It is likely that the historical account of the genesis of the camp system within the Third Reich presented through the expert reports, would have provided many Germans with their first introduction to the details of genocide at Auschwitz given the slow development of West German Holocaust historiography during the 1960s.[76]

[73] Ibid, p.60.
[74] Ibid, p.58.
[75] Ibid.
[76] Wittmann, 'Indicting Auschwitz?' p.506.

Indictment

Issued on 16 April 1963, the indictment comprised of approximately 700 pages and was split into two sections: historical background on the Third Reich and the charges against the defendants.[77] The two sections indicated that the Prosecution's aim was to indict both the structure of the Third Reich as well as the defendants. The Prosecution sought to emphasise the scale of the broader (illegal) system that the defendants served by drawing attention to the bureaucratic organisation of the concentration camps. This focus emphasises the indictment's status as both a judicial and historiographical document.

All the defendants were charged with murder in the indictment. The charges fell roughly into two categories: murder as part of the general process of extermination conducted at Auschwitz; and killings where the defendants were accused of a more direct involvement, such as torture, medical murders, or other 'excessive acts'.[78] The inclusion of the official Nazi camp policies was, therefore, of particular importance as it enabled the Prosecution to demonstrate where policy ended and the defendants 'base motives' began.[79] Yet the reliance on official Nazi orders to prove the illegality of the defendants' actions created a controversial situation where Nazi policies were used as the 'legal norm' and only actions that departed from these policies constituted individual acts.

[77] Wittmann, *Beyond Justice*, p.95.
[78] Pendas, '"Eichmann in Jerusalem"', p.92.
[79] The indictment was also criticised on the grounds that by indicting a 'structure' enabled individuals to escape responsibility for their crimes within the Third Reich. Whilst in the indictment the Prosecution proposed that all defendants were guilty of perpetrating murder, the judicial 'Third Criminal Division' at Frankfurt who drafted the order to convene (the main proceedings) were not convinced that all the defendants should be charged with Section 211 of the StGB. Consequently, the Division changed half of the charges against the defendants to accessory to murder. Pendas, *Frankfurt Auschwitz Trial*, p.114; Wittmann, *Beyond Justice,* pp.110, 126; Turner, *Historians at the Frankfurt Auschwitz Trial*, p.50.

From a historiographical perspective, the indictment stressed the role of Hitler and Nazi antisemitism, arguing that there had been a clear plan of Jewish annihilation.[80] This interpretation of history not only reflected the general state of Holocaust historiography during the 1960s, but it also demonstrated the constraints applied to a binary history of Auschwitz presented by the Prosecution during the trial.[81] The intentionalist historical narrative presented in the indictment provided a clear framework and chain of command so that the Court could understand and apply the StGB, and sought to act as a history lesson to the German public.

EXPERT WITNESSES

Overall, five expert historians were called to testify: four for the Prosecution and one for the East German adjutant prosecutor. Of these, only the reports provided by Buchheim, Broszat, Krausnick, and Jacobsen were considered admissible by the Court.[82] By assessing these reports it will be possible to establish how the historians

[80] Turner, *Historians at the Frankfurt Auschwitz Trial*, p.49.

[81] A further debate arose following the charges against Bednarek. As a *kapo*, he was an inmate in Auschwitz who performed violent duties under the threat of death, unlike the SS officers. Thus, many *kapos* viewed the fulfilment of these duties as their only chance of survival. However, memoirs and witness testimonies have argued that many of the *kapos* were excessively violent and acted beyond their required duties. The decisions to use the same standards of criminality against the other defendants and Bednarek generated questions about the suitability of using the StGB to prosecute Nazi crimes. Wittmann, *Beyond Justice*, p.116; Pendas, *Frankfurt Auschwitz Trial*, p.111.

[82] Jurgen Kuczynski was a professor of economic history at Humboldt University, 1946-1970 (Emeritus), Director of the Institute for the History of Economic Science of the (East) German Academy of Sciences from 1955-1968, and served as the President of the Society for the Study of the Culture of the Soviet Union, 1947-1950. Kuczynski joined the Communist Party of Germany (KPD) in 1930 until it was banned by the Nazis in 1933. During the war he worked as part of the Communist underground and headed the KPD émigré organisation when he was residing in Britain after 1936. In 1945 Kuczynski returned to Berlin and joined the Socialist Unity Party of Germany when it was established in 1946. Kuczynski was also a compulsive writer. His works include *The Condition of the Workers in Great Britain, Germany, and the Soviet Union 1932-1938* (London: V. Gollancz ltd., 1939) and *300 Million Slaves and Serfs: Labour Under the Fascist New Economic Order* (London: I. N. G. Publications, 1942). Pendas, *Frankfurt Auschwitz Trial,* p.152; David Childs, 'Obituary: Professor Jurgen Kuczynski', *The Independent* (13 August 1997). Accessed: 16 January 2019 [https://www.independent.co.uk/news/people/obituary-professor-jurgen-kuczynski-1245205.html]

contributed towards the Prosecution's overall aims and objectives, and the historiographical relevance of their evidence.

Biographies

The historians for the Prosecution were all chosen for their professional experience and ability to 'analyse the mental make-up of the SS with the strictest objectivity'.[83] Krausnick and Buchheim had already gathered five courtroom appearances between them, including Krausnick's testimony in the *Ulm* trial, despite historians as expert witnesses only beginning to be fully utilised from the 1950s.[84]

Krausnick was the director of the IfZ from 1959-1972. He received his doctorate at the University of Berlin in 1938 following his studies in history and political science at the University of Breslau (1923-1924), the University of Heidelberg (1924), and the University of Berlin (1924-1929). Prior to the Frankfurt-Auschwitz trial, Krausnick was conducting research for a book related to his expert report on the persecution of Jews and antisemitism before and after the Third Reich.[85] Krausnick's publication *Die Truppe des Weltanschauungskrieges: Die Einsatzgruppen der Sicherheitspolizei und des SD 1938–1942* (1981) concentrated on the mass murder of Jews in the occupied territories of the Soviet Union by the Einsatzgruppen and was considered a breakthrough for Holocaust Studies.[86]

[83] Wojak, 'Nicolas Berg', p.111.
[84] Turner, *Historians at the Frankfurt Auschwitz Trial,* p.61.
[85] 'Helmut Krausnick', *Munzinger: Internationales Biographisches Archiv* (12 March 1990). Accessed: 16 January 2019. [https://www.munzinger.de/search/go/document.jsp?id=00000013234]
[86] *Die Truppe des Weltanschauungskrieges: Die Einsatzgruppen der Sicherheitspolizei und des SD 1938–1942* (Stuttgart: Deutsche Verlags-Anstalt, 1981).

Broszat also worked at the IfZ between 1955-1989, becoming the director in 1972. Broszat was a professor at the University of Cologne (1954–1955) and a Professor Emeritus at the University of Konstanz (1969–1980). Broszat specialised in modern German social history, from which his functionalist narrative of the Third Reich stemmed. Broszat's expert report on the concentration camps and subsequent publication *The Hitler State* have been described as 'indispensable for any serious study' of Nazi Germany.[87]

Buchheim worked at the IfZ from 1951-1966 as a research assistant. Prior to the IfZ, Buchheim studied philosophy and classical philology until he was conscripted into the Wehrmacht in 1941. Buchheim continued his studies after the war and received his doctorate in 1950. From 1966-1973 he was a Professor of Political Science in the Faculty of Arts at the University of Mainz, and from 1973-1990 was Professor of Political Science in the Department of Social Sciences. Within the IfZ, Buchheim worked primarily on the ruling organisations within National Socialism.[88] Commenting on the state of Holocaust historiography within West Germany, Buchheim stated that 'the investigation of the persecution of the Jews leads to the roots of National Socialism

[87] Alongside *The Hitler State*, publications include *Der Nationalsozialismus: Weltanschauung, Programm und Wirklichkeit* (Berlin: Institute of Contemporary History, 1960). Eric Pace, 'Martin Broszat, German Historian and War Crimes Expert, 63, Dies*', The New York Times* (2 November 1989). Accessed: 16 January 2019. [https://www.nytimes.com/1989/11/02/obituaries/martin-broszat-german-historian-and-war-crimes-expert-63-dies.html]; Chris Lorenz, 'Broszat, Martin', in *The Encyclopedia of Historians and Historical Writing*, Volume 1, ed. Kelly Boyd (London: Fitzroy Dearborn, 1999), pp.143–144.

[88] Publications include *The Third Empire: Its Beginnings, Its Development, Its End* (London: O. Wolff, 1961). 'Univ. Dr. Hans Buchheim', *Johannes Gutenberg-Universität Mainz*. Accessed: 15 December 2018. [https://innen.politik.uni-mainz.de/personal/univ-prof-dr-hans-buchheim/]; 'Prof. Dr. Hans Buchheim', *Stiftung 20. Juli 1944*. Accessed: 16 January 2019. [https://www.stiftung-20-juli-1944.de/]; 'Hans Buchheim', *Gutenberg Biographics*: Directory of Professors of the University of Mainz. Accessed: 16 January 2019. [http://gutenberg-biographics.ub.uni-mainz.de/personen/register/eintrag/hans-buchheim.html]

and is therefore one of the most urgent tasks facing the historical profession, both on moral grounds and as far as the facts are concerned'.[89]

Unlike Krausnick, Broszat, and Buchheim, Jacobsen was not from the IfZ. Jacobsen joined the Wehrmacht in 1943 as a historian and political scientist, and in 1944 was captured and became a Soviet prisoner of war (POW) for five years. Jacobsen was a lecturer at the School of the Bundeswehr in Koblenz (1956-1961) and a professor at the Department of Political Science of the Rheinische Friedrich-Wilhelms-Universität Bonn between 1969-1991.[90] Jacobsen's appearance in court as an expert witness was due to the sudden passing of Heinrich Uhlig (also an IfZ historian), who was appointed to give testimony on the mass murder of Soviet POWs.[91] As a result of Jacobsen's time as a POW, his fluency in the Russian language, and respected publications on military warfare, Jacobsen was chosen as Uhlig's replacement.[92]

Expert Reports

Whereas Buchheim, Broszat and Krausnick had over twelve months to complete their *Gutachten*, Jacobsen was given fewer than six weeks due to the sudden passing of Uhlig.[93] The expert reports can be divided into two categories. The first set of reports

[89] Wojak, 'Nicolas Berg', p.108.
[90] Between 1989-2002 Jacobsen was the President of the Foundation for German-Polish Cooperation in Warsaw. During 1990-1991 he created and organised the 'Independent Commission for the Future Tasks of the Bundeswehr' (Jacobsen Commission). Ludger Kühnhardt, 'On the Death of Hans-Adolf Jacobsen: Military for Peace', *Frankfurter Allgemeine Zeitung* (14 December 2016). Accessed: 16 January 2019. [https://www.faz.net/aktuell/feuilleton/debatten/zum-tod-des-politologen-hans-adolf-jacobsen-14572845.html]
[91] Pohl, 'Prosecutors and Historians', p.122.
[92] Publication titles include *Dunkirk: German Operations in France 1940* (Philadelphia: Casemate Publishers, 2019) and *The Nazi Party and the German Foreign Office* (New York: Routledge, 2007).
[93] It is likely that Uhlig would have commenced research for his *Gutachten* at the same date as Buchheim, Broszat, and Krausnick. Turner, *Historians at the Frankfurt Auschwitz Trial,* p.65.

focused on the historical background of the Third Reich: 'The SS: Instrument of Domination' (Buchheim); 'The Evolution of National Socialist Concentration Camps' (Broszat); and 'Jewish Persecution' (Krausnick).[94] The second category of reports were specifically relevant to the overall case as they focused on aspects of the legal responsibility of the defendants. This category included Buchheim's second report on 'Command and Compliance' within the SS and Jacobsen's report on 'The *Kommissarbefehl* and Mass Executions of Soviet Russian Prisoners of War'.

Category One – Historical Background

In 'The SS: Instrument of Domination', Buchheim argues that the Third Reich cannot be understood within the traditional understanding of a state's power over its people. Rather, '[t]he Führer combines in his own person the entire supreme authority of the Reich; all public authority both in the State and in the Movement stems from that of the Führer.'[95] Hitler's function as the Führer of the German people and German Reich highlighted that the authority of the Führer went beyond the geographic boundaries of the German state to the 'Germanic race' in other parts of Europe. The Third Reich was therefore the manifestation of the Führer's authority, with the Führer acting as the 'executor of the united will of the people.'[96] As Buchheim observes, the will of the Führer was only legally binding 'in so far as the Führer might from time to time decide to set a norm or when his instructions happened to coincide with the existing

[94] 'The SS: Instrument of Domination' is the title of Buchheim's first report on *Anatomy*. Pendas also states that Broszat produced a second report on the Nazi policy in Poland, which subsequently became Broszat's book on the occupation of Poland. However, this second report was not included in *Anatomy*. Therefore, analysis in this chapter will concentrate on Broszat's first report. Pendas, 'Historiography of Horror', pp.212-213.
[95] Hans Buchheim, Martin Broszat, Helmut Krausnick, and Hans Adolf Jacobsen, *Anatomy of the SS State* (Cambridge: Collins, 1968), p.128.
[96] Ibid.

conventional system.'[97] Buchheim's observations on the ideological versus legal status of the Führer's will provides a foundation for Buchheim's later report on superior orders. Moreover, Buchheim's first report provided a platform for the Prosecution to argue that all the defendants demonstrated differing degrees of 'blood lust'. Buchheim's argument infers that acts committed against racial minorities were only authorised by ideological argument, rather than permissible in the eyes of the law. As such, only a specific type of sadistic person could justify employing extreme violence against racial minorities. In other words, the moral and innocent German citizens would live within the boundaries of the law, and only indecent and sadistic individuals could follow illegal and ideological orders.[98] Buchheim's assessment that the SS became the 'real and essential instrument of the Führer's authority' supports the intentionalist narrative argued by the Prosecution throughout the proceedings.[99] Buchheim's distinction between ideological orders vs. lawful orders and the individual's decision to obey even if commands were not legal, contributed to the already existing belief within West Germany during the 1960s that SS officers who worked in the camps were not the 'average' member of society, implying the majority of the German nation were not innately sadistic.[100] Consequently, Buchheim's first report clearly outlined the structure of the Third Reich, enabling the Prosecution to

[97] Ibid, p.130.
[98] Drawing upon Ernst Fraenkel's institutional analysis of the Third Reich and the *Rechtsstaat* in the pivotal work *The Dual State*, Jens Meierhenrich argues that the Nazi *Rechtsstaat* was shaped in response to the pressures of politics and society within the Third Reich. In contrast to Buchheim, Meierhenrich argues that the boundaries of law within the Third Reich were not clearly defined and hence it is too simplistic to suggest that illegality in the Third Reich could only be defined as actions outside of the *Rechtsstaat*. Meierhenrich's responsive ethnography of the *Rechtsstaat* reflects the functionalist perspective of the Nazi state rather than the intentionalist viewpoint as argued by Buchheim and Krausnick. Jens Meierhenrich, *Remnants of the Rechtsstaat: An Ethnography of Nazi Law* (Oxford: Oxford University Press, 2018), pp.10-21.
[99] Buchheim et al., *Anatomy*, p.140.
[100] During the trial, Boger epitomised the concept of the sadistic Nazi SS officer. The acts undertaken by Boger and his invention of the 'Boger swing' to torture inmates whilst interrogating them satisfied the mainstream image of the brutal SS officer.

satisfy the StGB requirements to prove the defendants' individual responsibility within Auschwitz. The report's conclusions also supported the wider intentionalist socio-political narrative of the trial thereby enabling the German public to come to terms with the Nazi atrocities.

At the beginning of his report Broszat notes that his *Gutachten* 'is not itself a fully comprehensive history of the National Socialist concentration camps …[but] it perhaps provides the framework for one.'[101] Broszat therefore implies that with additional evidence and time, a more in-depth history of the concentration camps could be reached. Broszat notes that the 'primary aim' of his report was to 'describe the chronological development of the concentration camps, the structure of their organisation and leadership, and their function'.[102] Broszat's report and supporting testimony provided the German public with a detailed account of the nature of the concentration camps and undoubtedly fulfils Bauer's instruction to 'only provide the so-called [historical] background'.[103] Broszat does not pass comment on the specifics of the trial, but he does mention the role of the *kapos*, and the medical staff, thus making indirect references to certain defendants. Broszat notes that though the *kapos* were continually told that they must not 'ill-treat' prisoners, few abided by this rule and 'most […] meted out punishment themselves, as they saw fit'.[104] Broszat's report provides a platform for the Prosecution to discuss the personal base motives of Bednarek by addressing the brutal nature of the *kapos*. Similarly, Broszat notes that the SS camp doctors were given 'more or less clear instructions to kill sick inmates

[101] Krausnick and Broszat, *Anatomy*, p.14.
[102] Ibid, p.143.
[103] Pendas, *Frankfurt Auschwitz Trial,* p.57.
[104] Krausnick and Broszat, *Anatomy*, p.235.

and prisoners too weak'.[105] All of the acts committed by medical staff at Auschwitz that Broszat highlights, were used by the Prosecution to prove the guilt of the defendants Lucas, Frank, Schatz, and Capesius.

Krausnick's *Gutachten*, titled 'Jewish Persecution', was the last within the first category of historical reports. Krausnick traced Hitler's own hatred of the Jews back to the evolutionary theory of the 1890s, whereas Buchheim's and Broszat's reports assessed the Third Reich from its creation in 1933 through to 1945.[106] Krausnick's report supplemented Buchheim's and Broszat's report, providing an essential foundation for the Court to comprehend the actions of the SS against the Jews (addressed in Buchheim's report), and the role of the concentration camps (Broszat). Without Krausnick's report, the Prosecution would have presented a narrow account of the Third Reich as an isolated moment in history. Krausnick's report allowed the Prosecution to address the Third Reich as only one of several organisations that were enabled by the pan-European antisemitic ideology. Furthermore, for the West German public to truly confront their past, they would have to acknowledge that antisemitism was not linked to the history of Nazism alone, but also to the history of Germany. Krausnick thus presents Adolf Hitler as the link between Social Darwinism and the activity of the SS, by focusing on the development of antisemitism from 1890, and its relationship to the ideology of the Third Reich.[107] Krausnick's report offered insight into

[105] Ibid, p.246.
[106] Ibid, p.27.
[107]Charles Darwin, *The Origin of the Species* (New York: Oxford University Press, 1996 [1859]); Richard Weikart, *From Darwin to Hitler: Evolutionary Ethics, Eugenics, and Racism in Germany* (Hampshire: Palgrave Macmillan, 2004); Richard Weikart, 'The Role of Darwinism in Nazi Racial Thought', *German Studies Review*, Vol. 36, No. 3 (2013): pp.537-556; Adolf Hitler, *Mein Kampf* (Delhi: Jaico Publishing House, 2012); Robert J. Richards, ed., *Was Hitler a Darwinian? Disputed Questions in the History of Evolutionary Theory* (London: The University of Chicago Press, Ltd., 2013); Gregory Claeys, 'The "Survival of the Fittest" and the Origins of Social Darwinism', *Journal of the History of Ideas*, Vol. 61, No.2 (2000): pp.223-240; George L. Mosse, *Toward the Final Solution: A History of European Racism*

Buchheim's conclusions that the SS were abiding by the will of Hitler as it emphasises the link from the individuals in the SS, to their antisemitic actions, to Hitler's ideology. The fact that Krausnick was able to sufficiently present the role of Auschwitz within the framework of the Final Solution meant that the Court could establish a clear chain of command fulfilling the requirements of the StGB.

Category Two – Legal Reports

The reports within the second category produced by Buchheim and Jacobsen were more legally relevant to the Prosecution's charges against the defendants. 'Command and Compliance' (Buchheim) directly addressed the debate surrounding the defence of superior orders, and indeed was the only report to have been a direct request of the Court rather than the Prosecution. Jacobsen's report on 'The *Kommissarbefehl* and Mass Executions of Soviet Russian Prisoners of War' likewise included examples of atrocities that were directly linked to the charges against the defendants. Consequently, the expert reports in category two provided a platform for the Court to discuss the defendants' guilt beyond the historical context.

The research undertaken by Buchheim for his second report highlights similarities between the research of a historian and a lawyer. Buchheim observes that the only way a historian can 'unravel the problem of an exceptional situation in which those receiving an order to kill found themselves, is to examine the whole mental, moral, and political environment in which such an order was given and received.'[108] Likewise,

(London: J. M. Dent & Sons Ltd.,1978); Mordecai M. Kaplan, *Judaism as a Civilization: Toward a Reconstruction of American-Jewish Life* (Philadelphia: The Jewish Publication Society, 2010 [1934]).

[108] Buchheim et al., *Anatomy,* p.305.

when undertaking pre-trial research, the lawyer must have a firm grasp on the context of an event or else leave their evidence open to attack by the opposing counsel. Buchheim also noted that his second report would 'show the basis upon which compliance with such orders was demanded; the extent to which those receiving them were generally inclined to obey them, and the possibilities available to the recipients of evading their fulfilment.'[109] Buchheim insists that his second report left no room for interpretation of evidence, with the report therefore being a precise presentation of the facts. Buchheim's research method can be understood as a response to the specific criminal standards of 'beyond reasonable doubt'. Indeed, Buchheim directly addressed the limitations of the historian's usefulness to the Court:

> [the validity] of specific individual cases in which members of the SS or police did or did not suffer actual bodily harm or lose their lives for refusing to accept an order for unlawful killing, for failing to carry it out or for attempting to evade it … cannot be proved unless the legal methods of a court of law could be used – which the historian cannot do.[110]

As Buchheim acknowledges, the historian cannot prove an argument beyond reasonable doubt due to the weight of interpretation within the discipline. Yet the fact that the Court sought expert advice to help reach a conclusion against the defence of 'superior orders', highlights that the Court believed that Buchheim's report would be of value to the trial. The Court's request for Buchheim's second report thus contradicts arguments presented by historians such as Wittmann that contest that the expert reports were legally irrelevant.[111]

[109] Ibid.
[110] Ibid.
[111] Wittmann, *Beyond Justice*, p.108.

'Command and Compliance' and 'The *Kommissarbefehl* and Mass Executions of Soviet Russian Prisoners of War' act as a bridge between the two categories of the *Gutachten* and the legal discussions held within the courtroom. Buchheim's second report builds on the historical foundation provided by Broszat's account of the structure of the concentration camps and Buchheim's own first report.[112] As mentioned, the reports in category one helped prove the chain of command within the Third Reich and therefore fulfilled some of the demands of the StGB. Whilst they did not directly reference any of the legal debates that concerned the Court, such as 'superior orders', they did provide the Court with the knowledge to understand 'Command and Compliance'. Similarly, Jacobsen's report builds upon Krausnick's historical account of 'Jewish Persecution'. Krausnick's contention that Hitler's persecution of the Jews was ideologically racial is elaborated by Jacobsen. Jacobsen adds that to Hitler, Europe was less a 'geographical concept' and more one that was distinguished by 'blood and race'.[113] The relationship between Krausnick's and Jacobsen's reports therefore demonstrate that in addition to providing a historical background for the Court, the reports in category one served to provide a foundation through which the more legally relevant reports by Jacobsen and Buchheim could be discussed. Just like the knowledge needed to understand 'Command and Compliance', Jacobsen's report on the mass execution of Soviet POWs would not have aided the Prosecution's argument without the sufficient historical context provided by the reports in category one. Seen through this perspective, the role of the historical expert witness is indispensable to the Frankfurt-Auschwitz trial.

[112] There is no reference in the existing literature as to whether the expert historians would have seen the other reports. However, considering that Broszat, Buchheim, and Krausnick all worked for the IfZ, it is likely they would have discussed their reports with each other.
[113] Buchheim et al., *Anatomy,* p.512.

CLOSING SPEECHES

The closing speeches began on 7 May 1965 and lasted twenty-six days.[114] The closing speeches allowed the legal counsel to summarise and present their conclusions to the Court based on their interpretation of the evidence, resulting in competing interpretations of history.

The Prosecution's closing speech was split into two sections: the historical context of the trial was initially presented by Großmann and was then followed by Kügler, Vogel, and Weise who evaluated the evidence against the individual defendants.[115] Großmann maintained the legal objective of the Prosecution to demonstrate both the guilt of the defendants and highlight the criminality of the entire National Socialist regime. Großmann's closing speech linked the historians' reports to the wider legal aspects of the trial 'in a way the historians themselves … could not'.[116] Großmann established the reports as 'background' knowledge, affirming the traditional duty of the expert historian to provide the Court with contextual knowledge not relating to the legal specifics of the case as established in chapter two. Indeed, in his second report Buchheim only provided an overview of the term 'superior orders' within the context of the Third Reich and did not indicate any specific examples in the case of the defendants, due to the legal constrictions of the role of the expert historian. Nonetheless, '[w]ithout this background ... the cause and effect of the offences, as well as their timing, [would] remain unknown'.[117] Mirroring the language used in the judgement of the *Hostage* Case, Großmann argued that although the trial relied on

[114] Wittmann, *Beyond Justice*, p.191; Pendas, *Frankfurt Auschwitz Trial*, p.192.
[115] Naumann, *Auschwitz*, p.383.
[116] Turner, *Historians at the Frankfurt Auschwitz Trial,* pp.100-101.
[117] Ibid*,* p.100.

legal questions, knowledge of the historical background was 'essential' and provided a platform for the Court to understand the environment in which the defendants acted.[118]

Broszat's functionalist interpretation of history appears only in Kaul's closing argument.[119] Though ideologically different to the narrative that Broszat had argued during his testimony, for Kaul it was the capitalistic businesses such as I. G. Farben, which made the 'connection between extermination via work and the sale of prisoners as slave labour' that bore direct responsibility for Auschwitz.[120] The fact that Kaul emphasised Broszat's interpretation of the Third Reich demonstrates that a functionalist interpretation chimed with the East German focus on capitalist structures, especially the working of big organisations. Kaul mirrored Großmann's acknowledgement of the importance of the historical evidence within the broader framework of the trial, despite the political point-scoring theme within Kaul's closing speech against the arguments presented by the Prosecution and the Defence. For Kaul, though he had 'differences of opinion' with some of the historians, the *Gutachten* would be 'crucially important' in establishing the historical context and thus reaching a verdict.[121]

[118] Ibid.
[119] Within Großmann's closing speech, the only report not drawn upon was Broszat's. Turner notes that the omission was 'a curious one', particularly given Broszat's focus on the concentration camps and its centrality in explaining the camp system for the Court. Ibid.
[120] Throughout the trial, Kaul had tried to argue the connection between the utilisation of I. G. Farben under the Nazi state and the capitalistic society of West Germany. For Kaul, and his associates in East Germany, it was capitalism and the need of the state to increase production that was responsible for the extermination of the Jews. Pendas, *Frankfurt Auschwitz Trial*, p.193; Naumann, *Auschwitz*, pp.386-87; Wittmann, *Beyond Justice,* p.201.
[121] Turner, *Historians at the Frankfurt Auschwitz Trial,* p.102.

By contrast, the Defence did not counter the evidence presented by Buchheim, Krausnick, Broszat, and Jacobsen on the grounds that the reports were 'not at all connected to a judicial purpose.'[122] As Defence counsel Rainer Eggert argued, whilst disputing the claims made by Buchheim that voluntary members of the SS were willing to follow illegal orders: 'I do not think I need to make the separate point that this historian's deduction has nothing to do with the law.'[123] According to the Defence, the deaths of inmates were inevitable, and responsibility for the murders stopped with the highest levels of Nazi leadership. Thus, the defendants were not guilty of perpetrating murder because they had not directly caused the deaths in Auschwitz. As Laternser argued '[w]hat the selectors accused of assisting in mass murder actually assisted in was the selection of a certain number of able-bodied persons, not in a criminal procedure, rather, they reduced the crime by the number of people they selected.'[124] In other words, the Defence sought to argue that the defendants had actually saved lives during the selection process of inmates on the arrival ramp at Auschwitz.[125] Laternser argued that, as Hitler had ordered the execution of all Jews, the selection process was the only chance that the defendants had to save some of the inmates.

The closing speeches demonstrate the selective interpretation of historical evidence by legal counsels to support their argument. Arguably, the different interpretations offered in Krausnick's and Broszat's reports provided opportunities for the Defence to drastically manipulate the expert historical accounts. Laternser's closing speech stands as an extreme manipulation of the conclusions reached by Broszat in his report concerning the fate of the Jews upon arrival at Auschwitz. The fact that the Defence

[122] Ibid, p.104.
[123] Ibid.
[124] Naumann, *Auschwitz*, p.396.
[125] Pendas, *Frankfurt Auschwitz Trial*, p.212.

did not seek to engage with the historical evidence that risked undermining their defence of 'superior orders' is hardly surprising, given the role of defence counsel to challenge the prosecuting argument. However, the attention that the expert reports received by both Großmann and Kaul reiterate that whilst the historiographical significance of the expert reports were not realised until the publication of *Anatomy*, the reports still proved fundamental to the trial and provided a platform for the legal counsels to engage with the crimes committed by the defendants.

JUDGEMENT

Whilst the closing speeches demonstrated the different use of historical narratives by the legal counsels, it was the Court's interpretation of the historical expert reports that formed the trial's historical narrative that was presented to the public.

Presiding Judge Hofmeyer orally delivered his 107-page 'Opinion of the Court' (justifications for verdict) over 19 and 20 August 1965.[126] The 'Opinion of the Court' included Hofmeyer's opinion on the impact of the expert reports and testimony within the trial:

> It was only to be expected that attempts would be made to have this trial serve as a basis for a broad, comprehensive presentation of events leading up to Auschwitz … However, the court did not give into the temptation and did not permit itself to be led astray …[127]

[126] Only seven of the final twenty defendants were convicted of murder, ten of accessory to murder, and three were acquitted. Prof. Dr. CF Rüter, et al., eds. *Justiz und NS-Verbrechen*. Vol. XXI. Procedure No. 590-595. 1965. pp.381-383. Accessed: 10 May 2020. [https://www.junsv.nl/cgi/t/text/textidx?c=justizw;cc=justizw;view=text;lang=de;idno=w21;rgn=div3;node=w21%3A6.2]

[127] Naumann, *Auschwitz*, p.414.

Hofmeyer's language indicates a level of resentment towards the Prosecution's use of historical evidence that characterised the trial. Though Hofmeyer did not object to the use of historical expert witnesses, his suggestion that the Prosecution sought to use the trial as a foundation for history mirrors the criticisms raised in the earliest stages of the trial against the use of expert reports. Hofmeyer's provocative statement that the Court did not yield to 'temptation' and was not led 'astray' creates an image of the Prosecution seeking to employ history to distract the law from its true purpose. Indeed, within the oral judgement, Hofmeyer did not reference any of the historians or their reports.[128] Certainly, if one were to read Hofmeyer's oral judgement alone, the role of the expert historian within the Frankfurt-Auschwitz trial would not appear profound.

The expert reports did receive attention in the written judgement, with the historical context spanning a total of forty pages. The written judgement was split into three sections. Section one was titled 'The Establishment and Development of Concentration Camps in the Nazi State' and drew explicitly upon Broszat's history of the concentration camps as supporting evidence of the Court's intentionalist narrative. The judgement noted that the use of concentration camps as sites of elimination, as cited by Broszat, were 'ordered and approved by Hitler'.[130] As stated at the beginning of this chapter, the intentionalist and functionalist narratives seen through the expert reports were only identified during the 1980s. During the trial, the Court and legal counsels may not have been able to make such a clear distinction between the differing historical interpretations.[131] It is more likely that the socio-political context

[128] Ibid.
[130] Rüter, et al., eds. *Justiz und NS-Verbrechen*. p.387.
[131] Christopher Browning later noted in his cross-examination during the *Irving* trial that at the beginning of the 1970s, 'very, very few people were working on [the Holocaust]'. However, as the 1970s progressed 'there was a shift to a greater consciousness of the Holocaust as an important historical

would have dictated the historical interpretation of the expert evidence presented during the trial, with the Prosecution and Court seeking to present a historical narrative that removed the collective guilt of the Nazi past away from the West German public.

Indeed, if the Prosecution and Court were aware of the intentionalist and functionalist interpretations, and their narrative implications within the socio-political context of West Germany, one would expect the Prosecution's and Court's emphasis of specific evidence to be the same. However, whereas Großmann did not reference Broszat's report in the Prosecuting closing speech, Hofmeyer included Broszat's research as the only form of supporting evidence for section one of the judgement. The difference between Großmann and Hofmeyer's use of Broszat's report stems from the Prosecution's and the Court's respective assessments of what was legally useful. As the oral judgement states:

> [T]he prosecution raised the questions of why an Auschwitz trial at all and why an Auschwitz trial still today. These questions must have been of concern to the prosecution when it had to decide whether to initiate these proceedings. The court does not have to deal with questions of this nature … as far as the court is concerned the only consideration was the guilt of the accused men.[132]

The different perspectives of the Prosecution and the Court is also apparent in Hofmeyer's use of the historians' reports in the second section of the written judgement titled 'The Concentration Camp Auschwitz'. Hofmeyer drew upon all the historical reports, though to different degrees. For example, though Krausnick's report dominated Großmann's closing speech, the Court was less convinced of its overall

topic'. Considering this, major interpretive differences were probably not so obvious to non-historians in the early 1960s. *Irving*. 7 February 2000. p.39.

[132] Naumann, *Auschwitz*, p.414.

relevance, noting '[i]t is not intended here to detail … the entire action within the framework of the so-called "Final Solution to the Jewish Question" … It was not the task of the jury to clarify this'.[133] Additionally, Jacobsen's report was used only to support the Court's conclusions on Auschwitz as an execution site for Soviet POWs. The omission of Jacobsen's discussion concerning the defendants that were accused of taking part in the mass killings of Soviet POWs, as well as a lack of any reference to Buchheim's report on superior orders, would suggest that the legal assertions made within these two expert reports were reserved for the Court to make their own conclusions.

The exclusion of Jacobsen and Buchheim's legal content within their reports was not due to doubts over their reliability. On the contrary, the written judgement noted that the reports offered 'well-founded and convincing explanations with which the Court concurs'.[134] Thus, the validity of the reports and the status of the historians as expert witnesses was wholly accepted. Nonetheless, following the distinction between the roles of the historical expert witness and the Court as established in chapter two, the omission of Jacobsen and Buchheim's reports demonstrate that whilst the historians could be confidently relied on to draw conclusions from historical context, decisions based on the scrutiny of legal evidence were deemed to remain the duty of the Court.

[133] The unwillingness to engage with the wider moral or ethical issues raised in the trial generated criticism of the Court's ability to fully comprehend the causes of the defendants' crimes and the motivation involved. Robert Woetzel noted that by evading the deeper implications of the defendants' actions, 'the Judgment of Frankfurt does not measure up to the legal and sociological depth of the Nuremberg Judgment, which dealt comprehensively in each individual case with the causes of guilt'. More recently, Pendas and Wittmann claim that the limitations of the StGB and the judicial emphasis on individual atrocity as opposed to the context 'prevented public recognition of the systematic nature of Nazi genocide'. Despite such criticism, Pendas adds that over the 1960s and 1970s general public attitudes to Nazi trials and the German Nazi past became more open, arguably initiated by the Frankfurt-Auschwitz trial. Rüter, et al., *Justiz und NS-Verbrechen*, p.419; Robert K. Woetzel, 'Reflections on the Auschwitz Trial', *The World Today*, Vol. 21, No. 11 (1965):
pp.497-498; Pendas, 'Seeking Justice', pp.367-368.

[134] Turner, *Historians at the Frankfurt Auschwitz Trial*, p.106.

SUMMARY

The Frankfurt-Auschwitz trial undoubtedly marked a development for the historian's role as an expert witness since the *Hostage* Case. The awareness of the pivotal role that historical context holds within a Holocaust trial, as well as by the expert historians of their role within the courtroom (shown in the foreword of *Anatomy*), can be attributed to the shift in importance of historical knowledge within the trial context. Furthermore, the written judgement of the Frankfurt-Auschwitz trial both utilised the expert reports and stated the names of the historians when the Court cited its sources. This was in contrast to the judgement of the *Hostage* Case which only alluded to the importance of historical knowledge. The inclusion of all but Buchheim's second report in the written judgement demonstrates that though the expert reports were largely absent of legal detail and did not deal with individual crimes of the defendants, historical evidence was deemed legally useful insofar as it allowed the legal counsels to discuss the legal issues of the trial and enabled the Court to reach an informed verdict.

From a historiographical perspective, the Frankfurt-Auschwitz trial acted as an impetus for subsequent scholarship. Buchheim and Broszat had begun to conduct some of the research included in their expert reports prior to 1958, when preliminary investigations for the Frankfurt-Auschwitz trial officially began. However, the research that was being conducted for the trial may have taken longer to finalise and the focus may have been different. Consequently, the role of the trial as a catalyst for the publication of *Anatomy* and the critical historiographical research that occurred due to the trial cannot be overemphasised. As Bloxham notes, 'one of the most valuable offshoots' of the trial

was the publication of *Anatomy*.[135] Undoubtedly, *Anatomy* is a classic within Holocaust historiography, with the reports providing contemporary academics with a foundation to engage with ever contested topics such as the defence of superior orders and the lawlessness of the Nazi State. The influence that the intentionalist and functionalist perspectives had on shaping later interpretations within Holocaust Studies mean that *Anatomy*, and thus the Frankfurt-Auschwitz trial, deserve to be viewed as pivotal in the history of Holocaust Studies.

Members of the Court during the 1960s still viewed the disciplines of history and law to be distinct, as Hofmeyer's assertion at the beginning of the oral judgement suggests. After the trial, Hofmeyer continued to argue that his preference would be for Holocaust trials to exclude historians and, as much as possible, be devoid of history.[136] Hofmeyer's resistance to the expert historical witness is reflective of the debate raised in chapter two regarding the disciplinary functions of law and history. Moreover, his reservations against historical expert testimony reinforces the distinctiveness of Holocaust trials and the use of expert evidence within such proceedings. Hofmeyer's argument to exclude expert testimony is out of place when discussing Holocaust trial proceedings and his suggestion for Holocaust trials to be devoid of history is even more surprising, if not jarring, given the wider socio-political context of the Frankfurt-Auschwitz trial and the need to generate a certain historical narrative. Hofmeyer's preference for Holocaust trials to exclude historians can be viewed as an example where lawyers seek to engage with the historical discipline in traditional formats (such as a lecture) rather than a courtroom. As argued throughout this dissertation, to not

[135] Bloxham, 'Streicher to Sawoniuk', p.404.
[136] Turner, *Historians at the Frankfurt Auschwitz Trial*, p.114.

include historical evidence in Holocaust trials would damage the wider public engagement with the history and memory of the Holocaust. Certainly, when assessing the legal arguments and historical narratives pursued in Holocaust denial trials (discussed in part four), the law's seeming inability to deal with the distinctive nature of Holocaust crimes and evidence within the traditional legal framework is exacerbated.

PART FOUR

1988-2000: SPOKESPERSON FOR HISTORY

V

Case Study Three

Her Majesty the Queen v Ernst Zündel (1988)

> But the chief, and in my opinion most complex, task of the expert witnesses in these [denial] trials was not just to prove that the Holocaust had happened but more precisely to prove that the deniers had made their claims in bad faith. In this sense, it was not the Holocaust but the practice of History itself that was on trial.
>
> Christopher Browning[1]

INTRODUCTION

The 1960s marked a turning point in Holocaust historiography. The *Eichmann* trial (1961) marked an unprecedented, although criticised, use of survivor testimony throughout the trial, establishing the now common theme of referring to the experience of the Jewish Holocaust victims, independent from the political and military story of the Second World War.[2] Pivotal texts such as Raul Hilberg's *The Destruction of the European Jews* (1961), and *Eichmann In Jerusalem: A Report on the Banality of Evil* (1963) by Hannah Arendt fundamentally challenged contemporary understandings of how the Holocaust was conducted.[3] The increasing engagement within the public sphere of a 'Holocaust consciousness' saw Holocaust trials central to the narrative of

[1] Browning, 'Law, History, and Holocaust Denial', p.198.
[2] Shoshana Felman, 'Theaters of Justice: Arendt in Jerusalem, the Eichmann Trial, and the Redefinition of Legal Meaning in the Wake of the Holocaust', *Critical Inquiry*, Vol. 27, No. 2 (2001): pp.233-234.
[3] Opposition existed between Hilberg and Arendt due to the misuse and disagreement of historical interpretations. Hilberg criticised Arendt's theory of the 'banality of evil' andclaimed that she had misused his characterisation of the *Judenrat* in her presentation of the Final Solution in *Eichmann In Jerusalem*. Raul Hilberg, *The Destruction of European Jews,* Volume One (New York: Octagon Books, 1961); Arendt, *Eichmann In Jerusalem*; Raul Hilberg, *The Politics of Memory: The Journey of a Holocaust Historian* (Chicago: Ivan R. Dee, 1996), pp.147-156; University of Vermont Special Collections Library. Raul Hilberg Papers. RG-074-005.

the Jewish experience and research on high-level bureaucratic Nazi officials, with an emerging 'us and them' argument pursued by legal counsels in line with wider historiographical trends.[4]

The historical reports produced by the expert historians during the Frankfurt-Auschwitz trial, in particular Martin Broszat's research on concentration camps, witnessed some of the most in-depth research on the Nazi framework to date. However, the steady increase in Holocaust literature also saw the polarisation within Holocaust historiography. Whilst the development of Holocaust historiography and its major interpretive differences may not have been so obvious to non-historians in the early 1960s, certainly by the 1980s there was a clear distinction between 'intentionalists' and 'functionalists'.[5] By 1988, Holocaust historiography was split between scholars

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[4] An 'us and them' narrative refers to a dual focus by legal counsels (predominantly in West Germany) during Holocaust proceedings that were held during the 1950s and 1960s. Firstly, the Frankfurt-Auschwitz trial analysis highlights that it was conducted to help German citizens 'come to terms' with their Nazi past. As Pendas notes, '[t]rials became … the dominant form for dealing with the Nazi past'. Secondly, Holocaust trials continued to focus on sadistic, bureaucratic Nazi officers, such as the *Eichmann* trial and the Frankfurt-Auschwitz trial, heavily shaping the public image and understanding of Nazism. Hence, the 'ordinary' German public were able to distinguish themselves apart from the high-level Nazi officials. Within this period, Holocaust historiography largely maintained a perpetrator-oriented approach, with the exception of Hilberg's *Destruction of the European Jews*. As Dieter Pohl argues, the similarities between the narratives that existed within the courtroom and Holocaust literature were a result of the work that expert historians were conducting for prosecution teams. Moreover, criminal courtroom debates based on interpretation were restricted, hence all legal narratives maintained an intentionalist narrative and there remained 'no room' for further interpretations such as Broszat's functionalism. Thus historians 'had no choice but to present a picture that was considered common sense during the postwar era.' Pohl's research reinforces the working relationship between Holocaust historiography and legal narratives in Holocaust trials during the 1960s, concluding that the legal work by expert historians indirectly 'strengthened the traditional approach of a high-level Nazi history focusing on the SS'. As Holocaust trials developed from the 1980s and Holocaust perpetrators became more linked to the 'grassroot' perpetrator than the bureaucratic officer, perpetrator trials reflected the depth within Holocaust historiography regarding the full scale of complicity within the Nazi regime. Pendas, *Frankfurt Auschwitz Trial*, p.21; Pohl, 'Prosecutors and Historians', pp.123-128.

[5] Academic debates regarding historical conduct within Holocaust historiography, as exemplified by Broszat and Saul Friedländer's famous exchange concerning the historicization of National Socialism, occurred around the time of the second *Zündel* trial. Martin Broszat, 'A Plea for the Historicization of National Socialism', in *Reworking the Past: Hitler, the Holocaust, and the Historians' Debate*, ed. Peter Baldwin (Boston, Massachusetts: Beacon Press, 1990), pp.78-87; Saul Friedländer, 'Some Reflections on the Historicization of National Socialism', in *Reworking the Past,* ed. Baldwin, pp.88-101; Martin Broszat and Saul Friedländer, 'A Controversy about the Historicization of National Socialism', in *Reworking the Past,* ed. Baldwin, pp.102-132.

such as Lucy Dawidowicz and Saul Friedländer who continued to emphasise the role of Hitler in the Holocaust, and Broszat and Hans Mommsen who focused on competing bureaucracies and low-level officials.[6]

This chapter examines the impact that different historiographical and ideological focuses can have on the role of the historian as an expert witness through analysing the Holocaust denial trial *Her Majesty the Queen v Ernst Zündel* (1988, Toronto). Ernst Zündel was re-tried in 1988 following a successful appeal after the first *Zündel* trial in 1985, also held in Toronto.[7] He was charged under Section 177 of the Canadian Criminal Code for distributing a pamphlet titled *Did Six Million Really Die?* by Richard Harwood (pseudonym for author Richard Verral). The 1988 trial lasted approximately four months and included six prosecution witnesses, twenty-three defence witnesses, and 150 exhibits.[8]

The second *Zündel* trial focused on the historical claims concerning the Holocaust within the pamphlet, resulting in the testimony of prosecution expert historian Christopher Browning receiving attention by all legal counsels and in the Judge's charge to the jury. Browning's role within the Prosecution's strategy cannot be understood without having considered the 1985 *Zündel* trial and the experience of prosecution expert witness historian Raul Hilberg. This chapter will commence by establishing the debates within the existing literature surrounding the difficulties of

[6] Lucy Dawidowicz, *The Holocaust and the Historians* (Cambridge, Mass.: Harvard University Press, 1983); Douglas, *Memory of Judgment*, p.251; Marrus, *Holocaust in History*; Stone, ed., *Historiography of the Holocaust*; Lawson, *Debates on the Holocaust;* Browning. Interview.
[7] Zündel was a right-wing publisher known for promoting Holocaust denial through his small press publishing house Samisdat Publishers.
[8] John F. Burns, 'Canada Puts a Nazi Apologist on Trial for His Ideas, Again', *New York Times* (30 March 1988). CBP. RG6.4.2. Box 8, File 3.

criminalising Holocaust denial and the concept of replacing the perpetrator with a Holocaust denier in a criminal court setting. The chapter will then consider the 1985 trial and assess its impact on the subsequent 1988 trial. The second *Zündel* trial will then be discussed in depth, establishing the differences between the 1985 and 1988 trials, and the impact these differences had on the role and experience of Browning as an expert witness through assessments of personal correspondence and trial transcripts. The chapter will end with evaluations of the closing speeches and the Judge's charge to the jury.

Browning's role in the 1988 *Zündel* trial serves as an example of how similarly structured Holocaust trials can build on one another: the Prosecution's case in 1985 was heavily criticised, not least for failing to fully utilise expert historian Raul Hilberg. Browning's involvement in the 1988 *Zündel* trial will contribute to the comparison between earlier cases of historian expert witnesses in Holocaust trials. It will also provide a platform to understand the personal experience of the evolving role of the expert historian across different forms of Holocaust trials, jurisdictions, and decades.

Browning exercised considerable influence in the 1988 *Zündel* trial through discussions over document strategies and the evidence that should be presented, in contrast to the involvement of the expert witness in perpetrator trials assessed in earlier chapters and in the *Sawoniuk* trial (chapter six). The focus on Zündel's presentation of evidence and historical narrative meant that the role of the expert witness developed from the professionalisation of the expert witness in the 1960s. In the 1988 proceedings, Browning not only testified to the historical context of the Holocaust, but in disputing the content of Zündel's pamphlet, Browning provided a

comparison between good and bad historical practices, thus becoming a spokesperson for the practice of history itself. As such, Browning's expert testimony in the second *Zündel* trial made both a historical and legal contribution, indicating a greater reliance on the role of the expert historian in the overall structure of the Holocaust denial trial.

EXISTING LITERATURE

Whilst Browning's role in the 1988 *Zündel* trial was pivotal to the Prosecution's case, it has largely been overlooked in contemporary assessments of the trial, beyond Browning's own works. Existing literature that focuses on Holocaust denial trials generally falls under three main categories: Holocaust denial as an ideology; the concept of a denial trial; and the issue of criminal denial trials. Assessing the debates within contemporary literature will enable an understanding of what Holocaust denial is, highlight the innate problems of bringing Holocaust denial into a criminal setting, and address why the role of the expert historian increases in prominence within such a context.

Holocaust Denial as an Ideology

Berel Lang provides the most succinct definition of the three principal claims of Holocaust denial: '(a) the supposed number of Jews murdered (the 6,000,000) is greatly exaggerated; (b) the primary means associated with the death camps (gas chambers and crematoria) could not have "handled" the number of victims claimed; and (c), most broadly, that whatever happened to the Jews through Nazi actions did

not reflect genocidal intent'.[9] Lang's definition of Holocaust denial is relevant when attempting to understand the denial rhetoric used by the Defence during the two *Zündel* trials. In contrast to Lang's singular 'form' of Holocaust denial, Robert Eaglestone and Deborah Lipstadt identify 'softcore' and 'hardcore' Holocaust denial.[10] Whereas hardcore denial is characterised by the above arguments, the softcore perspective contends that whilst the Jews were imprisoned in camps, they died in limited numbers because of camp diseases. For softcore deniers, the Holocaust was not the result of systematic Nazi policies but more of a consequence of extremist Nazi elements.[11] 'Softcore' deniers have recently adopted the identity of Holocaust 'revisionists'. According to Michael Shermer and Alex Grobman, '[h]istorians are the ones who should be described as revisionists', for they are the ones who are constantly reassessing, re-examining, and revising the current understandings of a historical event.[12] Most importantly, the honest revision of historical events only occurs when new evidence presents itself: 'reasonable historians' (to use the language of Eaglestone) do not deliberately seek to dispel well-founded historical explanations.[13] Jouni-Matti Kuukkanen establishes a shared disciplinary framework in which historians operate noting that the conclusions drawn within historiography can take several forms: 'reasoning from premises, a (narrative) description of the state of

[9] Lang, 'Six Questions', p.157.
[10] Eaglestone, *Holocaust and the Postmodern*,
p.227; Deborah Lipstadt, 'Holocaust Denial, Explained'. United States Holocaust Memorial Museum. 2016. Accessed: 18 November 2019. [https://www.youtube.com/watch?v=BtfR31PGZVA]
[11] Ibid.
[12] Shermer and Grobman assess individuals associated with the Holocaust denial movement, focusing on what it meant to be a denier, their beliefs, their motivation behind Holocaust denial, and how deniers practice their beliefs. Both the *Zündel* trials are discussed within the context of Zündel's own relationship with the denial movement. Shermer and Grobman, *Denying History,* pp.v-xvi.
[13] According to Eaglestone, the 'reasonable historian' is someone who has followed a recognisable line of research and reached a reasoned conclusion. A 'reasonable historian' is somebody who writes according to the 'generic conventions that historians … decide upon' and can be "reasoned" with'. By nature of their selective use of the documents to justify their own arguments, Holocaust deniers are not seen as 'reasonable historians'. Eaglestone, *Holocaust and the Postmodern*, pp.237-238.

affairs, exemplification, statistics, and so on'.[14] For Kuukkanen, historiographical works are an autonomous piece of argumentation with a historian's argument being shaped by the evidence available to them and the debate within the wider scholarly field.[15] However, there is a difference between the disciplinary framework presented by Kuukkanen and the rejection of certain forms of evidence by Holocaust deniers, such as survivor testimony. Hence, the term Holocaust deniers will be used throughout this chapter, instead of 'revisionists', so as not to provide Holocaust deniers with the academic respectability for which they strive.

Concept of a Denial Trial

The eight articles within Ludovic Hennebel and Thomas Hochmann's edited work *Genocide Denials and the Law,* typify the debates regarding Holocaust denial's relationship with the law: denial trials; understanding denial; the criminalisation of denial; and the relationship between denial and free speech.[16] However, *Genocide Denials* does not substantially address the use of expert witnesses within a criminal denial setting, despite providing a detailed examination of the relationship between denial and the law. Lawrence Douglas addresses the relationship between history, memory, and judgement within the courtroom through his concept of the 'didactic trial'.[17] Douglas notes that sometimes history can enter a courtroom 'through the appearance on the stand of the professional historian'.[18] However, Douglas does not

[14] Jouni-Matti Kuukkanen, 'Why We Need to Move from Truth-Functionality to Performativity in Historiography', *History and Theory*, Vol. 54, No. 2 (2015): p.241.
[15] Ibid.
[16] Hennebel and Hochmann eds. *Genocide Denials*.
[17] Douglas, 'Didactic Trial', p.514.
[18] Douglas analyses Raul Hilberg's cross-examination by Christie in the 1985 trial within *The Memory of Judgment*, assessed below. Ibid, p.515.

expand upon this statement. Douglas's brief reference to the role of the professional historian within denial trials is symptomatic of the attention that historians as expert witnesses receive in denial trial literature. As in much of the literature focusing on denial trials, the *Zündel* trials are only considered in the wider context of the relationship between denial and the law. Consequently, the role of the historian as an expert witness in Holocaust denial trials has generally been overlooked.

Criminal Denial Trials

Unlike criminal perpetrator trials which typically do not challenge the general history of the Holocaust, when a Holocaust denier takes the place of a perpetrator in a criminal denial trial, the details of the Holocaust are brought into the courtroom, making the trial politically charged and raising the stakes of the verdict.[19] Douglas's text *The Memory of Judgment* deals directly with the priorities of law both within perpetrator and denial trials. As Douglas argues, when the law is called upon to protect the public from the claims of deniers, 'the law's evidentiary constraints and its concerns with its own legitimacy' means that 'criminal law often fails to do justice to the history it has been enlisted to protect'.[20] However, Douglas is overly critical of the law's ability to produce 'good history' through a trial format. For Lynne Humphrey, during the *Zündel* trials and the later *Irving* trial (chapter seven), the engagement with the established scholarship 'not only reached the higher standards of legal proof, but maintained influence over the content and narratives' presented during the trials.[21] Thus, 'each trial reconstructed

[19] Ibid, p.212; Lawrence Douglas, 'From Trying the Perpetrator to Trying the Denier and Back Again', in *Genocide Denials and the Law,* eds. Hennebel and Hochmann, pp.73-74.
[20] Douglas, *Memory of Judgment*, p.255.
[21] Humphrey, 'The Holocaust and the Law', p.105.

empirically accountable, consistent and "truth-full" narratives of each subject'.[22] Browning's role as both a provider of contextual knowledge and a spokesperson for the historical discipline was essential within this framework. As Browning argued, unlike 'real' criminal trials, 'for both the second *Zündel* trial and the *Irving* trial … survivor witnesses [were] not relevant … this [was] about how you write history, [and] how you misuse documents'.[23] However, Browning suggests that factors such as 'conflicting claims of fact and state of mind, and meaning of language' that are central to Holocaust denial trials, are also empirical to law, whilst affirming that academic conferences or journals are the true 'domain' of historical interpretation.[24] Certainly, within criminal procedures, the defendant cannot be found guilty unless the act (*actus reus*) and the intent of the act (*mens rea*) have successfully been proven by the Prosecution 'beyond reasonable doubt'. Moreover, the accuracy of facts in order to obtain the truth is at the heart of all courtrooms. Within the context of the *Zündel* trials, the denial act was the distribution of the pamphlet *Did Six Million Really Die?* and the challenge that the Prosecution faced was having to prove that in distributing the pamphlet, Zündel demonstrated wilful intent to inflict harm on the Canadian Jewish community.[25] Proving that Zündel distributed the pamphlet knowing that the content was false, meant that the Prosecution had to bring history into the courtroom. Browning's examination-in-chief in 1988 thus served as a demonstration of the practice of a reasonable historian against the claims of a Holocaust denier, providing 'good history' within a legal setting.

[22] Ibid.
[23] Browning. Interview.
[24] Browning, 'Historians and Holocaust Denial', p.777
[25] Alan Davies, 'A Tale of Two Trials: Antisemitism in Canada 1985', *Holocaust and Genocide Studies*, Vol. 4, No. 1 (1989): p.78.

1985 *ZÜNDEL* TRIAL

Evaluating the Prosecution's use of Hilberg as an expert witness in the 1985 *Zündel* trial will enable an understanding of how the first trial shaped the 1988 re-trial, and why Browning's experience in 1988 as an expert witness for the Prosecution was different from Hilberg's.

Indictment

In 1985 Ernst Zündel was indicted on two counts under Section 177 of the Canadian Criminal Code (1970). The Code made it a crime to issue 'a statement or tale known to be false and likely to cause mischief to the public interest in social and racial tolerance'.[26] The first offence argued that in 1981 Zündel published an article titled *The West, War, and Islam*. The second offence dominated the trial's proceedings, and charged Zündel with the publication and distribution of *Did Six Million Really Die?* The Prosecution argued that both charges were justifiable under Section 177 as Zündel had published these articles despite being aware that their contents were false.[27] This chapter is solely focused on the issues raised against the second of the two indictments. Consideration of the first indictment is outside the scope of this dissertation.

[26] Leonidas E. Hill, 'The Trial of Ernst Zündel: Revisionism and the Law in Canada', *Simon Wiesenthal Center Annual*, Vol. 6 (1989): p.170.
[27] *Her Majesty the Queen v Ernst Zündel.* Supreme Court of Ontario. Court of Appeal. Judgement. pp.1-2. 23 January 1987. RHP. RG-074-005. Carton 21, Folder 5.

Legal Actors

In 1985, Judge Hugh Locke oversaw the trial alongside a jury. Christie, ruthless in his courtroom tactics and renowned for defending Holocaust deniers and neo-Nazis, acted as the Defence counsel for Zündel. Robert Faurisson, a leading Holocaust denier from France, appeared in court both as an adviser to the Defence and as an expert witness.[28] Peter Griffiths, a practicing attorney for fifteen years represented the Crown Prosecution. Griffiths's relatively limited experience, underestimation of Christie, and the politicisation of the trial are all cited as shortcomings of the 1985 case.[29]

Strategy and Use of Expert Witness

Due to the criminal jurisdiction of the trial, Griffiths had the task of proving to the jury that Zündel had distributed the pamphlet *Did Six Million Really Die?* with wilful knowledge of its falsity beyond reasonable doubt.[30] By contrast, the Defence argued that the case was one of 'free speech' and therefore sought to discredit the belief that there was one true narrative of the Holocaust.[31] The pamphlet claimed that its aim was 'quite simply to tell the truth' and unveil the 'edifice of guesswork and baseless assumptions upon which the extermination legend is built'.[32] By using language such

[28] Lipstadt, *Denying the Holocaust,* pp.160-161; Robert Faurisson, 'The "Problem of the Gas Chambers"', *Institute for Historical Review*, Reprinted from *The Journal of Historical Review*, Vol. 1, No. 2 (1980): p.4. [http://www.hist.lu.se/media/utbildning/dokument/kurser/SASH65/20171/The_Problem_of_the_Gas_Chambers.pdf]
[29] Lipstadt, *Denying the Holocaust,* pp.160-161.
[30] Letter to Cristopher Browning from Manuel Prutschi. 1985 Crown Case. pp.39-40. CBP. RG6.4.2. Box 9, File 1.
[31] Ibid. The Case for the Defence. p.1.
[32] Richard Harwood, *Did Six Million Really Die? Truth at Last, Exposed*. pp.5, 11. CBP. RG6.4.2. Box 9, File 2.

as ‘truth’, ‘guesswork’, and ‘assumptions’, the pamphlet and Zündel’s distribution of it, made a direct attack against the claims of ‘reasonable’ Holocaust historians and their practice. By asserting that ‘there is not a single document in existence which proves that the Germans intended to, or carried out, the deliberate murder of the Jews’, it meant that when the pamphlet was dissected in the courtroom, the practice of history and arguments of established historians came under legal scrutiny.[33] As a result, alongside the testimony of survivor witnesses and documentary film evidence, Griffiths sought to utilise Hilberg’s knowledge of the Holocaust by having Hilberg testify to his own findings so as to disprove the claims of the pamphlet.

Existing Literature

The debates surrounding the *Zündel* trials are reflective of the trends in Holocaust denial literature. Alan Davies assesses both the *Zündel* trials within the context of Zündel’s form of antisemitism compared to *R. v Keegstra* (1984).[34] Moreover, whilst academics such as Leonidas E. Hill and Douglas provide detailed assessments of the 1985 trial, their texts remain primarily summaries.[35] Both Hill and Douglas deal with the context of the 1985 trial, the trial’s proceedings, and the aftermath of the 1985 verdict. The 1988 re-trial receives less attention than the first trial, perhaps because the trial context and indictment remained the same between the two trials. The comparisons that are drawn between 1985 and 1988 largely focus on: the use of survivor witnesses during the first trial and its subsequent absence in the second; the

[33] Ibid, p.10.
[34] Davies, ‘A Tale of Two Trials’, pp.77-88.
[35] Summaries of both *Zündel* trials have also been written by D. D. Guttenplan and Deborah Lipstadt providing context for the *Irving* trial. Douglas, *Memory of Judgment*; Hill, ‘The Trial of Ernst Zündel’, pp.165-219; D. D. Guttenplan, *The Holocaust on Trial: History, Justice and the David Irving Libel Case* (London: Granta Books, 2001); Lipstadt, *Denying the Holocaust.*

lack of judicial notice of the Holocaust in 1985 and the reverse of this ruling in 1988; and the defence rhetoric used by Christie in both trials.

Whilst it is important to note that the use of historians as expert witnesses does not dominate academic discussions of the *Zündel* trials, this does not mean that they are entirely neglected. Hill offers a review of Hilberg's testimony, considering the implications that the trial had on the claims of historical truth.[36] Similarly, Douglas draws upon Christie's cross-examination of Hilberg as opening up a discussion concerning the suitability of historical expert testimony in a criminal courtroom, particularly the claims made by Christie over the extent to which Hilberg's testimony was hearsay. Douglas is less forgiving of Hilberg's testimony than Hill. Douglas comments that the 'dispassionate discourse' of the historian as an expert witness 'lacked the graphic power of [the film] *Nazi Concentration Camps* and the emotional appeal of the testimony of survivors.'[37] Whilst Douglas's claims are not untrue, they are unfair to the role played by Hilberg and Browning during the trials. Testimony by professional historians is often factual evidence, provided to clarify the historical context of the trial. Whilst the *Zündel* trials saw an increased reliance on the role of the expert historian, the testimony provided by Hilberg and Browning did not differ from its factual nature. The expert witness is not permitted to offer their opinion when testifying and can only present the evidence that they have interpreted as a result of their professional expertise. Thus, it is unjust to compare historical expert testimony against a graphic film of concentration camps and survivor testimony, because the three are

[36] Hill, 'The Trial of Ernst Zündel', p.190.
[37] Douglas, *Memory of Judgment*, pp.221-223.

fundamentally different types of evidence serving different purposes within the Prosecution's argument.

The few detailed assessments of the role of the historian as an expert witness in the *Zündel* trials come from historians who have acted as expert witnesses themselves. In contrast to Hilberg, who did not produce any subsequent works reflecting on his role in the 1985 *Zündel* trial, Richard Evans briefly addressed the struggle that historians experience when they serve as expert witnesses in criminal trials. Evans notes that historians as expert witnesses are often performing the role of 'a pathologist or a ballistics expert … where an informed conclusion about the angle and shape of a wound may establish the kind of weapon which caused it, the way in which the blow was inflicted, and even some of the physical attributes of the murderer.'[38] Faced with a 'maverick' defence counsel such as Christie, Evans notes that Hilberg's exasperated outbursts during his cross-examination are symptomatic of how constricting the courtroom can be for a historian when they are unable to expand their evidence beyond the responses they are required to give by the Court.[39]

Raul Hilberg

Often referred to as the 'founding father' of Holocaust Studies, Raul Hilberg was the John G. McCullough Professor of Political Science at the University of Vermont.[40] Hilberg received several awards for his contribution to Holocaust Studies, in addition

[38] Evans, 'History, Memory, and the Law', p.329.
[39] Ibid, p.332.
[40] 'Auschwitz Through the Eyes of Its Builders', The Joseph and Rebecca Meyerhoff Annual Lecture, United States Holocaust Memorial Lecture. 15 November 2005. RHP. RG-074-005. Carton 8, Folder 6; Statement of Witness. Raul Hilberg. April 1992. United States Holocaust Memorial Museum Archives, Washington, DC. Christopher R. Browning Papers. IRN 81871. Box 12, Folder 4.

to publishing numerous books, papers, and articles, including the seminal text *The Destruction of the European Jews*. Due to his detailed empirical research methods and assessments of documents from the Nuremberg trials, as well as other documents held in archives located across the world, Hilberg also provided expert evidence in several trials in the USA, Canada, Australia, and Scotland.[41]

Whilst Hilberg had been involved in several denaturalisation trials and perpetrator trials, the 1985 *Zündel* trial was the first Holocaust denial trial that Hilberg had testified in. Within the initial correspondence between Griffiths and Hilberg, Griffiths notes that Hilberg would be asked questions 'about the nature and sources of your research leading to your book *The Destruction of the European Jews*; about your statistical findings as to the loss of Jewish lives during the Holocaust; [and] about whether, based on your research, you can form an opinion as to whether the Holocaust actually happened'.[42] However, Griffiths fails to offer any assessment of the pamphlet itself. Whilst it is not possible to know if this preparation happened during telephone calls or face-to-face meetings, in correspondence after the trial, Hilberg noted that 'I could have performed more easily and with greater effect if I could have been briefed about defence counsel before I left Burlington, and if I could have called on someone for

[41] Hilberg noted he had visited the archives of the USA, the Federal Republic of Germany, the former GDR, the former USSR, Poland, Austria, Israel, and France. As an expert witness, Hilberg was involved in Holocaust trials ranging from denaturalisation and deportation cases to Holocaust denial including: *United States v Osidach* (1981, denaturalisation); *United States v Linnas* (1981, denaturalisation); *United States v Koziy* (1982, denaturalisation); *United States v Sprogis* (1983, denaturalisation); *Kungys v United States* (1987, denaturalisation); *Polyukhovich v The Commonwealth of Australia and Another* (1991, perpetrator); *State of Israel v Ivan (John) Demjanjuk* (1992, perpetrator). Statement of Witness. Raul Hilberg. CBP IRN 81871. Box 12, Folder 4; Lucy Dalglish, 'U.S. Racing Against the Clock in Tracking Down Nazis', *St. Paul XXX Press Dispatch* (28 August 1988), p.6A. RHP. RG-074-005. Carton 2, Folder 13; Mike Leary, 'Nazi War-Crime Suspect Falsified Papers, U.S. Says', *Metropolitan* (16 September 1980), p.3E. RHP. RG-074-005. Carton 2, Folder 13; Paul Teetor 'Expert: Demjanjuk not "Ivan the Terrible"', Vermont (16 June 1992), p.1. RHP. RG-074-005. Carton 2, Folder 13; Suggest Framework for Historian's Statement/ Proof of Evidence. Polyukhovich Trial. p.3. RHP. RG-074-005. Carton 20, Folder 11.

[42] Letter to Raul Hilberg from Peter Griffiths. 30 May 1984. RHP. RG-074-005. Carton 5, Folder 34.

simple assistance during my four days on the stand.'[43] Considering these reflections, it seems that the Prosecution were thoroughly underprepared and underestimated the courtroom tactics of Christie.

Hilberg was cross-examined by Christie for three days following the day-long examination-in-chief.[44] Throughout the exchange, Christie continually interrupted Hilberg so as to disrupt the flow of his testimony and cast doubt on the authority of Hilberg's testimony to the jury. Christie's tactics sought to present Hilberg to the jury as an unprofessional expert witness who was easily rattled and could not back up his arguments with substantial documents. Moreover, throughout the cross-examination, Christie employed denial rhetoric whereby deniers focus on specific forms of evidence which cannot be produced and thus argue that there is no 'proof' of the Holocaust, such as questioning Hilberg on the lack of documentation concerning a Hitler Order. When trying to justify his answer concerning the Hitler Order, Hilberg exclaimed '[y]ou previously criticised me for not using sources. I am trying orally to give my sources', in response to Christie's earlier claims, 'in your broad, sweeping statements … you have not, yourself, produced one single document to support anything you have said'.[45] Christie's line of questioning demonstrates his use of denial rhetoric along with the legal demand for precise evidence to cast reasonable doubt over expert testimony. Hilberg's concentration on the documentation returned the scrutiny of cross-

[43] Letter to Alan Rose from Raul Hilberg. 25 November 1986. RHP. RG-074-005. Carton 21, Folder 5.
[44] *Her Majesty the Queen v Ernst Zündel.* Volume IV. 15 January 1985. pp.696-697. Accessed: 15 November 2019. [https://codoh.com/media/files/1985Z%C3%BCndelTrialTranscript.pdf]; Paul Lungen, 'Zündel Pamphlet "Concoction of Contradictions"', *The Canadian Jewish News* (24 January 1985). RHP. RG-074-005. Carton 21, Folder 16.
[45] Griffiths's appearance in court without documents was with prior agreement between Christie and Griffiths that the trial proceedings would not be one where documents were continually submitted. However, Christie ambushed the Prosecution by presenting and referring to documents throughout Hilberg's cross-examination. *Zündel*. Volume IV. 16 January 1985. pp.765, 832; Letter to Peter Griffiths from Raul Hilberg. 26 January 1985. RHP. RG-074-005. Carton 5, Folder 35.

examination to the practice of historians and its suitability within a courtroom, and hence away from the pamphlet itself. At the end of the exchange which focused on the Hitler Order, Hilberg reflected: '[t]his is the problem of teaching complex history in such a small setting'.[46] Hilberg's statement is symptomatic of the struggle that the historian as an expert witness can undergo when testifying in the courtroom. As demonstrated in chapters three and four, testimony of expert witnesses is influenced by the line of questioning pursued by legal counsels depending on which argument they wish to present to the jury. Therefore, as Hilberg notes, when 'complex history' such as the Holocaust is being discussed, the Court often misses the wider context of the subjects due to the nature of questioning by legal counsels.

Similarly, alleged interdisciplinary difficulties arose in Judge Locke's final charge to the jury. In both his opening and closing address, Judge Locke instructed that just because Hilberg appeared before them as an expert 'does not make him any different than any other witness … you … can accept all, part or none of what any witness has to say under oath'.[47] Within the context of a Holocaust denial trial, this address appears particularly problematic: had the jury rejected Hilberg's testimony, the implications for Holocaust Studies regarding the agreed narrative of the Holocaust and the validity of the argument of Holocaust deniers would have been profound. This statement was made even more problematic by the fact that Judge Locke did not take judicial notice of the Holocaust, thus meaning that the details of the Holocaust had to be proven to establish Zündel's guilt. However, whilst the consequences of Judge Locke's address to the jury may seem striking within a Holocaust denial trial, when compared to other

[46] *Zündel*. Volume IV. 16 January 1985. pp.841-840.
[47] Ibid. 15 January 1985. pp.689-690.

criminal trials it becomes clear that Judge Locke was following standard criminal procedure. Similar to the *Zündel* trials, Justice Potts in the *Sawoniuk* trial (1999) also noted in his summing up that the jury could reject in part or in whole the content of Browning's expert testimony.[48] While concerns regarding the implications within Holocaust historiography remain the same, it is clear that the address to the jury concerning the validity of expert testimony, historical or not, is not specific to Holocaust denial trials, but is a feature of criminal trials in general. However, whilst historical expert witnesses must abide by the same rules as other expert witnesses in murder trials, no other form of criminal trial discusses war crimes committed over fifty years ago. Indeed, it is the distinctive nature of a Holocaust trial that makes standard criminal procedure contentious, including the parameters and Court's use of expert testimony.

Aftermath

The jury found *Zündel* guilty of the second count of the indictment and sentenced him to fifteen months in prison.[49] Following the sentence proceedings, Christie appealed the verdict on several grounds, including Judge Locke's acceptance of Hilberg's testimony, arguing that it was predominantly hearsay and should not have been admitted. The Appeal Court concluded that they were 'of the opinion that the Honourable Judge Locke committed some errors in the course of the trial'.[50] With specific focus on Hilberg's testimony, the Appeal Court found that the material that Hilberg had relied upon to present his evidence 'was material to which … any careful and competent historian would resort.'[51] The Appeal Court stated that they were

[48] *R v Anthony Sawoniuk*. Summing Up. 29 March 1999. Case No: T980662. p.8.
[49] Lipstadt, *Denying the Holocaust*, pp.159-160.
[50] *Zündel.* Supreme Court of Ontario. Court of Appeal. Judgement. pp.2-3.
[51] Ibid, p.80.

'satisfied that Dr. Hilberg's opinion evidence …. [a]lso fell within this hearsay exception and was therefore admissible'.[52] Given the centrality of the reasonable historian throughout the trial, the Appeal Court's wording regarding Hilberg's evidentiary material in many ways acted as a ruling regarding what was deemed to be acceptable historical conduct and research. From an interdisciplinary perspective, whilst this ruling would have benefitted Hilberg and other Holocaust historians, the fact that the Court defined what they deemed to be acceptable historical conduct on the basis of their own legal definitions of evidentiary research and hearsay, can be seen as a potential source of conflict between historians and lawyers in Holocaust denial trials. Though the Appeal Court did rule that Hilberg's testimony was admissible, they concluded that the 1985 verdict should be appealed and a new trial be run because of the errors made by Judge Locke, 'particularly those relating to the selection of the jury and the misdirection on the essential elements of the offence'.[53] The second *Zündel* trial therefore saw a shift, not only in the preparation of the Prosecution and documentary evidence, but their utilisation of the historian as an expert witness.

1988 *ZÜNDEL* TRIAL

The 1988 *Zündel* trial differed from 1985 in three fundamental ways. Firstly, in 1988, presiding Judge Thomas stated in the opening of the trial that 'the mass murder and extermination of Jews in Europe by the Nazis during the Second World War is so notorious as not to be the subject of dispute'.[54] The wording did not address how many Jews were killed, the means, or the official Nazi government policy towards the Jewish

[52] Ibid, p.81.
[53] Ibid, p.125.
[54] Hill, 'The Trial of Ernst Zündel', p.200.

extermination, thus leaving the content of the pamphlet open for debate. However, the ruling by Judge Thomas led to the second change in 1988: absence of survivor testimony. The wording of Thomas's judicial notice meant that survivor testimony in many ways was unnecessary as survivors could not have provided evidence on Zündel's awareness of the falsity of the pamphlet's claims. Finally, Zündel did not testify in the 1988 retrial.[55] Whilst the final difference from 1985 did not affect Browning's role or experience as an expert witness, the first two factors had a profound impact on the use of documentation by the Prosecution and thus the presentation of Browning's evidence.

Legal Actors

Whilst the trial was still a trial by jury, Judge Ronald Thomas replaced Judge Locke. Christie and Faurisson returned as Defence counsel and Defence adviser respectively. John Pearson replaced Griffiths as the leading prosecutor for the case. With greater experience as an attorney and the opportunity to study the 1985 trial transcripts, Pearson appeared in court to be substantially more knowledgeable in the history and historiography of the Holocaust than Griffiths.[56]

Strategy

The indictment against Zündel remained the same. However, the argument of the Prosecution shifted dramatically due to Thomas's judicial notice of the Holocaust.

[55] Browning, 'Historians and Holocaust Denial', p.774.
[56] Douglas, *Memory of Judgment*, p.248.

Whereas in 1985 Griffiths had provided evidence to the Court that the Holocaust had happened, in 1988 Pearson was able to completely focus on the contradictions and falsehoods contained in *Did Six Million Really Die?*

In contrast to 1985, and more importantly for the role of the expert witness within the trial, the evidence in 1988 became noticeably more document heavy. The Prosecution's case was presented without 'the voice of memory', due to the absence of survivor witnesses, as well as Thomas's ruling against showing the film *Nazi Concentration Camps* (shown in 1985).[57] Consequently, the Prosecution's evidence was much more reliant on the words of history and interpretations of documents. Pearson noted in his opening speech that he would 'present evidence that the pamphlet … is riddled with false statements, concoctions, and half-truths'.[58] The Prosecution proposed that they would present select historical documents and texts to the jury, side by side with the claims of the pamphlet, and certified by the testimony of Browning as an expert witness.[59] Therefore, the second *Zündel* trial depended far more on expert witnesses than the first due to the greater reliance on documents and the acute focus on the pamphlet as opposed to the Holocaust itself.[60]

Use of Expert Witnesses

Amongst the twenty-three defence witnesses called, Christie introduced two new 'expert' witnesses: David Irving and Fred Leuchter. Whilst Leuchter was dismissed as

[57] Ibid, p.246.
[58] *R. v Zündel*. Appeal Judgement. Supreme Court of Ontario. Court of Appeal. No. 424/88. 5 February 1990. pp.11-12. CBP. RG6.4.2. Box 9, File 3; Paul Bilodeau, 'Zündel's Beliefs Are Not on Trial Prosecutor Says', *Toronto Star*. CBP. RG6.4.2. Box 8, File 3.
[59] Browning, 'Historians and Holocaust Denial', p.774.
[60] Browning, 'Law, History, and Holocaust Denial', p.201.

an expert by Thomas due to his inadequate qualifications, Irving's role in the 1988 trial is seen to be the turning point in his status as a Holocaust denier and a precursor to the 2000 *Irving* trial.[61]

Hilberg refused to testify in 1988 because of his experience of cross-examination in 1985.[62] However, Pearson did read all of Hilberg's 1985 testimony to the Court, thus getting it on the record.[63] Expert testimony presented by historians therefore became an essential part of the trial as Pearson was subsequently able to draw upon Hilberg's testimony throughout the rest of the trial's proceedings.

The 1988 trial readdressed several of the interdisciplinary differences concerning the place of the historian within a criminal court that had been covered in 1985. The examination-in-chief of Browning focused predominantly on whether it was possible to prove the high evidentiary standard of 'beyond reasonable doubt' within the practice of history and make the distinction between honest history and dishonest falsification.[64] As Browning noted upon reflection, 'I was very conscious that historians had a sliding scale [of evidentiary proof and interpretation]. In law you have a fixed … bar to get over in that particular case and it does not slide'.[65] Whilst the purpose of the historian's expert testimony had developed from 1985 to 1988, the weight of Browning's testimony within wider Holocaust historiography had increased, to reflect and do justice to the practice of history as a discipline. However, as Pearson privately

[61] Lipstadt, *Denying the Holocaust*, pp.164-179; Guttenplan, *The Holocaust on Trial*, pp.52-54.
[62] Paul Bilodean, 'Expert Witness Refuses to Testify a Second Time', *Toronto Star*. RHP. RG-074-005. Carton 21, Folder 16; Hill, 'The Trial of Ernst Zündel', p.200.
[63] Letter to John Pearson from Raul Hilberg. 6 January 1988. RHP. RG-074-005. Carton 21, Folder 5; 'Previous Cross-Examination Entered in New Zündel Trial', *The Globe and Mail* (6 February 1988). RHP. RG-074-005. Carton 21, Folder 16; Browning. Interview.
[64] Browning, 'Historians and Holocaust Denial', p.773.
[65] Browning. Interview.

noted to Browning, 'such cases might have to be proved at some point in time when there would be no survivor witnesses still alive.'[66] Hence, prosecutors needed to learn how to make a case and present evidence without survivor testimony. Considering the above, the use of expert witnesses during the 1988 *Zündel* trial demonstrates two factors that impact the experience of the historian as an expert witness. Firstly, the contrasting utilisation of expert testimony between 1985 and 1988 highlighted how trials of similar jurisdictions can learn from each other. Secondly, the decision by the Prosecution to rely more on documents increased the importance of the expert witness's interpretation of the documents and presentation of evidence, thus making the expert testimony indispensable to the overall verdict.

TRIAL PROCEEDINGS: CHRISTOPHER BROWNING

Browning is one of the most esteemed academics within contemporary Holocaust Studies. Born in 1944, he graduated with Highest Honours in History from Ohio College in 1967, earned his Masters at the University of Wisconsin in 1968, and his doctorate in 1975. Appointed as Assistant Professor of History at Pacific Lutheran University (PLU), Tacoma, in 1974, Browning continued to work at PLU for twenty-four years. During this time, he taught courses on the Holocaust, German History, French History, Western Civilisation, and World Civilisation. He was promoted to the level of Professor in 1984, and to Distinguished Professor in 1997.[67] During this period, he published his seminal text *Ordinary Men* (1992), for which he received numerous awards, amongst them the Faculty Excellence Award from PLU in 1992, and the

[66] Browning, 'Law, History, and Holocaust Denial', pp.200-201.
[67] Christopher R. Browning Papers, 1967-2015. Biographical Note. Accessed: 29 September 2019. [http://archiveswest.orbiscascade.org/ark:/80444/xv90856]

National Jewish Book Award in Holocaust Studies in 1993. In 1999, Browning left PLU and began work as the Frank Porter Graham Professor of History at the University of North Carolina-Chapel Hill teaching undergraduate and graduate courses on the Holocaust, Western Civilisation, contemporary European History, and German History. In 2004 he was awarded the National Jewish Book Award in the Holocaust category for his text *The Origins of the Final Solution.*[68] He retired in 2014. Throughout his career, he has published nine books, fifty-eight papers in various languages, delivered countless lectures and papers at conferences, published ten review articles, and written book reviews for various internationally-circulated newspapers and journals.[69] As a result of his knowledge of the Holocaust, having researched both the decision making processes of the Nazi regime and the grassroots experience of the Holocaust, Browning has been hired as an expert witness in several Holocaust trials.[70]

The 1988 *Zündel* trial was the first Holocaust trial that Browning was involved in. It is clear that due to the increased reliance by the Prosecution on hard documentary evidence and the testimony of the expert witness, Browning enjoyed more agency in terms of suggesting argument strategies to the Prosecution than had been the case

[68] Ibid.

[69] Browning's publications include, but are not limited to: *The Final Solution and the German Foreign Office* (New York: Holmes and Meier, 1978); *Fateful Months: Essays on the Emergence of the Final Solution* (New York: Holmes and Meier, 1985); *The Path to Genocide* (New York: Cambridge University Press, 1992); *Ordinary Men* (New York: HarperCollins, 1992); *Nazi Policy, Jewish Labor, German Killers* (New York: Cambridge University Press, 2000); *Collected Memories: Holocaust History and Postwar Testimony* (Madison, Wisconsin: The University of Wisconsin Press, 2003); *The Origins of the Final Solution* (London: Arrow Books, 2004); *Remembering Survival: Inside a Nazi Slave Labor Camp* (New York: W. W. Norton & Company, 2011).

[70] Browning testified in six trials: *Her Majesty the Queen v Ernst Zündel* (Holocaust denial, Toronto, 1988); *R. v Heinrich Wagner* (magistrates hearing, perpetrator, Australia, 1992); *R. v Serafinowicz* (magistrates hearing, perpetrator, UK, 1997); *Can. (M.C.I) v. Kisluk* (denaturalisation trial, Ottawa, 1999); *R. v Sawoniuk* (perpetrator, UK, 1999); *Irving v Lipstadt* (Holocaust denial, UK, 2000). Browning also wrote historical reports for two other trials, however did not testify as the trials did not progress. Christopher R. Browning Papers, 1967-2015. Biographical Note; Browning. Interview; Letter to Raul Hilberg from Christopher Browning. 22 September 1992. RHP. RG-074-005. Carton 8, Folder 6; Letter to Raul Hilberg from Christopher Browning. 10 January 1994. RHP. RG-074-005. Carton 8, Folder 6.

for expert witnesses in earlier Holocaust criminal trials, demonstrated through Browning's preparation for the trial alongside the examination-in-chief by Pearson. Browning's cross-examination by Christie reiterates the similar interdisciplinary arguments against the use of the historian in Holocaust trials. Moreover, Browning's testimony relating to the pamphlet meant that his testimony was more relevant to the overall case than the historical testimonies given in the *Hostage* Case or the Frankfurt-Auschwitz trial. Overall, the assessment of Browning's testimony within this chapter will be used to understand firstly how Browning's experience as an expert witness in general developed from 1988 to 2000; and secondly, how the denial focus of the trial increases the agency and importance of the testimony of the expert historian in contrast to criminal perpetrator trials.

Existing Literature

Apart from Browning's own reflections of the trial, his testimony is somewhat neglected within existing literature with the exception of a handful of texts. Evans summarises Browning's testimony as 'well-attested and correct evidence' whilst discussing the wider role of the historian as an expert witness within criminal trials: 'Browning helps the court by giving it information on which to base its decision, information which is only available to experts'.[71] Though Evans is right to draw upon the role of the historian as an expert witness, he does not thoroughly analyse the testimony of Browning to demonstrate how Browning presented his 'well-attested' evidence, the strategy of the Prosecution, or the role of the expert witness within it.

[71] Evans, 'History, Memory, and the Law', p.330.

More interestingly, Douglas compares the personal background of Hilberg and Browning and discusses how it affected their experience as expert witnesses within their respective trials from a comparative methodological perspective. Douglas draws upon Hilberg's qualification as a political scientist as opposed to a historian and his Jewish faith as an argument for why, despite extensive knowledge on the Holocaust and constant dedication to the sources, Hilberg was continuously personally targeted during his cross-examination.[72] As Douglas notes, whilst Browning's non-Jewish background and professional status as a historian did not stop Christie from arguing that Browning was a 'propagandist for the State of Israel', it prevented Christie repeating the arguments he had made against Hilberg: Christie had suggested that Hilberg as a political scientist was no better qualified to write history than the Holocaust deniers whose background in research Hilberg had critiqued.[73] Moreover, Douglas emphasises Browning's successful use of sarcasm whilst testifying during cross-examination compared to Hilberg's flustered responses. Douglas's assessment of the backgrounds and characteristics of Browning and Hilberg is one of the few comparisons of two individuals within separate Holocaust trials that exists on historians as expert witnesses. While Browning had clearly been better prepared for the second trial than Hilberg, Douglas's comparison demonstrates the importance that the behaviour of the expert witness can have on the reception of their testimony.[74]

Considering the limited literature on Browning, the following analysis of Browning's experience of the Prosecution strategy, examination-in-chief, and cross-examination

[72] Douglas, *Memory of Judgment*, pp.248-249.
[73] Ibid; *Her Majesty the Queen v Ernst Zündel*. Volume XIV. 16 February 1988. pp.3290-3291. CBP. RG6.4.2. Box 9, File 5.
[74] Chapter two assesses literature analysing the impact of the expert's body language within the courtroom. Additionally, see chapter seven for a comparison of the body language between Browning and Richard Evans during the *Irving* trial.

will contribute to the literature on the *Zündel* trials by assessing Browning's 1988 testimony to accompany the existing research on Hilberg. This will provide both a foundation for a comparison between the experiences of Hilberg and Browning as expert witnesses and assessing Browning's experience across three different forms of Holocaust trials.

Expert Witness Strategy

The Prosecution in the 1988 trial presented their argument by comparing the original documents cited in the pamphlet alongside the pamphlet itself on a dual screen, so the jury could clearly see the inconsistencies within Zündel's claims. As the expert witness, Browning would explain to the jury the significance of the documents in front of them.[75] Given the contextual role of the expert historians in the prior *Hostage* Case and Frankfurt-Auschwitz trials, and the lack of agency that Hilberg experienced in 1985, surprisingly this strategy was Browning's idea and not Pearson's. Commenting on the process through which he became the expert witness for the 1988 trial, Browning stated that Pearson asked 'how would you dissect the pamphlet … my recommendation was that we take the pamphlet, paragraph by paragraph and then look at each of [Zündel's] claims and on the second screen you put up the document or the book that it's citing and the jury can simply see side-by-side the total falsification.'[76] In contrast to other criminal proceedings, 'there was no overall brief; [Browning's] job was to dissect the pamphlet in a way that demonstrated that this was a conscious falsification'.[77] The extent of Browning's influence on the courtroom

[75] Browning, 'Law, History, and Holocaust Denial', p.201.
[76] Browning. Interview.
[77] Ibid.

strategy to present the Prosecution's argument demonstrates a distinct development from earlier Holocaust trial proceedings, as well as other criminal trials in general. As observed at the Frankfurt-Auschwitz trial, it was the Prosecution counsel who decided where the expert testimony would best fit within the prosecuting strategy. Importantly, Browning's role as an expert witness did not deviate from standard criminal practice. Browning noted that his job was to 'give the court … a historically proven background … to equip the jury to make that judgement … in an informed way'.[78] However, Browning was given some guidance regarding the focus of the examination-in-chief: 'to explain what Nazi policy was; what were the stages by which it happened; the chronology; how was Nazi power manifested on the ground in this particular region, and what was the structure of that, and by what stages did [Nazis] do things that [historians] could document'.[79] Nonetheless, Browning's influence over the Prosecution's strategy demonstrates that within the 1988 *Zündel* trial, the expert historian was fundamental to the legal arguments presented in the trial beyond providing the historical context.

Another example of the agency that Browning received during the preparation for the trial can be seen through Browning's selection of the documents. In contrast to the *Sawoniuk* and *Irving* trials, Browning was not required to produce a written report. Browning notes that he was contacted in the 'fall' (September to November) of 1987, had selected the documents by December, and testified in February 1988.[80] In 1988, Browning's testimony was to deliver an oral presentation to the Court on which Pearson would examine him.[81] The fact that Browning was entrusted to select

[78] Ibid.
[79] Ibid.
[80] Ibid.
[81] Ibid.

documents that most clearly demonstrated the falsification of the pamphlet demonstrates another development of the role of the historian as an expert witness. Pearson recognised that Browning had better knowledge of the historical documents than the legal counsels and also had a clear understanding of which documents would satisfy 'the key part of the law' against Zündel and prove that Zündel was consciously disseminating false information.[82]

Within this context, the working relationship between Browning and Pearson was one of interdisciplinary equality: both understood the similarities as well as the limitations concerning how the disciplines could work together to prove the charges against Zündel. Firstly, given that the *Zündel* trial was dealing with the nature of historical practice meant that the testimony of the historian would hold more weight within the overall judgement of the trial. Secondly, both disciplines require the evidence to be at a similar level of accuracy and could therefore work together to prove the falsification of the pamphlet. Finally, Browning's preparation leading up to the 1988 trial was more in depth than Hilberg's in 1985. Whilst Browning only met Pearson 'for the first time in the autumn of 1987 to discuss and plan for a trial that was scheduled to begin in early 1988', both individuals had the 1985 transcripts to review and understand how to prepare for the trial and what to expect.[83] By reviewing the 1985 transcripts, Browning was able to understand the language used by Christie, and what to expect during the cross-examination, as well as what documents would provide the most effective evidence during the examination-in-chief. Hence, Browning and Pearson were

[82] Browning noted he received assistance by a woman (name unknown) with the documents during the week that he was in Toronto for the trial, particularly concerning documents that Browning could not gain access to in PLU due to archival admittance and permission. However, the preliminary evidentiary research was conducted by Browning alone. Ibid.
[83] Ibid.

prepared to cover the pamphlet more 'responsibly' and provide a stronger rebuttal against Christie, particularly the politicisation of the trial and the arguments used by Christie against the documents.[84] Indeed, the success of this approach, and the shared interdisciplinary understanding, was most clearly displayed in Browning's examination-in-chief and cross-examination.

Testimony: Examination-in-Chief

In accordance with standard criminal procedure when introducing an expert witness to the Court, Browning's *voir-dire* began with Pearson establishing Browning's status as an expert in Holocaust historiography, where Browning conducted his research, how long he had spent studying the Holocaust, and his publications. Similar to Judge Locke in 1985, Judge Thomas having acknowledged Browning's status as an expert witness for the Prosecution, addressed to the jury that an expert witness's opinion 'is obviously, in some respects, hearsay' but additionally 'just like any other witness, you can accept … whatever amount of the testimony you wish, all, some or none.'[85] Judge Thomas's statement to the jury reiterates that the use of expert witnesses in criminal Holocaust trials followed standard criminal procedure. However, as noted above, the ramifications of a jury dismissing an expert's history on the Holocaust is profound, particularly in the context of a Holocaust denial trial. Indeed, Judge Thomas's directions to the jury reiterates that it is the distinctive nature of the Holocaust that makes the role of the expert historian so contentious within Holocaust trials, as opposed to the role of the expert historian in general.

[84] Ibid.
[85] *Zündel*. Volume XIII. 15 February 1988. pp.3012-3013.

Pearson's initial questions to Browning during his examination-in-chief also demonstrated continuity between Holocaust trials from a historiographical perspective.[86] Pearson returned to the intentionalist-functionalist debate that had originated from the Frankfurt-Auschwitz trial by asking Browning whether he was the author of 'The Genesis of the Final Solution, A Reply to Martin Broszat'.[87] While Browning did not reference the Frankfurt-Auschwitz trial, the impact that Broszat's expert report had on the line of questions that future expert witnesses faced, demonstrated that the work produced by expert historians for Holocaust trials not only went on to shape debates within Holocaust Studies, but also the narratives presented in future Holocaust trials.

Pearson's decision to question Browning over the intentionalist-functionalist perspectives can be seen as a tactic to pre-empt Christie's earlier arguments against Holocaust historiography being 'opinion based'.[88] By requesting Browning to define the intentionalist-functionalist debate and explain his criticism of Broszat in the article mentioned above, Pearson was indicating to the Court that different interpretations within Holocaust historiography do exist and are often an avenue of debate amongst Holocaust academics. Pearson presented a binary view regarding how historical literature is received by scholars and the wider readership, though Pearson's position does engage with the depth of Holocaust historiography and debate within Holocaust Studies that existed in the 1980s. As Dan Stone argues, the type of popular historiography presented within mainstream academia, and thus the courtroom, were

[86] Browning's examination-in-chief took one and a half days.
[87] *Zündel*. Volume XIII. 15 February 1988. pp.3022-3025.
[88] During cross-examination, Christie presented the intentionalist v. functionalist debate as evidence that historical fact did not exist and that the historical discipline was only formed of opinions. Ibid, p.3109.

influenced by wider factors such as the Cold War and transnational politics.[89] Stone compares the similar arguments presented by Arno J. Mayer, Gerhard L. Weinberg, and David Cesarani and their reception within academia. In the 1980s, Mayer's argument that the Holocaust, or 'Judeocide', could not be understood outside of the context of the military and strategic history of the Second World War was heavily criticised and rejected. By contrast, in *Final Solution: The Fate of the Jews 1933-49* (published in 2016) Cesarani presents a similar argument to Mayer, assessing the Holocaust within the wider Nazi German war effort. As Stone asserts, 'the adoption of transnational Holocaust commemoration and research means that an argument perceived as threatening in the context of the rise of nationalism at the end of the Cold War could now be regarded with equanimity'.[90] Given the criminal standard for clear discernible evidence, it could be argued that the functionalist and intentionalist narratives were readily adopted by lawyers during the 1980s, not just because of the wider historiography and the narratives that were presented by the expert historians, but because the two lines of debate enabled a clear binary engagement of historiography that the law could comprehend and understand. Such a conclusion furthers the argument that by adopting the terms of the intentionalist-functionalist debate, the Court was demonstrating its ability to understand the complexities of historiography.

The line of questions resulting from the side-by-side assessment of the pamphlet and historical documents was not only highly successful in disproving the claims of the pamphlet, but it demonstrated the rapport and understanding of the interdisciplinary

[89] Dan Stone, 'The Course of History: Arno J. Mayer, Gerhard L. Weinberg, and David Cesarani on the Holocaust and World War II', *The Journal of Modern History*, Vol. 91, No. 4 (2019): pp.883-904.
[90] Ibid, p.884.

relationship between history and law within a Holocaust trial setting. In one instance, Pearson read an excerpt from the pamphlet describing the Warsaw Ghetto. Browning clearly and methodically dissected all of the falsifications within the section that had just been read out, cross-referencing with the documentation displayed on the screen. Drawing on evidence that was presented earlier in the trial, Browning testified that the excerpt was 'terribly troubling' because 'it not only denies the deaths of these people, but it imputes that the Jews were the aggressor and the Nazis were … in self-defence, going to clear out the ghetto'.[91] Browning's testimony demonstrates an acute awareness of his role as an expert within the trial setting. By adding at the end of the Warsaw Ghetto review 'maybe I shouldn't make that kind of judgement on it, but it troubles me greatly', Browning highlighted his awareness of the distinction between expert witness testimony, personal response, and opinion hearsay.[92] The examination-in-chief of Browning thus demonstrated the effectiveness of Pearson and Browning's preparation which was reflected through the presentation of their argument and pre-empting Christie's cross-examination tactics. Browning's precise destruction of the pamphlet placed the Defence in a difficult position in winning the trust of the jury. As Browning noted, with the Defence claiming that the pamphlet's contents were true 'they were really in a hard place because they were just defending what was clearly falsification'.[93]

[91] *Zündel*. Volume XIV. 16 February 1988. p.3216.
[92] Ibid.
[93] Browning. Interview.

Testimony: Cross-Examination

Browning's preparation for the 1988 trial was not limited to reviewing the 1985 trial transcripts. Browning noted that Hilberg had offered an insight into the nature of Christie's cross-examination tactics: 'he just said … Christie was like a dog that bit your pant leg and [would] not let go … he was tenacious and absolutely focused on what he wanted to do'.[94] While this is clear from the 1985 trial transcripts, Hilberg's personal experience also helped Browning to prepare for the 1988 trial. Unlike Hilberg who felt underprepared in 1985, Pearson organised a 'mock interview' for Browning, with Pearson playing the role of Christie and Browning responding to Christie's style of questioning.[95] Pearson sought to familiarise Browning with Christie's style, 'to not [lose] focus because of all of the distractions and the non-essential things [Christie] is trying to throw up'.[96] Browning's mock interview served an additional purpose within the Prosecution's wider strategy. As Browning noted, Pearson observed in 1985 that 'Christie needed a fight with someone'.[97] Thus, Browning's mock interview also served as practice for Browning to defend himself without objections from Pearson: if Browning remained calm and Pearson refused to object, then Christie would 'inevitably' fight with Judge Thomas.[98] This assessment proved to be correct. In response to Christie attempting to get Browning to give his opinion on the *Demjanjuk* trial (1986), Judge Thomas claimed 'that is preposterous'.[99] According to Browning, Christie's reply, 'I don't appreciate the fact that your Honour should make judgements

[94] Ibid.
[95] Ibid; Letter to Alan Rose from Raul Hilberg. 25 November 1986.
[96] Browning. Interview.
[97] Ibid.
[98] Ibid.
[99] *Zündel*. Volume XVII. 19 February 1988. pp.3856-3857.

upon my questions', consequently undermined the Defence more than Christie's questions to Browning.[100]

Browning's mock interview demonstrates the advantages that can be gained by legal counsels if one studies previous trial transcripts and the experiences of expert witnesses. The similarity between the 1985 and 1988 trials is unique: the indictment and the Defence counsel remained the same, meaning the Prosecution could pre-empt the tactics that would be used, and the 1985 trial transcripts were available for analysis. As Browning subsequently commented, his experiences in 1988 contributed to the development of his overall role as expert witness where he would continually learn from each trial.

Browning notes through his reflections on his three-and-a-half days of cross-examination that Christie followed 'at least' four lines of questioning: free speech; personal attacks against Browning; credibility as an expert; and the extent of interpretation within the historical discipline.[101] These themes reoccurred throughout the Defence's case. During counsel submissions prior to Browning's appearance as a witness, Christie tried to discredit Browning as an expert witness on the basis that 'history is not a subject upon which an expert can testify as to the matters of the fact'.[102] Christie's language mirrors the opposing counsel's views against the use of expert witnesses in both the *Hostage* Case and the Frankfurt-Auschwitz trial. The fact that

[100] Ibid.
[101] The existing literature that examines Browning's 1988 testimony focuses on his cross-examination by Christie. Aside from Browning himself, Lawrence Douglas notes the similarities of Christie's tactics and lines of argument between the two *Zündel* trials. Browning, 'Law, History, and Holocaust Denial', pp.201-203; Browning, 'Historians and Holocaust Denial', p.774; Douglas, *Memory of Judgment*, pp.249-252.
[102] *Zündel*. Volume XIII. 15 February 1988. p.2935.

the same arguments were raised during the *Zündel* trials as in the Holocaust perpetrator trials suggest that lines of argument against the testimony of expert witnesses remain the same regardless of the purpose of the trial.[103]

Importantly, given that four themes of enquiry can be easily identified suggests the repetitiveness and intensity of Christie's cross-examination. For example, during the first day of cross-examination, Christie argued that Browning was not a historian at all. Instead, he was 'part of a scheme to rewrite history' because Browning was under contract to write a book for Yad Vashem Publications (part of the International Institute for Holocaust Research, based in Israel) .[104] Browning firmly denied the personal accusation made against him, yet Christie returned to the same argument on the final day of cross-examination by arguing that 'most, if not all' of Browning's works were published by Jewish sources, again an accusation Browning denied.[105] At first glance, the repetition of Christie's questions could demonstrate an unstructured argument, designed to wear down the expert witness and to affirm Christie's position to the jury, with little focus on the pamphlet itself. However, as Browning noted, the entire cross-examination was a focused 'fishing expedition' to trip Browning up: '[Christie] knew exactly what his plan was, every question that I could answer he'd just shut me off, he didn't want to hear that and would move as quickly as he could to the next one.'[106] Thus, Christie employed repetitive questions and denial rhetoric, drawing upon a

[103] As addressed in chapter six, defence counsel William Clegg in the *Sawoniuk* trial did not dispute Browning's status as an expert witness or the events of the Holocaust. Clegg's approach remains the exception.
[104] *Zündel*. Volume XIV. 16 February 1988. pp.3290-3291, 3294-3295.
[105] Ibid, p.3807.
[106] Browning. Interview.

select source of documents that expert historians may not be fully versed in to discredit Browning as an expert witness, and thereby lend validity to the Defence's argument.[107]

Though Christie's arguments to discredit Browning as an expert witness echoed those used in the trials of the *Hostage* Case and the Frankfurt-Auschwitz trial, Christie's lack of focus on the pamphlet demonstrated a distinct shift in tactics from earlier Holocaust criminal trials. During the *Hostage* Case and the Frankfurt-Auschwitz trial, the primary aim for the Defence was to have their client acquitted. It seems fair to assert that Christie did not view acquitting Zündel as a priority within his cross-examination, given that Christie gave little focus to the content of the pamphlet, and thus to the claims of the indictment. Similar to his approach in 1985, Christie sought to use his witness cross-examination to affirm the politicisation of the trial and provide a platform for the arguments of Holocaust denial. As Browning notes, certainly from a historical and legal perspective, Christie's attacks towards the suitability of a historian as an expert witness were more interesting than the personal jibes that Christie made towards Browning.[108] In one instance, the interdisciplinary debate between Christie and Browning led to a discussion over the nature of evidence that both history and law rely upon with Browning affirming that, similar to the law, in his opinion historians work with 'roughly four kinds of evidence: documents, eyewitness testimonies, physical evidence, [and] circumstantial evidence'.[109] Within both disciplines Browning noted there was a distinction between 'debating facts proved beyond reasonable doubt versus debating interpretations of certain events', for example why the Holocaust

[107] Browning also notes that aside from subjecting key individual documents to rigorous analysis to extract alternative meanings, Christie used denial tactics of treating bureaucratic euphemisms (such as resettlement) literally, and explicit language (such as destruction) figuratively. Browning, 'Law, History, and Holocaust Denial',
p.203.
[108] Ibid, p.202.
[109] Ibid; *Zündel*. Volume XIII. 15 February 1988. p.2952.

happened as opposed to whether it happened.[110] However, Christie's rebuttals concerning what a 'reasonable historian' may believe, demonstrates a shift from earlier opposing counsel arguments regarding the views of expert witnesses and a wider attack on the practice of history itself.

Both *Zündel* trials resulted in significant attacks on history not otherwise seen within a courtroom. Whilst both trials followed the criminal jurisdiction as with the *Hostage* Case and the Frankfurt-Auschwitz trial, the responsibility to prove one's argument 'beyond reasonable doubt' is the only consistency between criminal perpetrator trials and criminal denial trials. Whilst one could expect attacks against the status of the expert and disputes over interpretations within the historical discipline, the history that an expert presented would largely not be open for dispute from the perspective of the expert witness during a perpetrator trial. By contrast, in a denial trial, both history and the historian come under attack, due to the ideological defence of the opposing counsel. Thus, for the expert witness, it is an altogether different experience than testifying in a criminal perpetrator trial. As the differing experiences of Hilberg and Browning demonstrate, to successfully testify in a Holocaust denial trial, the expert must be sufficiently prepared to defend both themselves and history itself.

CLOSING SPEECHES

Unlike closing speeches within prior Holocaust perpetrator trials, reference to Browning's expert testimony was not confined to the beginning of the Prosecution's closing speech. Moreover, Browning noted that he 'never personally experienced …

[110] Browning. Interview.

any of the prosecutors … manipulating or misusing [his] material' in contrast to the use of expert historical testimony in the closing speeches of the Frankfurt-Auschwitz trial.[111] Assessing the 1988 closing speeches reaffirms the centrality of Browning's testimony to the trial.

Prosecution

Pearson's closing speech focused predominantly on the claims underpinning the pamphlet, following the reminder to the jury of Zündel's indictment and the burden of proof that lay with the Prosecution (that Zündel willingly published the pamphlet despite knowing the content was false).[112] Pearson broke the pamphlet down, chapter by chapter, addressing the key themes of contention, with Browning's dissection of the pamphlet peppered throughout the Prosecution's summation of evidence to disprove the pamphlet's content. Throughout the closing speech, Pearson objectively highlighted Browning's testimony to the jury by stating 'Professor Browning told you', 'Professor Browning suggested that', and 'Professor Browning testified that', while constantly referring to the submitted exhibits.[113] Pearson's reference to Browning's testimony and presentation of evidence gives rise to two observations. Firstly, within criminal proceedings, legal counsels can only submit evidence through a witness. For example, with a murder trial, the results from a ballistics test can only be submitted to the jury through the testimony of an expert witness, and not through the legal counsel presenting them without testimonial relevance. The correlation between Browning's testimony and the evidence submitted demonstrates that expert historians also

[111] Browning. Interview.
[112] *Zündel*. Volume XXXV. 4 May 1988. pp.10253-10255.
[113] Ibid, pp.10264-10268.

provide legal counsel with an avenue to submit relevant historical evidence. Secondly, Pearson's continual reiteration of expert witness testimony ('Professor Browning told you that…') rather than adopting or paraphrasing the testimony, emphasises that no historical narrative was being presented because Browning's testimony focused on the false claims made in the pamphlet, thus demonstrating 'good history' and historical truth.

Defence

The Defence's summation followed a different strategy. Christie returned to the personal attacks against Browning's practice as a historian rather than focusing on Browning's testimony against the pamphlet.[114] Christie reiterated to the jury that Browning had 'well established contacts in Israel' and was thus 'in a position of being influenced by his contacts, to put it mildly'.[115] Moreover, Christie sought to use denial rhetoric again to discredit the testimony of Browning. Following abovementioned denial tactics, Christie criticised Browning for 'not producing an autopsy of a gassing victim, [and] for not presenting a plan for a mobile gas van'.[116] Following condemnation of Browning's methodology (not doing on-site inspections of gas chambers and believing stories of survivors), Christie concluded with his attack on history as a discipline. Christie emphasised to the jury that 'history is basically opinion' and that within the context of the pamphlet, whilst there may have been mistakes, 'the essentials are true'.[117]

[114] Access to the full 1988 trial transcript was not possible, hence the analysis of Christie's closing speech is based upon the testimony cited in newspaper articles that reported the 1988 trial.
[115] Paul Lungen, 'Jury Deliberates After Lawyers' Final Statements', *The Canadian Jewish News* (12 May 1988), p.6. CBP. RG6.4.2. Box 8, File 3.
[116] Ibid.
[117] Ibid.

The reflection of Browning's testimony by Pearson and Christie during their closing speeches reiterates the different role that an expert historian must adopt within a criminal perpetrator trial compared to a criminal denial trial. When compared to earlier Holocaust perpetrator trials we can see that the approach towards expert testimony by the legal counsels was influenced not only by the argument of the legal counsel, but also by the purpose of the trial with Christie using his summation to reaffirm the Defence's ideological argument that had been present throughout the trial. Moreover, the centrality of Browning's evidence within the closing speeches proved that the testimony of the expert historian was no longer separate from the legal arguments presented during Holocaust denial trials. Rather, historical testimony was now fundamental to the overall legal proceedings.

JUDGEMENT

On 11 May 1988, the jury found Zündel guilty of willingly distributing the pamphlet *Did Six Million Really Die?* and was sentenced to nine months in prison.[118] Judge

[118] Like the verdict in 1985, Christie and Zündel appealed the 1988 verdict. In 1992 the case eventually reached the Canadian Supreme Court on a constitutional issue. The Court of Appeal sought to establish whether section 181 of the Canadian Criminal Code (originally section 177 but recodified as 181) infringed the guarantee of freedom of expression in section 2(b) of the Canadian Charter of Rights and Freedoms. If so, the Court of Appeal had to rule whether section 181 was justifiable under section one of the Charter. As summarised by Justice Beverly McLachlin, Pearson had successfully shown that 'the appellant misrepresented the work of historians, misquoted witnesses, fabricated evidence, and cited non-existent authorities.' However, McLachlin furthered, 'it is undeniable that Section181, whatever its purpose, has the effect of restricting freedom of expression.' Consequently, by a narrow majority of four to three, Zündel's appeal was disallowed but the 'false news' law was overturned as unconstitutional. As Lawrence Douglas noted, the arguments presented during the appeal concerning freedom of expression, mimicked Christie's arguments during the trial itself concerning the control of speech dictated by the Canadian Criminal Code. Thus, though the Appeal condemned Zündel's methodological approach to history, the ruling against section 181 as unconstitutional resulted in a political victory for Christie and Zündel. *Zündel*. Volume XXXVI. 11 May 1988. pp.10541-10542; *Zündel*. Volume XXXVI. 13 May 1988. pp.10570-10571; Zündel Appeal Judgement. Supreme Court of Ontario. Court of Appeal. No. 424/88. 5 February 1990. CBP. RG6.4.2. Box 9, File 3; *Ernst Zündel v Her Majesty the Queen*. [1992] 2 SCR 731. Case No. 21811. Accessed: 10 November 2019. [https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/904/index.do]; Browning, 'Law, History, and Holocaust Denial', p.205; Douglas, *Memory of Judgment,* pp.253-254.

Thomas's charge to the jury followed a similar structure to Pearson's closing speech: the history of the Holocaust was interspersed during the charge with Browning's testimony referred to throughout. This development from other criminal proceedings demonstrates how historical expert knowledge was employed differently between Holocaust perpetrator and Holocaust denial trials, and how central the historian's expert testimony was in the proceedings of the latter.

Charge to the Jury

Although Judge Thomas told the jury that they could accept as much of Browning's evidence as they liked, he also expanded on the role of the historian as an expert witness. Thomas explicitly acknowledged that 'an historian is entitled to rely upon hearsay in arriving to his conclusions'.[119] Moreover, as established at the beginning of this chapter, though the documents admitted during the trial were hearsay, '[i]t constitutes the sources of information available to the expert historians on a particular matter'.[120] Thus, the admitted documents were available for the jury to consider the quality of the material, and what 'might have been taken into account by a careful and competent historian'.[121] The distinction that Thomas made concerning the role of the historian as an expert witness was significant. By noting that the historian as an expert witness has different sources of evidence, and sources of evidence that may breach other legal standards such as hearsay, Thomas differentiated between the experiences of being a historical expert witness, as opposed to an expert witness in general. By acknowledging the use of the historian as an expert witness, Thomas

[119] *Zündel*. Volume XXXVI. 10 May 1988. p.10378.
[120] Ibid.
[121] Ibid.

inadvertently drew upon the distinctiveness of Holocaust trials, and the exceptional standards of evidence that have to be met in order to comply with such proceedings.

Expert Witness Testimony

Following standard criminal procedure for a trial by jury, Thomas proceeded to summarise the evidence presented by both Hilberg (through Pearson reading the 1985 transcripts) and Browning's examination-in-chief. In earlier Holocaust criminal proceedings, the summary of historical testimony was either completely omitted from the charge to the jury (*Hostage* Case) or was in a 'historical section' of the judicial summary, separate from a summary of the legal arguments (Frankfurt-Auschwitz trial). By contrast, Browning's testimony and the evidence that he presented was interspersed throughout Thomas's summary of the Prosecution's and Defence's presentation of the historical evidence. Drawing upon the Defence's claim that 'history is always opinion and that nobody knows the truth', Judge Thomas presented the testimony of Browning and Hilberg to address the positions of Holocaust 'intentionalists' and 'functionalists'.[122] Focusing specifically on the debate concerning the Hitler Order, Judge Thomas reflected on the argument presented by the Defence concerning the 'very nature and structure [of Nazi Germany] as a dictatorship' alongside Browning's testimony.[123] Though objective in the language used towards Browning's evidence, the structure of Thomas's charge to the jury is a reflection of an academic debate. By addressing three historical perspectives (intentionalists, functionalists, and the position of the Defence), Thomas presented two arguments:

[122] Ibid, pp.10395, 10431-10433.
[123] Ibid, p.10431.

firstly, he effectively disproved the Defence's position by presenting Browning's evidence after each claim made by the Defence; and secondly, the discussion of Holocaust historiography alongside Christie's defence strategy established within a court of law that, whilst the different intentionalist and functionalist approaches to evidence are empirically respectable, the methods used by Christie and Holocaust deniers were not.[124]

SUMMARY

When compared with earlier Holocaust perpetrator trials, the 1988 *Zündel* trial saw a development in both the agency and role of the expert witness. Browning's preparation for the 1988 trial demonstrated the importance that a positive, mutual understanding between disciplines can have on the strength of a legal counsel's argument, as well as utilising the unique position of having access to the 1985 trial transcripts. The preparation by Griffiths in 1985 was inadequate to deal with the politicisation of the *Zündel* trial. Certainly, when comparing Hilberg's testimony in 1985 against Browning's in 1988, it is clear that the Prosecution in the former trial prepared evidence that would be appropriate for a criminal perpetrator trial as opposed to a criminal denial trial. This is apparent in the correspondence between Hilberg and Griffiths, and the latter's description of Hilberg's evidence as a contextual supplement to the trial rather than a central component. By contrast, Browning's agency in influencing the Prosecution's strategy concerning the presentation of evidence countering the pamphlet and expert witness testimony, demonstrates not only an increase in responsibility, but an

[124] Ibid, pp.10431-10433.

acknowledgement that the arguments presented in criminal denial trials are fundamentally different to criminal perpetrator trials due to the trial purpose.

The arguments presented by the opposing counsel in the *Hostage* Case, the Frankfurt-Auschwitz trial, and the *Zündel* trials in terms of seeking to discredit the testimony of the expert historian in the courtroom, remain largely consistent. Such a pattern confirms the conclusion that the reluctance towards expert witnesses in the courtroom is not reflective of a difficult interdisciplinary relationship, but rather of opposing counsel seeking to cast doubt on the other counsel's evidence. However, Christie's cross-examination tactics against Browning reinforced the difference in the treatment of historical evidence by opposing counsels in criminal perpetrator trials compared to criminal denial trials. Unlike the *Hostage* Case and the Frankfurt-Auschwitz trial, the historian's methodology and the Holocaust as an event came under question in the 1988 *Zündel* trial. As a result, the function of the expert witness shifted. Though the testimonial objective of the historian's expert evidence remained the same between perpetrator and denial trials (to provide the Court with expert information due to their knowledge from the research), the expert historian in Holocaust denial trials had to defend both themselves and the wider historiography of the Holocaust.

From an interdisciplinary perspective, Christie's employment of denial rhetoric throughout the two *Zündel* trials raises uncomfortable similarities between law's demand for precise evidence and the denial tactics to demand evidence in order to prove the Holocaust. Such similarities suggest that a criminal denial trial is not a suitable place to discuss matters of historical methodology and history itself. As noted by Thomas, the criminal jurisdiction of the trial allowed Christie to turn the trial into a

political platform for Holocaust deniers, distracting the wider public from the true purpose of the trial. Moreover, a denier's *mens rea* and *actus reus* are factors that are exceptionally difficult to prove and place a considerable burden on the Prosecution. Though historians as providers of contextual knowledge in earlier Holocaust criminal perpetrator trials did not hold much agency, with their testimony conditioned by legal counsels, the history at the centre of the perpetrator trial remains relatively untouched and provides an arguably safer platform for the historian to present their expert testimony.

Browning's experience as an expert witness in 1988 was essential in preparing him for his role as an expert witness in later trials. As will be seen in the analysis of the *Sawoniuk* and *Irving* trials, Browning consistently offered his advice concerning the most effective way to present historical expert testimony within a trial context, subsequently bringing more interpretative historiographical debates into the courtroom.[125] Moreover, Browning's experience with rapid testimony under cross-examination proved important to the overall reception of his testimony in later Holocaust trials. Due to Christie's 'ferocious tactics' in 1988, Browning reflected that later cross-examination, in particular David Irving's in 2000, was 'like child's play'.[126]

Finally, Pearson's observation that 'such cases might have to be proved at some point in time when there would be no survivor witnesses still alive', demonstrates that a shift in how legal counsels in Holocaust trials prepared and presented their arguments had

[125] See *Sawoniuk* trial (chapter six) for the historiography presented by Browning in his expert report and testimony relating to grassroot perpetrators, reflecting the changing historiography in Holocaust Studies.
[126] Browning. Interview.

begun.[127] Certainly during the *Hostage* Case and the Frankfurt-Auschwitz trial, the weight placed on witness testimony within criminal law meant that consideration of conducting a Holocaust trial without survivor testimony would not have occurred. Whilst Pearson's observation should always be held within the context of a Holocaust denial trial, his acknowledgment of 'such cases' suggests that he is discussing Holocaust trials in general. Though survivor testimony was still heard in the *Sawoniuk* trial, Pearson's comment can be seen as an acknowledgement of the evolution of the historian as an expert witness and their increase in centrality and agency within later Holocaust-related trials.

[127] Aside from a decline in survivor witnesses, the increasing reliance on expert historical testimony from the 1980s onwards is linked to the debates within wider culture regarding identity politics; the changing place of the Holocaust in the post-communist period; and the development of 'Holocaust consciousness' across the western world. In particular, it is believed by some survivors that full knowledge of extermination camps such as Auschwitz will 'die with them'. As Richard Evans notes, many Holocaust historians have been approached by survivors and told 'that [historians] could never understand what [survivors] went through.' Consequently, expert historians are having to speak for the wider memory of the Holocaust due to the privatisation of Holocaust memory under Post-Zionism. Evans, 'History, Memory, and the Law', p.339; Daniel Gutwein, 'The Privatization of the Holocaust: Memory, Historiography, and Politics', *Israel Studies*, Vol. 14, No. 1 (2009): pp.36-64.

VI

Case Study Four

R. v Sawoniuk

> 'You cannot have a trial that requires the proof of historic facts without expert evidence.'
>
> William Clegg QC, Defence Counsel, *Sawoniuk* Trial[1]

INTRODUCTION

The *Sawoniuk* trial can be viewed as somewhat 'ordinary' when compared to other Holocaust trials assessed within this dissertation. The trial proceedings followed standard criminal practice regarding the use of expert testimony held under English common law. Christopher Browning was called as an expert historical witness for the Prosecution and was able to draw upon his prior role in the 1988 *Zündel* trial. As Browning noted when reflecting upon the *Sawoniuk* trial, 'criminal cases … were more straightforward … [expert witnesses were] simply laying out [the background] ... for the Court to make an informed judgement of the eyewitness evidence that was going to be presented'.[2] Indeed, Browning goes as far to argue 'any good, informed historian could have done what I did … I think I did a good job, but I don't think what I did was in any way unique or special to me'.[3]

[1] Clegg QC. Interview.
[2] Browning. Interview.
[3] Ibid.

In all other Holocaust trials studied within this dissertation, legal counsels or the Court have disputed the use of historical expert evidence. During the Frankfurt-Auschwitz trial there were tensions between the Prosecution and the Court contesting whether only the perpetrators should be tried for individual crimes, as against those who perceived it as a trial of a systematic state apparatus. Fritz Bauer wanted to use the expert testimony of Broszat, Buchheim, Jacobsen, and Krausnick to highlight the Nazi crimes within the wider socio-political context of 1960s West Germany. The Frankfurt-Auschwitz Court thus perceived the expert historians as an attempt to lead the legal proceedings 'astray' because they brought awareness of the systemic crime into the courtroom.[4] Furthermore, it was Christie's strong challenge against historical fact and the historical discipline during the second *Zündel* trial, that defined the role of the expert witness as unique. Unlike in the Frankfurt-Auschwitz trial where the lead Defence counsel, Dr. Hans Laternser, had dismissed the expert evidence of Broszat, Buchheim, Jacobsen, and Krausnick as irrelevant to the trial, in *Sawoniuk* William Clegg QC, Sawoniuk's Defence counsel, acknowledged the accuracy of the expert evidence and did not seek to dispute the historical details or undermine Browning's status as an expert. Indeed, Clegg commented after the trial: 'I knew it was all true, I didn't need an expert to tell me, so the basic facts could be agreed but … it was important to get the jury to understand [the historical facts]… you can't over emphasise how ignorant some people can be about historic facts'.[5] For this reason, Justice Potts's address to the jury during *Sawoniuk*, stating they could accept 'some or none' of Browning's testimony, though in line with standard criminal procedure, is surprising given that none of the legal counsels, including the Defence, contested Browning's

[4] Naumann, *Auschwitz*, p.414.
[5] Clegg QC. Interview.

expert testimony. As the above citation from Clegg highlights, all legal counsels understood the fundamental nature of expert evidence within the proceedings. It is the open acknowledgment by all legal counsels of the centrality of Browning's testimony that is the most unique and defining factor for the role of the expert witness in the *Sawoniuk* trial.

Upon reflection of the trial, Clegg and Sir John Nutting QC (lead Prosecution counsel) independently agreed that the historical context was essential to help build a foundation upon which the legal discussions of the trial could take place. Nutting was adamant that Sawoniuk could not have been found guilty of any of the charges in the indictment unless the jury had been satisfied that Browning was accurate and truthful in relation to his assertion that what was done to the Jews during the war was a war crime.[6] The comments by the *Sawoniuk* counsels thus demonstrate that neither the Prosecution nor the Defence viewed the presence of a historian, or inclusion of historical context within the *Sawoniuk* trial, as diminishing the legal purpose of the trial.

Held between 8 February and 1 April 1999 in Court Twelve at the Old Bailey, the Central Criminal Court of England and Wales in London, the *Sawoniuk* trial is the only successful prosecution of a Holocaust perpetrator to have occurred in Britain.[7] Anthony Sawoniuk was tried on four counts of murder, and convicted of two, under the War Crimes Act (1991).[8] This chapter will only provide a summary of Sawoniuk's war

[6] Sir John Nutting QC (Barrister, Retired), interviewed by Amber Pierce, London, 17 July 2019.
[7] *R. v Anthony Sawoniuk*. European Court of Human Rights (ECHR), Statement of Facts and Argument. Appeal. 5 December 2000. p.4; Michael J. Bazyler and Carla Ferstman, 'Prosecuting Nazi War Criminals in the UK and Lessons for Today: Will History Repeat Itself?' *UCL Human Rights Review*, Vol. 4 (2011): p.22; Martin Dean, 'Local Collaboration in the Holocaust in Eastern Europe', in *The Historiography of the Holocaust*, ed. Stone, p.129.
[8] Initial research by the War Crimes Unit, 'missed' Sawoniuk due to an alternative spelling of his name. However, the historical researchers of the Unit (including Martin Dean) were aware of the different

crime actions as background for the reader as the resulting literature surrounding the *Sawoniuk* trial has sufficiently addressed the trial's context and the survivor witness testimony. The chapter will then move on to discuss the indictment, opening speeches, and how the Prosecution sought to use Browning's expert evidence to support their legal argument. Analysis will then be drawn from Browning's experience during the *Sawoniuk* trial: the use of Browning's expert report by the Court and his reflections on his examination-in-chief and cross-examination. This discussion will then assess the interdisciplinary relationship during the *Sawoniuk* trial. The chapter will conclude with evaluations of the closing speeches and the Judge's summing up.

Though often referred to as 'contextual' and 'background' knowledge, such language diminishes the centrality of Browning's expert testimony within the *Sawoniuk* proceedings. The fact that all legal counsels agreed that Browning's testimony aided the legal proceedings rather than distracted from them, as Presiding Judge Hofmeyer had argued following the Frankfurt-Auschwitz trial, clearly demonstrates a shift in how history can aid a Holocaust criminal trial and how legal counsels have subsequently engaged with Holocaust historiography.

Methodological Limitations

The research for this chapter encountered a significant methodological limitation due to the inability to access the trial transcripts. Despite the *Sawoniuk* trial only occurring

spelling of surnames in Polish and Russian. Thus, Dean and his colleague Alisdair Macleod were able to present the correct details of Sawoniuk to the War Crimes Unit and open an investigation that resulted in his prosecution and conviction. *Sawoniuk*. ECHR Appeal.
p.4; Robert Sherwood, *A Comprehensive Study into the United Kingdom War Crimes Investigation Teams in Relation to World War Two*, PhD Thesis. Royal Holloway, University of London (2019), pp.289-293.

twenty years ago, according to the administrative office of the Old Bailey 'due to the age of this case, a transcript of the hearings would not have been preserved for that long.'[9] Hence, this chapter uses primary material drawn from the interviews with those involved in the *Sawoniuk* trial, Browning's private papers relating to the *Sawoniuk* trial held at the United States Holocaust Memorial Museum Archives (Washington, DC), and trial materials made available by Sawoniuk's Appeal counsels.

TRIAL CONTEXT

Establishing the context of the *Sawoniuk* trial demonstrates how Browning's expert testimony aided the knowledge of the Court. In particular, the opening speeches by the Prosecution and the Defence address how each legal counsel sought to engage with the content of Browning's expert historical report.

Legal Actors

The *Sawoniuk* trial was not the first criminal Holocaust trial to be held in the UK. In 1997, Szymon Serafinowicz was charged on three counts of murder regarding the destruction of the Jewish populations of Mir and Minsk.[10] However, following a

[9] Email from Moushumi Begum Himi (Administrative Officer, Central Criminal Court, Old Bailey) to the author, 24 May 2019.

[10] Serafinowicz was eighty-six when he was prosecuted. Like Sawoniuk, Serafinowicz was a collaborationist police chief although in a different town in Belarus, and served in the same Waffen-SS unit as Sawoniuk. The suspension of the *Serafinowicz* trial highlighted to Scotland Yard and the Crown Prosecution Service (CPS) that different prosecution procedures (such as being more relaxed with their prosecution criteria) needed to be followed in order to gain a conviction.. The *Serafinowicz* case also demonstrated that quick prosecutions were necessary within late twentieth-century Holocaust trials due to the age of the defendants. In contrast to Serafinowicz, Sawoniuk was seventy-eight when he went to trial in 1999 and was deemed to be in good health. William Clegg QC, *Under the Wig: A Lawyer's Stories of Murder, Guilt and Innocence* (London: Quercus Editions Ltd, 2019), p.109; CBP. IRN 81871. Boxes 17-26.

successful argument from the Defence, the trial was suspended on medical grounds: Serafinowicz was found unfit for trial as it was determined that he was suffering from a degree of dementia caused by Alzheimer's.[11] The *Serafinowicz* trial acted as precedent for the *Sawoniuk* trial. All of the legal counsels that were present during the *Serafinowicz* trial returned to the courtroom in 1999 for *Sawoniuk*.[12]

The *Sawoniuk* trial was held in front of Mr. Justice Francis Humphrey Potts and a jury. William Clegg QC, an established criminal defence barrister, led Sawoniuk's defence. Junior counsel for the Defence was Kalyani Kaul, now Her Honour Judge Kaul QC. The Prosecution was led by Sir John Nutting QC, an esteemed barrister whose clients included the Queen. Junior counsel for the Crown was John Kelsey-Fry (now QC).[13]

Events

The *Sawoniuk* trial concentrated on the period of German occupation of the Byelorussian Soviet Socialist Republic (now Belarus) after June 1941 following Operation Barbarossa.[14] The Byelorussian town of Domachevo had an approximate population of 3,000-5,000 inhabitants, a large majority of whom where Jewish between 1939 and 1941.[15] Upon occupation, the Germans set up the *Schutzmannschaft*.[16] The duties of the *Schutzmannschaft* included assisting in the implementation of the Final Solution in Domachevo, though some of the individuals within the police force

[11] Cesarani, *Justice Delayed*, p.275.
[12] Browning was also due to appear as an expert witness in the *Serafinowicz* case. Bazyler and Ferstman, 'Prosecuting Nazi War Criminals', p.31.
[13] Ibid.
[14] Operation Barbarossa was the German invasion of the Soviet Union, launched on 22 June 1941.
[15] European Court of Human Rights. Third Section. Decision as to the Admissibility of Application No. 63716/00 by Anthony Sawoniuk Against the United Kingdom. 29 May 2001. p.2.
[16] See German Glossary for a definition of *Schutzmannschaft.*

including Sawoniuk went beyond their ordered duties. On 19-20 September 1942, the Jewish Day of Atonement (Yom Kippur), German *Sonderkommando* units assisted by local policemen murdered 2,900 Jews in a nearby wood.[17] The initial massacre was followed by a 'search and kill' operation by the local police force to find the Jews who had escaped the massacre.

Indictment

Sawoniuk became a member of the local Domachevo Nazi-organised police unit in 1942, rising to the rank of local commander of the force.[18] Sawoniuk served as a *Schutzmann* for approximately three years, although allegedly did not assist in the initial massacre on Yom Kippur. However, witnesses claimed that Sawoniuk had been involved in the 'search and kill' operation that occurred in the days after the 'eradication'.[19] In July 1944, Sawoniuk fled the advancing Red Army with the Germans and joined the Waffen-SS. Sawoniuk's status as a corporal amongst the Waffen-SS became a heavily contested part of the trial and is an example of the conflict between the law's demand for precise evidence and historical evidence. During the proceedings, the Prosecution introduced Exhibit Seven, a German SS document showing Sawoniuk's name, his correct date and place of birth, and his service in the Waffen-SS from July to November 1944. Whilst the exhibit clearly demonstrated

[17] In February 1942 the German civil administration recorded 3,316 Jews living in Domachevo. *Sawoniuk*. ECHR. Appeal. p.10; Cesarani, *Justice Delayed*, pp.278-279.
[18] Domachevo was a small border town within Poland during the interwar period, now part of Belarus. Following Poland's partition in September 1939 between Stalin's Soviet Union and Hitler's Germany, eastern Poland was incorporated into Byelorussia (White Russia). Martin Dean, 'War Criminal Sawoniuk Sentenced 20 Years Ago: Stories from Behind the Headlines, Third and Final Part', *LinkedIn*. Published: 1 April 2019. Accessed: 17 April 2019. [https://www.linkedin.com/pulse/war-criminal-sawoniuk-sentenced-20-years-ago-stories-from-martin-dean-2e/]
[19] Ibid.

Sawoniuk's involvement within the Waffen-SS, Justice Potts dismissed the exhibit because the Prosecution was unable to produce the man who signed the document (who had died prior to the trial's proceedings) to confirm that it was his signature. Additional evidence such as Sawoniuk's KGB file was not included as direct evidence against him.[20] Following the reversal in Germany's military fortunes, Sawoniuk defected and enlisted in the Polish Free Army, which fought alongside the British. After the German surrender in 1945, Sawoniuk moved to Britain on 27 June 1946.[21]

In March 1997, Sawoniuk was charged with five counts of murder.[22] In 1998, magistrate Judge Graham Parkinson allowed four of the five counts to be taken to trial, with the fifth charge being dismissed because the necessary witness was unable to be in London to testify against Sawoniuk.[23]

The four counts of murder that went to trial focused on Sawoniuk's involvement in the 'search and kill' operation in 1942.[24] Counts one and three of the indictment charged Sawoniuk with having shot two Jewish women (a different woman in each count) 'in circumstances constituting a violation of the laws and customs of war.'[25] Count two

[20] Bazyler and Ferstman, 'Prosecuting Nazi War Criminals', pp.24-29; Dean, 'War Criminal Sawoniuk'.
[21] Bazyler and Ferstman, 'Prosecuting Nazi War Criminals', p.24.
[22] Prior to the proceedings, Clegg made numerous applications arguing that the trial should be dismissed due to the lapse of time since the crime and that Sawoniuk would not obtain a fair trial because certain documents that would aid his defence would no longer be available. Concerns over the admissibility of evidence were also raised. The confrontation that occurred during the cross-examination of Ben Zion Blustein, a former Jewish playmate of Sawoniuk, saw the question over the reliability of survivor witness memory used by the Defence to weaken the validity of the testimony used against Sawoniuk. ECHR. Third Section. Decision as to the Admissibility of Application No. 63716/00. p.3; Bazyler and Tuerkheimer, *Forgotten Trials*,
pp.286-291; Hirsch, 'The Trial of Andrei Sawoniuk', p.538.
[23] Bazyler and Ferstman, 'Prosecuting Nazi War Criminals', p.28.
[24] Under English criminal law the defendant cannot be charged with the death of more than one person in one count. Whilst witness statements established that Sawoniuk had acted beyond his ordered duties and had additionally attacked members of groups, it was not necessary to prove that Sawoniuk had killed more than one person for each count of murder. Opening Note for the Jury. John Nutting QC and John Kelsey-Fry. p.3. 6 February 1999. CBP. IRN 81871. Box 11, Folder 17.
[25] *R. v Anthony Sawoniuk*. Indictment No. T98 0662. Count One; Count Three. 19 June 1998.

charged Sawoniuk with the murder of a Jewish man named Schlemko.[26] Likewise, count four charged Sawoniuk with the murder of a Jew 'known as Mir Barlas'.[27]

Legal Counsel Arguments

The trial debated the extent of Sawoniuk's willingness to comply during the 'search and kill' operations and thus engaged with the historiographical debates concerning the extent of agency that grassroot perpetrators held during the Holocaust. The Prosecution argued that Sawoniuk had willingly volunteered to be a member of the *Schutzmannschaft*, knowing what tasks would be required of him, and had taken part in the 'search and kill' operation.[28] Nutting directly addressed this argument in his opening notes to the jury: '[t]he evidence indicates that the Defendant was not only prepared to do the Nazi bidding, but carried out their genocidal policy with enthusiasm.'[29]

The Defence argued that due to Sawoniuk's abject poverty prior to 1942, Sawoniuk was placed in an impossible situation: 'either work for the local police force and guard against partisans or run the risk of being deported himself into forced labor [sic] or living life on the run.'[30] Within the interviews conducted for this chapter, Nutting added that Sawoniuk was an illegitimate child and thus low down the ranks of the Domachevco social structure, hence 'it was less surprising that he of all people of the

[26] Ibid, Count Two.
[27] Ibid, Count Four.
[28] ECHR. Third Section. Decision as to the Admissibility of Application No. 63716/00. p.3.
[29] Opening Note for the Jury. pp.1-2.
[30] Bazyler and Ferstman, 'Prosecuting Nazi War Criminals', p.33.

local population should have signed up so enthusiastically … because that gave him the power he'd never possessed, it gave him a sense of self-worth that he never had'.[31]

Use of Expert Testimony

It was essential for the Prosecution's case to demonstrate that Jews were murdered in Byelorussia under the orders, or with the encouragement of the defendant. For such an argument to be established, the Prosecution needed to present 'the background of the whole Nazi apparatus being brought to bear against people solely because of their race' through the testimony and report of an expert witness.[32]

Nutting began by commenting that the jury would be 'remind[ed] … of the history of the German invasion of the Soviet Union in 1941' and will be able to 'understand something of what is known as "the Holocaust"'.[33] Indeed, Nutting added that the jury would 'perhaps learn a little' history too. Browning's research involved understanding the decision-making processes of the Final Solution as well as the grassroot 'ordinary men', enabling Browning to include the overall Nazi policy in his address and how this was reflected in the occupation structure at the local level. As Browning noted, 'those are the required backgrounds you have put in the report that equip in a sense the Court to make an informed choice about the eyewitness testimony that they were going to hear'.[34]

[31] Nutting QC. Interview.
[32] Ibid.
[33] Opening Note for the Jury. p.1.
[34] Browning. Interview.

Nutting's presentation of Browning's report reflected how far the law's engagement with wider Holocaust historiography had developed concerning the mentality of grassroot perpetrators since the binary 'functionalist' and 'intentionalist' arguments presented in the 1960s. In his historical report, Browning accurately depicted Hitler and Himmler as reactionaries. Rather than portraying the Final Solution as a clear plan that had been decided in 1938; following the events of *Kristallnacht* as was suggested in the Frankfurt-Auschwitz trial, Browning highlighted that the Final Solution only materialised as a result of the collapse of other Nazi plans to solve the 'Jewish question', including the deportation of Jews to Madagascar.[35] This was directly reflected in Nutting's opening speech:

> [A]fter the invasion of France in 1940, Himmler and the German Foreign Office altered their plans and decided to expel all Jews from Europe to the island of Madagascar … "I hope to see" wrote Himmler in May 1940 "the complete elimination of the concept of Jew through the possibility of a great emigration of all Jews to Africa or a colony elsewhere".[36]

Nutting's argument, presented in a nuanced manner to the jury so they could adequately understand the depth of the historical debates raised throughout the proceedings, demonstrates the shift in the historiographical narratives being presented in Holocaust trials, thereby reaffirming the interlinking relationship between contemporary historiography and the law.

Within the wider historiographical debates relating to grassroot perpetrator involvement, the Defence sought to contest the extent of 'choice' that Sawoniuk had during 1942. Clegg's acceptance and acknowledgement of Browning's expert

[35] Historical Background Report Concerning the Prosecution of Andrei Sawoniuk. pp.8-9. CBP. IRN 81871. Box 11, Folder 9.
[36] Opening Note for the Jury. p.9.

testimony demonstrated a positive shift in the relationship between opposing counsels and expert witnesses. Thus, for Browning, from the opening of the trial, Clegg was 'a gentleman': 'Clegg did not go at the basic documents [about the Holocaust], he was basically trying to create escape hatches for his client without challenging what happened overall'.[37] Clegg's engagement with Browning's expert testimony and focus on accentuating certain aspects of the historical narrative rather than contesting it in its entirety, meant that Browning's overall experience as an expert witness was quite different from his own and Hilberg's experience during the *Zündel* trials.

TRIAL PROCEEDINGS: CHRISTOPHER BROWNING

In line with his role to 'remind' and 'educate' the jury about the history of Operation Barbarossa, the Holocaust, and the role of the *Schutzmannschaft*, Browning was the first witness to appear in the *Sawoniuk* trial.[38] The distinct separation of the historical expert testimony at the beginning of the *Sawoniuk* trial from the subsequent legal discussions not only affirmed the use of the expert historian to 'set the scene', but also demonstrated that the historical expert testimony served a different purpose from that provided by the other witnesses that were to appear.

By understanding the depth of attention that Browning's role has received within the literature reviews; Browning's historical report; the rapport between Browning and Geoffrey J. Giles (defence historical expert witness); and Browning's experience during the trial's proceedings, the 'ordinariness' of Browning's experience as an expert

[37] Ibid.
[38] For Browning's biography, see chapter five. Cesarani, *Justice Delayed*, p.277; Historical Background Report Concerning the Prosecution of Andrei Sawoniuk. pp.1-2.

witness in the *Sawoniuk* trial will be affirmed. When comparing the *Sawoniuk* trial to the 1988 *Zündel* trial; though both were criminal trials, Browning's testimony was more legally relevant in the *Zündel* trial due to the trial's focus on Holocaust denial. This comparison demonstrates that within routine criminal perpetrator trials, historians as expert witnesses adopt a more traditional role of the expert witness as a provider of contextual knowledge (albeit essential to establishing the foundation for the trial) due to the legal requirements regarding the use of expert evidence.

Existing Literature

Browning's role in the *Sawoniuk* trial remains understudied, although this is arguably a result of the wider contextual treatment of the *Sawoniuk* trial within academic literature. Michael J. Bazyler, and Frank M. Tuerkheimer offer one of the few focused assessments of the trial, dedicating an entire chapter of their book *Forgotten Trials of the Holocaust* to *Sawoniuk*.[39] However, they only provide an overview of the pre-trial context, cross-examination against survivor witnesses, and a summary of the implications of the trial verdict. When the *Sawoniuk* trial is mentioned, such as within Donald Bloxham's article 'From Streicher to Sawoniuk', it is discussed within the context of the War Crimes Act.[40] The focus within literature on the War Crimes Act is

[39] David Hirsch's article on cross-examination during the trial and chapter within *Law Against Genocide* are the only other two works dedicated specifically to the *Sawoniuk* trial. Hirsch, 'The Trial of Andrei Sawoniuk', pp.529-545; David Hirsch, *Law Against Genocide: Cosmopolitan Trials* (London: The Glass House Press, 2003).

[40] Tony Kushner, 'Who Do You Think You Are Kidding, Mr Sawoniuk? British Memory of the Holocaust and Kosovo, Spring 1999', in *The Memory of Catastrophe*, ed. Peter Gray and Kendrick Oliver (Manchester: Manchester University Press, 2004), pp.207-208; Donald Bloxham, 'From Streicher to Sawoniuk: The Holocaust in the Courtroom', in *The Historiography of the Holocaust*, ed. Stone, p.413;Sir Thomas Hetherington and William Chalmers Esq., *War Crimes: Report of the War Crimes Inquiry* (July 1989), p.105. House of Commons Parliamentary Papers Online. Accessed: 17 May 2019. [http://parlipapers.proquest.com/parlipapers/result]; Cesarani, *Justice Delayed*; Sherwood, *A Comprehensive Study into the United Kingdom War Crimes Investigation Teams*, PhD Thesis; Clegg

justified as the *Sawoniuk* trial would not have occurred without it. However, the attention given to the Act has meant that other aspects of the trial have been overlooked: namely, the role of Browning as an expert witness.

Despite Browning's prominent involvement in the 1988 *Zündel*, *Sawoniuk* and *Irving* trials, his participation as an expert witness within these three trials has only briefly been mentioned by Michael J. Bazyler and Carla Ferstman.[41] Bazyler and Ferstman used Browning's role as an expert witness to provide context to a statement made by Browning concerning the experience of survivor witnesses during cross-examination in the 1985 *Zündel* trial. Interestingly, even when Browning reflected on his own experiences as a historical expert witness, he only focused on his roles in the 1988 *Zündel* and *Irving* trials.[42] Both trials were Holocaust denial trials (held under criminal and civil law respectively), and therefore provided Browning with an opportunity to draw a clear comparison. Browning noted that such an omission of his experience in the *Sawoniuk* trial was 'in part' due to his role as a provider of contextual knowledge for the Court. For Browning, 'the reports just spoke for themselves … I just never felt that there was any particular point I've had to make beyond the one that I had done in the courtroom'.[43] The fact that Browning did not deem his involvement in the *Sawoniuk* proceedings particularly noteworthy, or comparable to other experiences as an expert

QC, *Under the Wig*, pp.117-118; Bazyler and Tuerkheimer, *Forgotten Trials*, p.299; Bazyler and Ferstman, 'Prosecuting Nazi War Criminals', p.41;

[41] Bazyler and Ferstman, 'Prosecuting Nazi War Criminals', p.45.

[42] Browning, 'Historians and Holocaust Denial', pp.773-778; Christopher Browning, 'The Personal Contexts of a Holocaust Historian: War, Politics, Trials and Professional Rivalry', in *Holocaust Scholarship: Personal Trajectories and Professional Interpretations*, eds. Christopher R. Browning, Susannah Heschel, Michael R. Marrus, and Milton Shain (Hampshire: Palgrave Macmillan, 2015), pp.48-66.

[43] Browning. Interview.

witness, reiterates the seeming ordinariness of the role of the expert historian in traditional criminal perpetrator trials, compared to the *Zündel* and *Irving* trials.

Indeed, Browning's role as an expert witness receives no more than a contextual sentence within existing literature that mentions the use of historical expert testimony during the *Sawoniuk* trial. David Hirsch typifies this state of affairs, noting that the historical context presented by Browning was 'fine' for briefing the jury: '[h]owever, to convict the defendant, the court required direct witness testimony.'[44] Hirsch's use of language diminishes Browning's expert testimony as supplementary to the Court's proceedings. By using the word 'fine', Hirsch implies that whilst it was adequate to use historical expert testimony to set the scene for the jury, it would not aid the Prosecution in convicting the defendant. Whilst this conclusion is certainly true concerning the direct guilt and actions committed by Sawoniuk, Clegg and Nutting both argued that historical expert testimony was essential to the context of the trial. Hirsch's disregarding, if not slightly pejorative language, furthers the view that historical expert testimony was not essential in *Sawoniuk* and was therefore only worthy of a simple statement.

Bazyler's assessment of Nutting's use of Browning's expert testimony is more respectful and provides a fairer representation of Browning's role in establishing the historical context. Bazyler states that it was '[w]ith Browning's help' that Nutting 'set forth before the jurors the Nazi ideology.'[45] To say that it was Nutting who established the historical context of the Holocaust with Browning's 'help' again diminishes the extent of agency that Browning had during the pre-trial research and in drafting the

[44] Hirsch, 'The Trial of Andrei Sawoniuk', p.537.
[45] Bazyler and Tuerkheimer, *Forgotten Trials*, p.289.

historical report presented at the trial. Bazyler's observation does note that the content of Browning's testimony was conditioned by Nutting's understanding of how the Prosecution could effectively use a historical expert witness. Given that Clegg commented in his memoir that Browning's testimony 'really painted a picture for the jury and was always going to be difficult to counter', it is clear that Browning and Nutting succeeded in making full use, within the parameters set by a criminal perpetrator trial, of historical expert testimony.[46]

Bazyler notes that Nutting would have Browning 'set out a roadmap of the Nazis' Final Solution, and in particular the murder operations conducted by the Germans and local collaborators against the Jews in German-occupied Soviet Union'.[47] Only after Browning had established this context, could Nutting 'subsequently identify Sawoniuk as one of these legal murder[er]s.'[48] Unlike Hirsch, Bazyler's phrasing demonstrates that Nutting's arguments and use of survivor eyewitness testimony would not have been possible, or at least not as successful, if Browning had not provided the context. Bazyler's observation is the crux of the interdisciplinary relationship between the historian and lawyer during the *Sawoniuk* trial.

Expert Report

In a criminal trial, the jury would not have read the historical report prior to the proceedings.[49] Hence, for the report and its accompanying supporting documents to

[46] Clegg QC, *Under the Wig*, p.115.
[47] Bazyler and Tuerkheimer, *Forgotten Trials*, p.289.
[48] Ibid.
[49] Clegg added that during both the Frankfurt-Auschwitz trial and the *Sawoniuk* trial, the judge would have read the historical reports prior to the trial but not the jury. Additionally, during a civil trial, the judge would read out the historical reports, or fragments of the report, to the Court. Clegg QC. Interview.

be admitted as evidence, Browning's testimony would have included reciting his report's conclusions by virtue of his examination-in-chief and then the cross-examination.[50]

Throughout the report every historical conclusion that Browning made was supported by evidence, sometimes numerous pieces. Not only did the extent of evidence reflect good historical conduct, the report was also used by the Prosecution to admit historical documentation into the trial. In the correspondence between Browning and Jill Thomas of the Crown Prosecution Service (CPS) during the preliminary research phase, relating to the initial committal hearing of Sawoniuk, Thomas notes that 'changes … need to be made to [Browning's] Historical Material bundles'.[51] The mention of Martin Dean, the historical researcher for Scotland Yard, within this correspondence, suggests that Browning's report needed either more supporting documentation or more specific references to certain documents that the Prosecution wanted to draw out during the trial proceedings. Within both the *Serafinowicz* and *Sawoniuk* trials, Dean worked alongside Browning to produce the supporting historical documentation and to assist in the writing of the report.[52] According to Dean, once Browning had received the Prosecution's brief about the content of the historical report, emphasising the Domachevo *Schutzmannschaft* and the 'search and kill' operations, Browning would write to Dean highlighting the documents that Browning needed to support the historical report and then Dean would find such evidence.[53] Additionally, Dean would

[50] Browning. Interview.
[51] Letter to Christopher Browning from Jill Thomas. 18 February 1998. CBP. IRN 81871. Box 11, Folder 14; Letter to Christopher Browning from Jill Thomas. 19 February 1998. CBP. IRN 81871. Box 11, Folder 14.
[52] Letter to Christopher Browning from Martin Dean. 20 January 1997. CBP. IRN 81871. Box 11, Folder 16.
[53] Browning's official briefing date for the *Sawoniuk* trial could not be found in correspondence nor could the interviewees involved in the trial remember the date. However, Nutting notes that Browning had 'months not weeks' to prepare his report before the committal hearing. Additionally, Browning's

make ‘little tweaks … or suggestions’ to Browning about the content and historical details of the report.[54] The omission of Sawoniuk’s name throughout the entire report reiterates the distinction of Browning’s report being considered as a piece of supporting documentation from other forms of witness testimony, such as evidence that could specifically address Sawoniuk’s guilt.[55] However when Browning discusses the purpose of the *Schutzmannschaft*, it is clear that he is talking about the police unit that Sawoniuk was involved in and is inviting debate to be addressed in examination-in-chief and cross-examination.[56] Thus, without mentioning Sawoniuk, parts of the report become legally relevant to the trial through enabling legal discussions.

As discussed in chapter two, most historians are content to comply with this brief, understanding that it is not their duty to discuss the legal status of the defendant but rather for the report to enable legal discussions concerning the defendant’s guilt. When assessing Browning’s expert report in the *Sawoniuk* trial, and the acceptance by all legal counsels of expert evidence within the proceedings, it is evident that the interdisciplinary relationship between the historian and the lawyer was more equal in the *Sawoniuk* trial than the *Hostage* Case. Certainly, Browning accepted the parameters of his involvement in the trial and knew why such parameters existed, and

report for the *Sawoniuk* trial would have been readily adapted from the *Serafinowicz* trial because Browning’s evidence predominantly focused on Hitler’s determination to exterminate Jews which was relevant to both trials. Nutting QC. Interview.

[54] Dean. Interview.

[55] Browning’s report was structured as follows: Brest-Litovsk (pp.2-3); The Evolution of Nazi Jewish Policy 1933-1941 (pp.3-9); Operation Barbarossa (pp.9-13); The German Occupation Government on Soviet Territory (pp.13-17); The German Police on Occupied Soviet Territory (pp.17-23); The *Schutzmannschaften* and the German Police (pp.24-31); The Nazi ‘Final Solution’ (pp.31-34); Implementing the Final Solution on Occupied Soviet Territory (pp.35-39); The Final Solution in the Generalbezirk Volhynia-Podolia, and especially in the Kreisgebiet Brest-Litovsk (pp.39-60); Conclusions (pp.60-61). Historical Background Report Concerning the Prosecution of Andrei Sawoniuk; Second Historical Report Concerning the Investigation of the Domachevo Police Unit. Martin Dean. 12 April 1996. p.19. CBP. IRN 81871. Box 17, Folder 8.

[56] Ibid; Historical Background Report Concerning the Prosecution of Andrei Sawoniuk. The *Schutzmannschaften* and the German Police, pp.24-31.

the lawyers accepted the necessity for including expert testimony to provide the historical context within which guilt could be established. The use of Browning's report and brief thus demonstrates that Browning's evidence was treated just like any other expert evidence from other disciplines, following standard criminal guidelines and therefore making Browning's experience as an expert witness in 1999 'ordinary'.

Defence Expert Witness

The uniqueness of Clegg's engagement and acceptance of Browning's evidence can be demonstrated through the Defence's use of their own historical expert witness. The opening of the defence historical report noted, '[t]his report will focus on a handful of specific issues raised by the historical evidence presented, rather than restating the general background'.[57] The Defence called Geoffrey J. Giles to produce an expert report concerning the culture and environment in Domachevo prior to and during the German occupation to determine the level of choice that Sawoniuk had in joining the *Schutzmannschaft*.[58] In addition to critiquing Browning and Dean for not distinguishing between the duties of a village policeman and the mobile police battalions, Giles reached two main conclusions concerning the extent of choice that the local Domachevo men possessed under occupation.[59] Firstly, Giles noted that '[a]lready under the Soviet occupation … young men were simply designated to serve in the local police, if the community itself did not provide a sufficient number of volunteers'.[60]

[57] Historical Background Report. Professor Geoffrey Giles. 29 January 1999. p.2. CBP. IRN 81871. Box 17, Folder 10.
[58] Giles, Historical Background Report, pp.1-2; Clegg QC. Interview.
[59] Giles, Historical Background Report, p.22.
[60] Ibid, p.33.

Secondly, '[a] similar … coercive system of recruitment for the local police took place under Nazis as well, who in many cases simply took over the existing local militias'.[61]

Within the primary documents supplied by Dean for Browning's report, there are extracts stating that once the local men had joined the *Schutzmannschaft,* they were no longer in control of their actions. In the 'Order of the Day' given in August 1942, the Commander of the Uniformed Police for the Ukraine stated that all members should demonstrate 'a soldierly, aggressive attitude in carrying out the instructions given by our superiors; absolute obedience towards the orders given.'[62] Though this is not to argue that superior orders presented a viable defence for Sawoniuk, this section of the order if read independently would suggest that those who followed the orders and did not exceed them had little choice in their actions. However, the beginning of the same document also states: '[a]fter the takeover of … Byelorussian … territories by the German administration, you place yourselves in the service of the German Police … and have thereby shown your willingness to cooperate.'[63] The fact that Sawoniuk was one of the first to enlist; went beyond his duties; became a non-commissioned officer in the local police, and subsequently decided to stay in the *Schutzmannschaft* after his brother had left when the Germans outlined the duties of the *Schutzmannschaft,* all support the Prosecution's argument that Sawoniuk did make conscience choices during his time in the *Schutzmannschaft*.[64]

[61] Sawoniuk was not part of the local Domachevo militias when the Nazis invaded. Ibid.
[62] Order of the Day. Commander of the Uniformed Police for the Ukraine. 22 August 1942. Translated by David Wilson. p.994. CBP. IRN 81871. Box 14, Folder 2.
[63] Ibid.
[64] Dean. Interview.

Clegg noted that 'by the time Sawoniuk had finished giving evidence there was really no point in calling [Giles] … there really wasn't enough of a dispute between the experts to justify it.'[65] Consequently, since Giles never testified, his historical report was not presented as evidence, and therefore did not affect the jury's verdict.[66] Yet, the fact that the Defence sought to employ a historian to contest why individuals decided to act in a certain way demonstrated a shift in the narrative of historical evidence that was presented in criminal Holocaust proceedings. In the Frankfurt-Auschwitz trial, the expert historians testified to objective facts and events as opposed to considering the culture, traditions, and environment of individuals and how those impacted on the contested events. By comparison, the correspondence between Browning and Dean concerning Giles's report focused on disputing the 'sympathetic picture of the hard life of the *Schuma*'.[67] Consequently, expert evidence had gone beyond providing simply objective information, but had begun to engage with the more complex and subjective historiographical debates. Given the arguments against the use of historical expert testimony in the 1960s which were used by counsel to 'distract' the Court, the inclusion of history focusing on a region's culture arguably demonstrates two conclusions. Firstly, there was a closer engagement with the law when developing historiographical debates and the complex task of seeking to understand perpetrator motivation. Secondly, and linking to the first factor, the historian expert witness and lawyer developed more of a reciprocal relationship than in previous Holocaust perpetrator trials, with the historian and lawyer working together to present the best, and most historically truthful, case possible.

[65] Clegg QC. Interview.
[66] Ibid.
[67] Email to Martin Dean from Christopher Browning. 7 February 1999. CBP. IRN 81871. Box 17, Folder 10; Notes of Martin Dean for Christopher Browning Regarding the Report of Geoffrey Giles. 5 February 1999. CBP. IRN 81871. Box 17, Folder 10.

Testimony

Due to the absence of the trial transcripts, it is not possible to determine the full detail of Browning's examination-in-chief. Analysis of Browning's testimony is therefore based upon reflections of the trial by Browning, Nutting, and Clegg, and the details within Browning's expert report.

Following the Prosecution's opening speech 'in order to "set the scene"', Browning testified to the content of his expert report from the 10-11 February 1999.[68] Browning testified that within Domachevo, it was the 'elite German police', including the Gestapo, who controlled the region's police forces, with local recruited policemen working underneath them.[69] With reference to the Yom Kippur massacre, Browning stated to the Court that the 'seeking out and killing [of] any Jews who had escaped the main massacre would have been one of the main priorities of the local police' given their knowledge of the surrounding area.[70]

Examination-In-Chief

Nutting acknowledged that due to the rapport between the Prosecution and expert witness, Browning was an extremely effective witness, appearing in the witness box for no more than an hour.[71] The fact that Browning's appearance at the Old Bailey for the *Sawoniuk* trial was the third time that Browning and Nutting had engaged in

[68] Letter to Christopher Browning from Jill Murray. 8 January 1999. CBP. IRN 81871. Box 11, Folder 14; Letter to Christopher Browning from Jill Murray. 19 January 1999. CBP. IRN 81871. Box 11, Folder 14.
[69] Criminal Appeal Office Summary. *R. v Anthony Sawoniuk*. p.3. 9902465X4. Ind no T980662. 2 November 1999.
[70] Ibid, pp.4-5.
[71] Nutting QC. Interview.

examination-in-chief (the previous times being the *Serafinowicz* and *Sawoniuk* committal hearings, respectively), meant that Browning had become 'quite practiced at that stage in being able to focus his answers … [Browning] knew what [Nutting] wanted so it was a happy meeting of minds.'[72] Moreover, Browning noted that he had a clear understanding of the Prosecution's argument and how historical expert testimony would help prove the Prosecution's case. Browning remembered specifically requesting Nutting to ask him questions during the examination-in-chief relating to the historical context of Domachevo: 'I sort of felt there were some things we had to make sure we got out and the best way to do that was for him to ask me the questions that would allow me to make sure that they got presented to the jury'.[73] Thus for Browning, 'in that sense the lawyer and the historian were basically partners in that we both [were] trying to get the best case we [could]'.[74] Though the use of Browning's testimony within the *Sawoniuk* trial was clearly following established criminal procedure for expert evidence, Browning's rapport with Nutting does demonstrate a positive development of the role of the expert historian in Holocaust perpetrator trials. During the 1988 *Zündel* trial, it can be argued that the relationship between Browning and Prosecution counsel John Pearson reflected the centrality of historical evidence within a Holocaust denial trial. Such a dynamic between legal counsel and expert witness may not be expected within a perpetrator trial due to the contextual nature of historical expert evidence. Indeed, during the Frankfurt-Auschwitz trial, it was Fritz Bauer and the Prosecution team that directed the use of expert evidence within the courtroom. Whilst the foreword in *Anatomy* asserted that expert witnesses understood the parameters of their role within a criminal trial, no evidence has been found that

[72] Ibid.
[73] Browning. Interview.
[74] Ibid.

demonstrates that Broszat, Buchheim, Krausnick, or Jacobsen offered their advice to the Prosecution team regarding the use of historical evidence within the overall legal strategy. Whilst Browning's testimony was subject to legal conditioning by Nutting in *Sawoniuk,* as is customary for criminal expert evidence, it could be argued that the interdisciplinary relationship had developed since the 1960s, having a positive impact on the experience of the expert witness. As Browning noted, due to the rapport between himself and Nutting, 'I never felt I couldn't make suggestions that dealt not just with what happened as a historical expert, but what I thought would be the most effective courtroom strategy … I felt that I was making an input'.[75]

Correspondence between Browning and the CPS indicated that Nutting sought to question Browning about the number of Jews murdered by the *Einsatzgruppen* in Domachevo.[76] This line of questioning was a result of Nutting and Browning's previous consultations before both the committal and the official proceedings. Nutting recalled that upon receiving the bulk of Browning's supporting evidence for the historical report (eight volumes of documentation, all approximately 500 pages), Nutting instructed Browning that he was only to refer to five documents whilst in the witness box.[77] As Browning reflected, 'you had to lay out very briefly the big background, and you had to lay out the local scene, and you had to lay out the policy and the chronology and the documents that were there'.[78] However, Browning commented that he 'certainly'

[75] Ibid.
[76] Letter to Christopher Browning from Jill Murray. Undated. CBP. IRN 81871. Box 11, Folder 14.
[77] The five documents requested by Nutting were: the Gemlich letter (Adolf Hitler to Adolf Gemlich,1919, believed to be the first piece of antisemitic writing by Hitler); the Nuremberg Laws (racial laws against Jews enacted by the Nazis during 1935); a letter from Reinhard Heydrich to Martin Luther, Undersecretary at the Foreign Office, inviting him to the Wannsee Conference; documents detailing the number of Jews who were being murdered daily by the *Einsatzgruppen* (including those killed in Domachevo), which were sent to the Nazi chief statistician who then messaged Adolf Eichmann; the fifth document Nutting could not recall. Nutting QC. Interview.
[78] Browning. Interview.

does not remember Nutting stating that Browning needed five documents to prove the Holocaust.[79] Due to the absence of trial transcripts it is not possible to fully ascertain which post-trial account is accurate. According to Nutting, he insisted to Browning that 'you can and you will' prove the Holocaust in five documents:

> [B]ecause although you of course are a professor of history, I am an advocate, and you are going to give the magistrate and the jury a history lesson ... Your evidence is going to be pithy and absolutely to the point … the very last thing I want is for the magistrate, certainly the jury, to be buried in a vast quantity of documentation such that your history lesson becomes a long sprawl over two or three days … that's not how I want to present this case to the jury. I need to prove the Holocaust and it's going to be quite easy to prove through your evidence.[80]

As discussed within chapter two and demonstrated by Nutting's succinct statement, the disciplinary practices between a historian and lawyer most noticeably differ when a legal counsel is presenting an argument and evidence within a trial. Whilst it is historical practice to support each claim with sufficient evidence, from an advocate's perspective, 'there are just certain documents that are so lively in a horror sense' that they took precedence over other evidence.[81] For example, the inclusion of the *Einsatzgruppen* statistical documentation, demonstrating an increasing number of Jews being killed in Domachevo, served a dual purpose: firstly it successfully added to the Prosecution's argument to prove that the acts committed in Domachevo were war crimes; and secondly, the inference of the document could be used to advance claims of Sawoniuk's guilt.[82] From an advocate's perspective, '[Nutting] could fillet [Browning's] evidence and certainly fillet his exhibits because [Nutting] knew what [he]

[79] Ibid.
[80] Nutting QC. Interview.
[81] Ibid.
[82] Ibid.

needed to prove, and [Nutting] knew what [Browning] was capable of saying.'[83] In summary, '[Browning] was the historian who produced it all, [Nutting] was the advocate who wanted to ensure that [he] kept the jury's attention and therefore presented his evidence in the most memorable and effective fashion'.[84]

Cross-Examination

The most prominent legal debates emanating from Browning's report was firstly whether the role of the local police force had been used to protect the local inhabitants or instead used as a tool by the Germans to terrorise the population, and secondly the level of choice that Sawoniuk had in joining the *Schutzmannschaft*.[85] Hence, these issues became the principal focus of Browning's cross-examination by Clegg.

Speaking to Clegg as part of the research for this dissertation, he emphasised that the Defence sought to use Browning's cross-examination to provide a background for the jury to look at what Sawoniuk had done from a different perspective.[86] Clegg focused on the differences between historical facts that could be presented under expert testimony and facts susceptible to interpretation throughout Browning's cross-examination. It is clear that Browning was aware of these factual boundaries given Browning's experience in the 1988 *Zündel* trial. Yet Clegg addressed to the Court that the choice within the *Schutzmannschaft* 'shouldn't be a fact that's susceptible to expert evidence, it should be a fact that's susceptible to evidence from people who were

[83] Ibid.
[84] Ibid.
[85] Dean. Interview.
[86] Clegg QC. Interview.

there, who can say in that particular village [Sawoniuk] had an actual choice'.[87] Given the traditional weight of witness testimony in criminal proceedings, Clegg is correct in stating that if witnesses who lived in Domachevo were available to testify, then their evidence would have held more legal weight than Browning's when discussing the degree of choice that members of the *Schutzmannschaft* possessed. However, the *Sawoniuk* trial was held fifty-four years after the end of the Second World War, hence the number of surviving inhabitants of the occupied territory available to testify was very small. Nonetheless, Clegg commented, '[Browning] can say what the orders were … but as to how they were put into effect locally … there's quite a fine line really where the expert evidence ends and the evidence of the crime itself begins.'[88] The criticism made by Clegg that Browning's evidence overstepped the boundaries by discussing the extent of Sawoniuk's choice in his report, is consistent with other experts in criminal trials. Hence, it is clear that the reservations and reluctance that Clegg held over Browning's emphasis of Sawoniuk's choice within both the report and the trial are not a result of interdisciplinary tensions but demonstrate agreement with the legal definitions of the role of the expert historian as a provider of contextual objective knowledge, as established in chapter two.

As observed throughout this dissertation, when an expert witness testifies, the opposing counsel seeks any ambiguity in their evidence to question the general credibility and reliability of the witness, especially the historical witness given the degree of interpretation that a historian relies upon when reaching their conclusions. However, as Clegg commented on the rapport between himself and Browning during

[87] Ibid.
[88] Ibid.

cross-examination, ‘nothing was hostile … such would have been counter-productive in the eyes of the jury … so it was gentle cross-examination really’.[89] Browning noted that the cross-examination in the *Sawoniuk* trial resembled more a ‘presentation’ of different scenarios for the jury to consider, in contrast to the cross-examination in 1988 by Douglas Christie. On the one hand, Clegg sought to present an image of Sawoniuk as a destitute nineteen-year old, who due to his impoverished childhood and low status within the Domachevo community, had ‘no choice’ but to join the *Schutzmannschaft*. Browning stated that he told the Court ‘well that's one scenario … but another scenario could be, and then I laid out exactly the sequence of things and I said your scenario and my scenario don't matter, it's what the eyewitnesses say about which of these scenarios is right’.[90] Browning’s recollection of the interactions between himself and Clegg during cross-examination reiterate the distinctiveness of the ‘bull-dog’ cross-examination experience in the 1988 *Zündel* trial, with the uniqueness of Clegg’s stance as an opposing counsel towards his expert testimony. Moreover, Clegg did not seek to contest the historical narrative of the Holocaust. Thus, in line with Lynne Humphrey’s concept of ‘good history’ generated in legal settings, the engagement of legal counsels with wider historiography in the *Sawoniuk* courtroom produced ‘good history’ more so than earlier Holocaust perpetrator trials.[91]

Interdisciplinary Relationship

The research within this chapter has demonstrated that the interdisciplinary relationship had clearly developed since the *Hostage* Case and the Frankfurt-

[89] Ibid.
[90] Browning. Interview.
[91] Humphrey, ‘The Holocaust and the Law’, pp.101-105.

Auschwitz trial. Nutting stated that evidence had to be offered to the jury that justified the assertion that a war crime has been committed when presenting a case for a murder in pursuit of a war crime conviction. Due to the complexity of war crimes, according to Nutting, legal counsels need an expert, in this case an historian, to tell the jury why there is good reason for suggesting that a war crime has been committed. Nutting concluded that he 'certainly couldn't have proved the case without Browning's evidence'.[92] Regarding the interdisciplinary relationship between history and law, Clegg 'strongly' disagreed that the historian entering the courtroom leads to a fractious relationship.[93] This is in distinct contrast with the objections made by the lead prosecutor, Theodore F. Fenstermacher, in the *Hostage* Case, where he argued that historians could not be experts to the facts because the facts are not exclusive knowledge to historians. Clegg and Dean have noted that in line with the legal definitions of expert testimony, historical expert testimony provided in war crime trials would very rarely be anything to do with identifying the defendant's guilt as opposed to describing the context of the allegation.[94] However, they agreed that the historian as an expert witness continues to be 'essential' in providing expert evidence as required by the Court. The difference between Fenstermacher's argument and Dean and Clegg's assertion, reinforces that the historian as an expert witness became not only more accepted in the *Sawoniuk* trial, but a recognised component of the legal arguments in proving that a war crime had been committed.

[92] Nutting QC. Interview.
[93] Clegg QC. Interview.
[94] Ibid; Dean. Interview.

CLOSING SPEECHES

The closing speeches saw the Prosecution and Defence engage with the historiographical debates regarding the involvement of 'ordinary men' in the Holocaust by fully utilising the evidence presented by Browning.

Prosecution

Nutting consistently referred to Browning's report throughout the Prosecution's closing speech, using Browning's expert testimony as supporting evidence for the legal conclusions that Nutting had drawn.[95]

During his closing speech Nutting referred to the concept of 'willing executioners'. The level of choice that Sawoniuk had in participating in the actions committed by the *Schutzmannschaft* received scrutiny throughout the trial, linking to the wider historiographical debate concerning the responsibility of the 'ordinary' German and occupied people within the Holocaust and the justifications of Holocaust perpetrators. Indeed, Nutting reminded the jury to 'consider that the Nazis needed willing executioners to carry out the policy of genocide … [t]he question [the jury] have to ask in this case is whether the defendant was one of those willing executioners.'[96]

Nutting's assertion emphasises the impact that contemporary historiography can have on how history is presented in Holocaust trials. Nutting's language directly mirrors the

[95] *R. v Anthony Sawoniuk*. 25 March 1999. p.18. Min-U-Script. Live Note
[96] Ibid.

title of Daniel Goldhagen's *Hitler's Willing Executioners*: a highly controversial text which offered a strikingly different interpretation from Browning's *Ordinary Men*. Both Browning and Goldhagen also dealt with the same Order Police Battalion 101. However, whereas Browning represented a more complex, yet moderate functionalist position, Goldhagen put forward an ultra-intentionailist argument. For example, one of Goldhagen's chapters titled 'Eliminationist Antisemitism as Genocidal Motivation' addressed the argument that 'Germans' could not help but hate Jews and wanted to take part within the Final Solution. According to Goldhagen, '[t]hese were such beliefs that led Germans to take joy, make merry, and celebrate their genocide of the Jews'.[97] Goldhagen's argument reflected the narrative that was presented by West German courts during the 1960s and indeed was questionably the reason for his ill-deserved popular success. Within the *Sawoniuk* trial, Nutting's use of the phrase 'willing executioners' skilfully directed the jury towards an intentionalist perspective, keeping his argument within the binary parameters of law, whilst using Browning as the expert witness in whom the jury could have confidence.

Just as access to new materials was possible after the end of the Cold War such as the KGB archives, allowing historians to further their interpretations regarding grassroot involvement with the Holocaust, the law's engagement with such historiography similarly developed.[98] Whilst criminal law requires clearly defined narratives to comply with a guilty or not guilty verdict, Nutting's presentation of 'headline' intentionalism ('willing executioners') within a more complex and

[97] Goldhagen, *Hitler's Willing Executioners*, p.453.
[98] Other archives such as the Brest-Litovsk Archives opened in 1989.

sophisticated historiography, reiterates the close relationship between the legal arguments presented and the wider historiography of the Holocaust.

Defence

In contrast, the Defence argued that the trial 'should have really focused on people who made decisions rather than foot soldiers'.[99] Assessing Clegg's closing speech, Tony Kushner accused Clegg of invoking a 'mythical image of Britain at war' by comparing Sawoniuk to Pike of *Dad's Army*.[100] Speaking as part of the research for this dissertation, Clegg maintained that the *Sawoniuk* trial was 'too little too late' and was a result of how long it took to get the War Crimes Act through parliament: the only perpetrators left to prosecute were lower-level foot soldiers.[101] Considering Clegg's post-trial comments, it is certainly unfair to suggest that Clegg was seeking to 'domesticate' the Holocaust or bring the trial's proceedings down to a level that the jury would understand.[102] Kushner's assessment of Clegg's closing speech is held within the wider consideration of the British memory of the Second World War, than the *Sawoniuk* trial in particular. Rather, Clegg's analogy was trying to downplay Sawoniuk's involvement and to demonstrate how small a role Sawoniuk had played within the wider echelons of the Nazi chain of command. Kushner's argument that Clegg sought to domesticate the Second World War is thus ironic, given that Clegg readily engaged with Browning's historical evidence throughout the trial.

[99] Clegg QC. Interview.
[100] Kushner, 'Who Do You Think You Are Kidding, Mr Sawoniuk', p.208.
[101] Clegg QC. Interview.
[102] Kushner, 'Who Do You Think You Are Kidding, Mr Sawoniuk', p.209.

JUDGEMENT

On 1 April 1999, Sawoniuk was found guilty of counts one and three, and was sentenced to two terms of life imprisonment for the shooting of more than ten Jews in Domachevo following the Yom Kippur Massacre in 1942.[103]

During the summing up of the trial, Justice Potts reminded the jury of the standard criminal procedure concerning Browning's expert testimony and their 'entitlement to reject it and not act upon it' as seen in other criminal Holocaust trials.[104] However, arguably within the *Sawoniuk* proceedings, Justice Potts's directions appear more jarring than earlier trials due to the uncontested nature of Browning's testimony. Nonetheless Justice Potts stated to the jury: '[y]ou [the jury] may say "He is an expert. We cannot possibly reject what he says". Well, that would not be quite right members of the jury. You have to regard his evidence in the usual way, bearing in mind, as I say, substantially it is not challenged.'[105] It is only within the summary of the *Sawoniuk* proceedings that one finds an arguable disparity between domestic criminal law and the *Sawoniuk* proceedings as a Holocaust trial. Though Justice Potts was following established criminal practice, given the uncontested nature of Browning's testimony, Justice Potts did not necessarily need to make that specific address to the jury. As

[103] At the end of the Prosecution's case, Justice Potts ruled that there was insufficient evidence to support Sawoniuk's conviction on counts two and four of the indictment. Whilst Sawoniuk's conviction substantiated passing the War Crimes Act, the time and money spent on convicting Sawoniuk meant that debate still continued beyond the trial. Out of the 393 cases investigated by Scotland Yard and the Scottish unit since 1991, only the Serafinowicz and Sawoniuk cases had come to court and only the latter resulting in a conviction. David Cesarani summarises the discontent against the War Crimes Act and Scotland Yard's War Crime Unit: '[o]n the balance of the evidence Britain was and remains a safe place to be a Nazi collaborator and mass murderer. Justice was delivered eventually, but too late and in too small a measure.' Dean, 'War Criminal Sawoniuk'; ECHR. Third Section. Decision as to the Admissibility of Application No. 63716/00. pp.3-4; Cesarani, *Justice Delayed*, p.280.
[104] *R. v Anthony Sawoniuk*. Summing Up. 29 March 1999. Case No: T980662. p.8.
[105] *Sawoniuk*. Summing Up. p.8.

Nutting stated, Justice Potts was 'a judge who was conspicuously fair throughout the whole case, [and] rigorous in his application of the rules of evidence'.[106] The fact that the content of Browning's testimony and report was accepted by both legal counsels would have played a significant part in the jury accepting Browning's testimony as uncontested fact. Once the jury had accepted Browning's historical evidence, their attention would have been on the legal evidence presented against Sawoniuk and assessing the guilt of the defendant. Nonetheless, within the context of a Holocaust trial, Justice Potts's statement could have had a profoundly damaging impact on the historiography of the Holocaust if the jury had ruled against Browning's evidence. Whilst the trial proceedings had demonstrated a progression of the law's engagement with the existing and developing historiography in Holocaust Studies, Justice Potts's summary was a harsh reminder of the treatment of expert evidence in a courtroom and the rigid procedures that have to be followed, potentially resulting in damaging established historical narratives.

SUMMARY

Browning's experience as an expert witness in the *Sawoniuk* trial appears remarkably ordinary due to the application of Browning's testimony within the parameters of expert evidence as defined by criminal law when compared to other Holocaust proceedings that have been addressed in this dissertation.

It is clear that the purpose of the trial can determine the experience of the expert witness specific to those proceedings, particularly when considering the 1988 *Zündel*

[106] Nutting QC. Interview.

trial and the Frankfurt-Auschwitz trial. The historiographical arguments concerning 'what is history' with the expert historian acting as a spokesperson for the historical discipline in a criminal Holocaust trial can be distinguished from the experience for the expert witness seen in Holocaust denial trials. Similarly, the impact that the wider socio-political context in the 1960s had on Fritz Bauer's use of the expert evidence and the Court's condemnation of it (though not dismissal) defined the expert testimony as having an additional purpose beyond providing background knowledge. By comparison, the *Sawoniuk* trial demonstrated that Browning's expert evidence was treated within the same parameters as other expert witnesses from other disciplines, with Browning providing contextual historical knowledge that was conditioned in part by the Prosecution. Browning's own acknowledgement that 'any good historian' could have appeared as an expert witness in 1999 could be used to support the argument that Browning's experience was underwhelming, particularly when compared to the intense cross-examination seen in the 1988 *Zündel* trial.

It was not the evidence presented by the expert witness in the *Sawoniuk* proceedings that made Browning's experience unique, but rather the engagement with the expert evidence and wider historiographical debates by the legal counsels. The *Sawoniuk* trial saw a distinct improvement in the interdisciplinary relationship through the acceptance of the need for Browning's historical expert testimony. Even in the Frankfurt-Auschwitz trial in which the reports and testimony presented by the expert witnesses were essential in providing a foundation for the trial's legal discussions, the counsels and judges alike voiced their discontent concerning the role of historians in the courtroom. Clegg's acceptance of Browning's expert testimony during the cross-examination was therefore unprecedented at least in the proceedings assessed within

this dissertation, with Clegg not seeking to contest Browning's status as an expert or the evidence he presented. Clegg's acknowledgement of the essential service that historical expert evidence would hold within the *Sawoniuk* proceedings marks a distinct progression for the experience of the expert witness. Since Holocaust perpetrator trials in the 1960s, the historian as an expert witness had developed from a provider of historical background knowledge and viewed as supplementary to the proceedings, to being acknowledged as an essential component of the trial by both legal counsels to support their respective arguments.

Finally, the depth of engagement by Nutting and Clegg with the emerging historiographical debates in Holocaust Studies, demonstrates a shift in historical arguments presented by legal counsels in Holocaust proceedings. Whereas binary 'intentionalist' and 'functionalist' arguments had been presented in the 1960s, leading to a reflective historical period during the 1970s and 80s, the *Sawoniuk* case demonstrated a more nuanced engagement with Holocaust Studies. As Nutting's closing speech demonstrated, in order to assess the extent of low-level perpetrator guilt, one had to understand the relevant historiography.

However, for Browning, though the entrance of complex historiographical debates in the courtroom was unprecedented in Holocaust perpetrator trials, the criminal evidentiary standard of beyond reasonable doubt still proved challenging particularly when seeking to engage with Holocaust historiography. From this perspective 'the civil case is closer to the way in which [historians] work … and the criminal case imposes a standard that is way beyond what we normally work with … [historians] understand evidence isn't perfect and that one can reach fairly compelling conclusions without the

beyond reasonable doubt standard'.[107] Indeed, whilst the *Sawoniuk* trial confirmed that law and history could work alongside each other and showed clear improvement for the acceptance of the legal need for the historian as an expert witness in a criminal Holocaust trial, the experiences of the historians during the *Irving* trial conducted under civil libel law demonstrated that certain legal environments and court cases suit the historical discipline better than others.

[107] Browning. Interview.

VII

Case Study Five

David Irving v Penguin Books Ltd. and Deborah Lipstadt

> 'An objective historian is obliged to be even-handed in his approach to historical evidence: he cannot pick and choose without adequate reason.'
>
> Mr Justice Charles Gray[1]

INTRODUCTION

The introduction of civil law Holocaust-related trials resulted in significant developments for both the historical practice and the role of the historian as an expert witness. As Mr Justice Charles Gray commented, the focus on historical malpractice during *David Irving v Penguin Books Ltd. and Deborah Lipstadt* (2000) resulted in a clear establishment of the rules for the 'objective historian'.[7] These 'rules' as defined by Gray above, though based on lead expert Richard Evans's definition of an 'objective historian', would have been equally applicable to historical expert witnesses in earlier criminal Holocaust trials. Indeed, Evans's *In Defence of History* (1997) reasserted the importance for historians to approach their research with the scrupulous assessment of documents.[8] Yet, though the foundation for the 'objective historian' already existed prior to Gray's judgement, due to the criminal focus of Holocaust trials from 1945, the

[1] *Irving.* Judgement. 13.24.
[7] Throughout the rest of this chapter, *David Irving v Penguin Books Ltd. and Deborah Lipstadt* shall be referred to as the *Irving* trial.
[8] Richard J. Evans, *In Defence of History*, First Edition (London: Granta, 1997).

role of the judge would not have been to rule on what constituted an 'objective historian'. Within criminal perpetrator trials, the role of the expert historian is to present contextual evidence of a specific event, hence they do not normally experience their expert report or testimony being challenged on a historiographical basis.[9] By contrast, in Holocaust denial trials, the expert historian provides testimony relating to wider Holocaust historiography and the interpretation of evidence of the Holocaust. Hence, the discussion on historical malpractice directly enters the courtroom through the expert evidence presented for the Court.

Interdisciplinary literature discussing the place of history and the expert historian within the courtroom predominantly focuses on criminal Holocaust trials. As chapter two highlights, scholarly debates concentrate on 'beyond reasonable doubt' and whether historians can achieve such a high standard of evidence given that historical conclusions are based on interpretations of facts and can change as new evidence appears. However, such attention has meant that literature on civil Holocaust trials, and the role of the expert witness within this trial format, has been overlooked.[10] Whereas 'beyond reasonable doubt' does not permit a high degree of interpretation that certain historical events necessitate, such as whether there was a 'Hitler Order', the civil standard of a 'balance of probabilities' aims to reach the most accurate conclusion based on the available evidence at the time. Consequently, what is viewed as a manipulation of evidence in the eyes of the historian, is also viewed as manipulation for the lawyer as demonstrated through Gray's definition of an objective

[9] The 1985 and 1988 *Zündel* cross-examinations of Raul Hilberg and Christopher Browning are the exception to this observation. As established in chapter two and five, Defence counsel Douglas Christie had an ideological focus during the *Zündel* trials (to disprove the Holocaust), thus the histories provided by Hilberg and Browning were heavily scrutinised.
[10] Douglas, *Memory of Judgment*, p.261.

historian. This chapter therefore argues that, under civil law, historians and lawyers can work together in presenting evidence to the Court, meaning that expert historians can present their testimony in a near-academic environment that is arguably more suited to the historical profession.

This chapter demonstrates that the evidentiary standards within the civil jurisdiction enabled the historical expert testimony to dominate the *Irving* proceedings, thereby affirming that historical testimony does have a place within the courtroom. A comparison of Christopher Browning's experience as an expert witness within the *Irving* trial will be analysed alongside the testimony of the other Defence expert witnesses: Robert Jan van Pelt, Evans, and Peter Longerich.[11] This assessment will reiterate the importance of understanding the requirements of the expert witness and the benefit of engaging with expert testimony from prior Holocaust trials. Assessing Browning's experience within a civil libel trial will explain how the focus of different trial perspectives (denial or perpetrator) and standards of proof (criminal or civil) can impact the expert witness, both within the courtroom and the wider historiographical context. This chapter will conclude with an evaluation of the expert testimony within the closing speeches and Gray's judgement.

Whilst the *Irving* verdict was given by a judge and the arguments were presented by lawyers, expert historians became the primary source of testimony. Due to the 'balance of probabilities' there was a more equal relationship between the expert historians and lawyers during the *Irving* trial, enabling Browning to contribute towards

[11] Hajo Funke also acted as an expert witness for the Defence, examining Irving's right-wing political ties and racist attitudes. Given the historical focus of this dissertation, this chapter concentrates on the involvement of van Pelt, Browning, Evans, and Longerich.

the legal strategy similar to the 1988 *Zündel* and *Sawoniuk* proceedings. Given the interdisciplinary arguments against the inclusion of historians as expert witnesses as presented in chapter two, it is clear that Holocaust trials conducted under civil law necessitate a more comprehensive engagement with historical debates than criminal Holocaust trials. Hence, this chapter argues that the *Irving* trial can be viewed as the apex of the interdisciplinary relationship and experience for the historian as an expert witness within the case studies assessed for this dissertation.

TRIAL CONTEXT

The *Irving* trial started on 11 January 2000 and ended on 11 April. The trial focused on Irving's practice and credibility as a historian due to the defamation charges made by David Irving against Deborah Lipstadt and Penguin Books.[12] Standards of historical research were therefore brought directly into the courtroom, consequently placing emphasis on the testimony of the historians who appeared as expert witnesses. The impact that the civil evidentiary standard had on the interdisciplinary relationship between history and law, and the subsequent use of historical expert testimony, will be demonstrated by establishing the context of the *Irving* trial.

Indictment

In 1996, Irving sued Deborah Lipstadt and her British publisher, Penguin Books, over the claims made by Lipstadt against Irving in her work *Denying the Holocaust*.[13] Lipstadt argued that due to Irving being 'a Nazi apologist' and 'an admirer of Hitler', he

[12] Browning, 'Law, History, and Holocaust Denial', p.209.
[13] *Denying the Holocaust* was published by Penguin Books in the UK in 1994.

had ‘resorted to the distortion of facts and to the manipulation of documents in support of his contention that the Holocaust did not take place.’[14] Irving sought aggravated damages for libel, arguing that Lipstadt’s claims, and Penguin’s wide publication of these assertions, had defamed his reputation as a historian.[15]

Legal Actors[16]

David Irving (plaintiff) is a prolific writer, having authored over thirty books about the Second World War by the time his suit was brought to court in 2000.[17] Prior to 1988, Irving was seen as a reputable military historian, who demonstrated ‘thoroughness of research and eloquence of writing’, with his work printed by well-respected publishing houses, including Penguin Books.[18] Following his appearance in the 1988 *Zündel* trial as an expert witness for the Defence, Irving became a self-professed ‘stone cleaner’ regarding the history of the Third Reich and Adolf Hitler.[19] As Lipstadt noted, Irving’s previously good reputation as an academic made him ‘one of the most dangerous spokespersons for Holocaust denial’.[20] During the trial, Irving represented himself.

[14] *Irving*. Judgement. 1.2.
[15] Evans noted that the cost of Lipstadt and Penguin Books not following with the libel suit ‘in terms of freedom of speech, the freedom of historians to say what they like, and the freedom of publishers to publish it’, would have been unacceptably high. See: Evans, ‘History, Memory, and the Law’, p.341; Neal Ascherson, ‘The Battle May Be Over - But the War Goes On’, *The Guardian* (16 April 2000). Accessed: 21 January 2020. [https://www.theguardian.com/uk/2000/apr/16/irving]; Leader, ‘The Cost of Free Speech’, *The Guardian* (13 April 2000). Accessed: 21 January 2020. [https://www.theguardian.com/uk/2000/apr/13/irving.guardianleaders]; Deborah Lipstadt, *History on Trial: My Day in Court with A Holocaust Denier* (New York: HarperCollins Publishers, 2005); Marouf Hasian Jr., ‘Holocaust Denial Debates: The Symbolic Significance of Irving v. Penguin & Lipstadt’, *Communication Studies*, Vol. 53, No. 2 (2002): pp.145-146.
[16] This section introduces the leading legal representatives within the case. The biographies of the historical expert witnesses will be established later in the chapter, providing context for their expert reports and testimony.
[17] Dennise Mulvihill, ‘Irving v. Penguin: Historians on Trial and the Determination of Truth Under English Libel Law’, *Fordham Intellectual Property, Media & Entertainment Law Journal*, Vol. 11, No. 217 (2001): pp.219-220.
[18] Ibid.
[19] David Irving, *Hitler’s War and The War Path* (London: Focal Point, 2002), p.vii.
[20] Lipstadt, *Denying the Holocaust,* p.181.

Penguin Books (first defendant) were represented by the solicitor firm Davenport Lyons. Lipstadt (second defendant) is the Dorot Professor of Modern Jewish and Holocaust Studies at Emory University in Atlanta, Georgia. She has published five books since 1986 and was the presidential appointee to the United States Holocaust Memorial Council, overseeing the United States Holocaust Memorial Museum, for two terms.[21] It was Lipstadt's solicitors, Anthony Julius and James Libson of Mishcon de Reya LLP, that led the Defence courtroom strategy. Within the courtroom, both Penguin Books and Lipstadt were represented by leading defence barrister Richard Rampton QC.

Rampton is an established British libel lawyer, having represented clients such as Associated Newspapers Group plc in *Lucas-Box v News Group Newspapers Ltd* (1986). Rampton was supported by Heather Rogers (then junior counsel, now QC).[22] Anthony Julius is a British solicitor advocate and Deputy Chairman of Mishcon de Reya.[23] He is also an academic, with publications including *Trials of the Diaspora: A History of Anti-Semitism in England* (2010) and *T.S. Eliot, Anti-Semitism and Literary Form* (first edition 1995, second edition, 2003).[24] Known for representing Diana, Princess of Wales, it was Julius's decision not to let Lipstadt appear in the witness box, and instead use the testimony and expert reports of van Pelt, Browning, Evans,

[21] *Beyond Belief: The American Press and the Coming of the Holocaust, 1933-1945* (New York: The Free Press, 1986); *Denying the Holocaust* (1993); *History on Trial* (2005); *The Eichmann Trial* (New York: Schocken Books, 2011); *Antisemitism: Here and Now* (London: Scribe Publications, 2019). Trial Materials. Holocaust Denial on Trial. Accessed: 19 March 2020. [https://www.hdot.org/trial-materials/#info_DI]; Deborah E. Lipstadt. Emory University. Accessed: 19 March 2020. [http://religion.emory.edu/home/people/faculty/lipstadt-deborah.html]
[22] Guttenplan, *Holocaust on Trial*, p.19; Heather Rogers QC. Doughty Street Chambers. Accessed: 19 March 2020. [https://www.doughtystreet.co.uk/barristers/heather-rogers-qc]
[23] David Cesarani, 'The Holocaust on Trial', *Holocaust and Genocide Studies*, Vol. 16, No. 2 (2002): p.289.
[24] Anthony Julius. Mischon de Reya LLP. Accessed: 19 March 2020. [https://www.mishcon.com/people/anthony_julius]

and Longerich to critique Irving's work, thereby putting Irving 'on trial'.[25] Julius was supported by James Libson, the Executive Partner of Mishcon de Reya and Head of Mishcon Private.[26]

With the intention to keep the focus on Irving, Julius opted for a bench trial, as opposed to a trial by jury, consequently depriving Irving of an 'audience'.[27] Irving did have the option to dispute the bench trial, as is the right of the plaintiff, however he agreed to Julius's request. The trial was overseen by Mr Justice Charles Gray. In a bench trial, Gray would have to articulate every reason for his verdict. Consequently, a 'reasoned judgement' against Irving would be harder to argue against within the academic sphere and to refute in the Court of Appeal. Gray has practiced law since 1967, became a QC in 1984, and was appointed a High Court Judge (Queens Bench Division) in 1998. As a judge, Gray has overseen a wide variety of civil cases including contract, tort, and privacy copyright.[28]

Strategy

Irving noted in his opening speech that he would refute the claim that he was a 'Holocaust denier'.[29] Irving sought to demonstrate that he 'selflessly' discovered new historical documents and made them available both to scholars and the general public.[30] According to Irving, his translation and publication of foreign archival

[25] Cesarani, 'Holocaust on Trial', p.289.
[26] James Libson. Mischon de Reya LLP. Accessed: 19 March 2020. [https://www.mishcon.com/people/james_libson]
[27] The length and cost of the trial were also factors considered by Julius for reasons to dispense with a jury. Guttenplan, *Holocaust on Trial*, p.102.
[28] Ibid; Sir Charles Gray. Accessed: 19 March 2020. [https://web.archive.org/web/20120909031124/http://www.3vb.com/associate-members-SirCharles-Gray.html]
[29] *Irving*. 11 January 2000. p.24.
[30] Ibid, pp.14-15.

documents was ‘important in the interests of general historical research’, and thus his historical work had actually furthered Holocaust Studies.[31] Evidence put forward by Irving during the trial would consequently support his overall argument: his remarks, no matter how offensive, were true and under British libel law ‘truth has always been regarded as an absolute defence.’[32]

Julius adopted a defence of justification to address the allegations of historical manipulation and falsification made against Irving following the rules of libel and defamation.[33] As Gray noted during Rampton’s opening address to the Court, the Defence sought to put forward the case that Irving ‘not only ought to have known but did in fact know what the historic records showed’.[34] Irving established at the beginning of the trial that the specific events of the Holocaust were not at stake, but rather ‘what happened over the last thirty-two years on my writing desk’.[35] Thus, Julius sought to use all material compiled against Irving to ‘[r]un [the trial] as if it was a history seminar’.[36] After the trial Julius remarked that he had sought to engage with Irving in three ways: historical, historiographical, and political. For Julius, ‘the historical and the political were the bases of a pyramid, and … the apex was the historiographical.’[37] The language used by Julius demonstrates how central historical material and historical knowledge was to the trial from the offset. As the trial was primarily about

[31] Ibid.
[32] Ibid, p.28.
[33] According to Section 5 of the 1952 Defamation Act, ‘a defence of justification shall not fail by reason only that the truth of every charge is not proved if the words not proved to be true do not materially injure the plaintiff’s reputation having regard to the truth of the remaining charges’. Defamation Act (1952). Section 5. Accessed: 21 January 2020. [http://www.legislation.gov.uk/ukpga/Geo6and1Eliz2/15-16/66/section/5]; Mulvihill, ‘Irving v. Penguin’, p.253.
[34] *Irving*. 11 January 2000. p.89.
[35] Ibid, pp.15-16.
[36] Guttenplan, *Holocaust on Trial*, p.91.
[37] Ibid, p.92.

Irving's methods, as opposed to Lipstadt's book or the Holocaust, expert historical testimony became the primary form of evidence.[38]

Existing Literature

Literature on the *Irving* trial is dominated by two themes: the absence of survivor testimony, and the interdisciplinary relationship between history and law. Examining these two foci demonstrates how the different evidentiary standards impacted the role of the expert historian and the wider history of the Holocaust within the trial.

Absence of Survivor Testimony

The decision not to call any survivors to testify contributed to the debate concerning the place for survivor testimony within a courtroom and its place within the memory of the Holocaust.[39] In his briefings to the other expert witnesses, Evans noted '[w]e should think very seriously about bringing Holocaust survivors to the witness stand, despite all the strain that this might place on them. It might look bad if we don't'.[40] Evans's consideration that it might 'look bad' demonstrates the emphasis placed within Holocaust historiography on the testimony of survivors and the memory of the Holocaust. In *The Holocaust on Trial*, D. D. Guttenplan addresses his stance towards the merits of using survivor testimony. Though Guttenplan lays out Julius's reasons for not calling survivors, Guttenplan boldly claims '[h]ow better to underline the

[38] Nine witnesses were heard during the trial, five of which were expert witnesses for the Defence. Guttenplan, *Holocaust on Trial*, pp.91-97; Evans, *Telling Lies about Hitler*, p.269.
[39] See chapter one for debates within existing literature concerning the general suitability of survivor testimony and critiques of memory within a courtroom.
[40] Richard J. Evans. A Note on Expert Witnesses and Briefings. 16 April 1998. p.5. CBP. RG6.4.2. Box 10, File 1.

absurdity of Holocaust denial than by calling survivors'.[41] This statement reiterates the position voiced by Evans, relating to survivors as the key spokespeople for the history and memory of the Holocaust. Guttenplan finishes this statement by quoting survivor Elie Wiesel: 'any survivor has more to say than all historians combined about what happened'.[42] Guttenplan's use of Wiesel's quotation demonstrates his objection to the weight placed by the Defence on historical expert testimony over survivor testimony. Guttenplan concludes his overview of the trial noting that 'without human voices to put flesh on the facts, we have something that, while it may pass muster as history, can never tell the truth'.[43] Guttenplan's assertion that witnesses, memories, and testimony constitute truth is certainly apt given that the *Irving* trial was indeed about the truth of historical documentation. Guttenplan's distinction between history and truth lends itself to the postmodernist argument: there is no such thing as historical 'truth', only historical interpretations.

Guttenplan's distinction between history and truth thus suggests that he is mistaking the memory of the Holocaust with the ultimate 'truth' of the Holocaust. The language used by Guttenplan demonstrates that despite witnessing the full trial, and interviewing the participants, he missed the legal crux of the trial. It was not, as the title of his book suggests, the *Holocaust on Trial*, it was about Irving's historical malpractice, and hence, expert historians had a far greater role to play than Holocaust survivors. Evans emphasised that the weight placed on expert witnesses and historical source material, 'showed that empirical knowledge is possible without the direct involvement of the survivor generation', despite Evans's initial consideration of the role of survivor

[41] Guttenplan, *Holocaust on Trial*, p.95.
[42] Ibid.
[43] Ibid, pp.307-308.

testimony within the *Irving* trial.[44] Evans's reflection echoes the comment made by lead prosecutor John Pearson during the 1988 *Zündel* trial, where he noted that 'such cases might have to be proved at some point in time when there would be no survivor witnesses still alive.'[45] The fact that both Pearson and Evans were drawing upon their conclusions after their involvements in Holocaust denial trials, suggests that the historian as an expert witness is innately more suited to denial trials due to the focus on historical falsification and manipulation of evidence. Moreover, with two independent sources, one historical and one legal making the same observation demonstrates that there is indeed a shift in the evidence used during Holocaust trials, and an increased centrality on historical expert testimony.

Interdisciplinary Relationship

Guttenplan's preference for survivor testimony over historical expert testimony, demonstrates that he was uneasy with the inadequacies of the legal process of British libel law in dealing with a sensitive topic such as the Holocaust. Arguably this could be due to Guttenplan being an American journalist: the system of British libel favouring the plaintiff is in stark contrast to the First Amendment.[46] Guttenplan goes on to summarise the verdict of the trial as 'a trial about the Holocaust in history instead of a trial about the Holocaust'.[47] His language therefore suggests that his reservations

[44] Evans, 'History, Memory, and the Law', p.339.
[45] Browning, 'Law, History, and Holocaust Denial', pp.200-201.
[46] Kenneth Lasson focuses on the use of law under the First Amendment and implications within the academic sphere, including a section titled 'The Experience Elsewhere'. However Lasson does not mention the *Irving* trial under 'England', instead focusing on the 1936 Public Order Act, and the Act's strengthening in 1963. Irving is briefly mentioned regarding his arrest in Austria (November 2005), and his continuing appearance at Holocaust denial events despite his arrest. Kenneth Lasson, 'Defending Truth: Holocaust Denial in the Twenty-First Century', in *Genocide Denials and the Law*, eds. Hennebel and Hochmann, pp.114, 143-154.
[47] Guttenplan, *Holocaust on Trial*, p.96.

about the trial go beyond the exclusion of survivor testimony and relate to the wider interdisciplinary relationship concerning whether the law can rule on matters relating to the historical discipline.

As Emanuela Fronza and Lawrence Douglas agree, there are limits to the law's ability to 'speak adequately on behalf of humanity's most traumatic histories'.[48] Considering Douglas and Fronza's critique, it could be argued that British civil law, where the 'balance of probabilities' is much more aligned to historical practice, may provide a better platform for historical trials. Yet for Fronza, 'transforming historical truth into an official truth … [gives] credit to the idea that only one school of historical thought exists.'[49] Fronza's fear was echoed in literature and newspaper articles published directly after the *Irving* verdict. Howard Jacobson in *The Independent* noted that 'in general we are the poorer for every disagreement not voiced … we see the triumph of like-mindedness, and like-mindedness is scarcely to be distinguished from closed-mindedness'.[50] Fronza and Jacobson's conclusions and the decline in authentic academic debate misses the purpose of Holocaust denial trials more generally. It was not the 'Holocaust' on trial as Guttenplan argued; rather, the evidence presented to the Court by expert historians and upon which the judgement was based, demonstrated that historians are constantly re-examining and refining the available evidence concentrating on the Third Reich.[51] Indeed, returning to the arguments presented by Michael Shermer, Alex Grobman, and Robert Eaglestone in distinguishing between historical revisionism and denial (chapter five), revisionism is

[48] Douglas, *Memory of Judgment*, p.261.
[49] Emanuela Fronza, 'The Criminal Protection of Memory: Some Observations About the Offence of Holocaust Denial', in *Genocide Denials and the Law*, eds. Hennebel and Hochmann, pp.177-178.
[50] Howard Jacobson, 'Just Because a Lot of People Agree on Something Doesn't Mean They're Right', *The Independent* (15 April 2000): p.5.
[51] Evans, *Telling Lies About Hitler*, p.262.

standard historical practice: reasonable historians seek to reassess and revise current understandings of an established event.[52] Holocaust denial trials do not quell this type of academic engagement. They do, however, challenge the illegitimate form of historical interpretation that if presented in an academic format could mislead a non-academic audience. Holocaust deniers do not seek to 'revise' the historical narrative of the Holocaust, but rather completely dispel and reject the established facts of the Final Solution. The judgements of Holocaust denial trials are not to impose one school of thought over another within Holocaust Studies, but to establish the shared disciplinary norms of the historical practice and the law.[53]

Magnus Linklater in *The Times* reported one historian as saying, '[i]t is a defeat for all of us when history has to be decided in a court of law'.[54] Linklater's citation depicts history as the secondary discipline within the trial's overall proceedings, suggesting that Gray came to his verdict without the assistance of expert historians.[55] As demonstrated elsewhere in this chapter, the reports and testimony provided by the expert historians were fundamental to the trial's proceedings and to Gray's conclusions. James Libson and Julius summarised that during the course of the trial 'there was an unfettered, intelligent exploration of the historian's craft and standards

[52] Shermer and Grobman, *Denying History,* pp.v-xvi; Eaglestone, *Holocaust and the Postmodern*, pp.237-238.
[53] Barbara Herrnstein Smith, *Belief and Resistance: Dynamics of Contemporary Intellectual Controversy* (Cambridge, Mass.: Harvard University Press, 1997). For arguments relating to the relationship between Holocaust denial and the law, see: Douglas, *Memory of Judgment*, pp.215-216, 255-259; Neal Ascherson, 'Last Battle of Hitler's Historians', *The Guardian* (16 January 2000). Accessed: 25 January 2020.
[https://www.theguardian.com/books/2000/jan/16/historybooks.comment]; Deborah Lipstadt (plenary), 'Perspectives from A British Courtroom: My Struggle with Deception, Lies and David Irving', in *Remembering for the Future,* eds. Roth and Maxwell, pp.769-772.
[54] Magnus Linklater, 'This is the Real Price of David Irving's Lies', *The Times*, London (13 April 2000): p.20.
[55] Ibid.

with which the court and Gray dealt admirably'.[56] Thus, the *Irving* trial was not 'history judged by law'. Instead, due to the civil evidentiary standards and focus on historical practice, the *Irving* trial was a clear example of history and law working together, to produce a verdict that whilst it was delivered by a judge, fundamentally relied upon the work of the expert witnesses.

TRIAL PROCEEDINGS: VAN PELT, EVANS, LONGERICH

As mentioned, Julius saw historical and political evidence as the 'base' for the Defence's strategy: to demonstrate that Irving's ideological agenda led him to deliberately misrepresent the available historical evidence. The Defence sought to present to the Court the evidence that an 'objective' historian would have used.[57] To achieve this, the Defence followed three lines of enquiry. Firstly, van Pelt, Browning and Longerich were enlisted to produce expert reports and testify on the historical evidence available to Irving until 1993, when Lipstadt's claims were first published.[58] Secondly, Evans, with support from two graduate students, Nikolaus Wachsmann and Thomas Skelton-Robinson, produced a report that highlighted the historical falsifications within Irving's writings and on which Evans testified.[59] Van Pelt's, Browning's, Evans', and Longerich's subsequent examination-in-chief and cross-examination were based on these reports.[60]

[56] Libson and Julius, 'Losing was Unthinkable'.
[57] Browning, 'Law, History, and Holocaust Denial', p.209; Evans, *Telling Lies About Hitler,* p.35.
[58] Due to the claims being scrutinised, it was not legally relevant to assess the evidence available to Irving after 1993.
[59] Evans, *Telling Lies about Hitler*, pp.37-38; Professor Nikolaus Wachsmann. Birkbeck College, University of London. Department of History, Classics and Archaeology. Accessed: 24 March 2020. [http://www.bbk.ac.uk/history/our-staff/academic-staff/dr-nikolaus-wachsmann]
[60] Evans, 'History, Memory, and the Law', p.340.

This section will assess the reports and testimony of van Pelt, Evans, and Longerich, in distinction from Browning's involvement. Evans and van Pelt were interviewed for this dissertation. Unfortunately, Longerich was not available. Therefore, conclusions on the general trial experience are based on trial transcripts, reflections on the trial made by Evans and van Pelt during their interviews, and any wider comments made by the expert witnesses in their subsequent existing literature published after the trial.

Browning's testimony and report will be examined separately below due to the wider objective of this dissertation to compare Browning's experience across the 1988 *Zündel* trial, the *Sawoniuk* trial, and the *Irving* trial. Assessing Browning's testimony separately will enable a clear demonstration of the beneficial impact that Browning's earlier contribution as an expert witness had on his experience during the *Irving* trial. This analysis will reinforce the importance of adopting a comparative methodological approach within Holocaust trials, as a means to understand the experience of the historian as an expert witness.

Biographies

Robert Jan van Pelt

Van Pelt is an architectural historian, receiving an undergraduate degree in art history and classical archaeology (1977), a graduate degree in architectural history (1979), and a PhD in the history of ideas (1984).[61] Van Pelt has taught at the school of architecture in the faculty of environmental studies at the University of Waterloo since

[61] Leslie Jen, 'Robert Jan van Pelt', *The Canadian Encyclopaedia*. Last Edited: 15 December 2013. Accessed: 20 April 2020. [https://www.thecanadianencyclopedia.ca/en/article/robert-jan-van-pelt]

1987. His publication *Auschwitz: 1270 to the Present* (1996), in collaboration with Debórah Dwork, won the National Jewish Book Award (1996) and the Spiro Kostof Award from the Society of Architectural Historians (1997).[62] Lipstadt reviewed *Auschwitz* in 1996, and thus knew of van Pelt's specialism in the construction of Auschwitz prior to the *Irving* trial. *Auschwitz* established van Pelt as an expert on the architectural entity and construction history of the crematoria at Auschwitz. Thus, van Pelt was chosen for the *Irving* trial due to his forensic analysis of Auschwitz, his engagement with the Leuchter report, and Lipstadt's endorsement.[63]

Richard Evans

Evans was the lead expert witness for the Defence. After studying German history as an undergraduate at Jesus College, Oxford, Evans achieved his doctorate in 1973 from St. Antony's College, Oxford. From 1972, he lectured at numerous universities such as the University of Stirling, the University of East Anglia, Columbia University (New York City), and Umeå University (Sweden). In 2008 Evans became Regius Professor of History at the University of Cambridge where he remained until 2014. From 2010-2017 Evans was elected President of Wolfson College, Cambridge. Evans has also been made an Honorary Fellow of Jesus College (University of Oxford), Birkbeck College (University of London), and Gonville and Caius College (University of Cambridge).[64] He has published several books focusing on German social and

[62] Robert Jan van Pelt and Debórah Dwork, *Auschwitz: 1270 to the Present* (New York: Yale University Press, 1996).
[63] Van Pelt had acted as an advisor, also by the recommendation of Lipstadt, on the film 'Dr. Death'. Van Pelt. Interview; Professor Robert Jan van Pelt. University of Waterloo. Architecture. Accessed: 20 April 2020. [https://uwaterloo.ca/architecture/people-profiles/robert-jan-van-pelt]
[64] Richard J. Evans. Career: CV. Accessed: 19 March 2020. [http://www.richardjevans.com/career/cv/]

cultural history.[65] In 2012 he was appointed Knight Bachelor in the Queen's Birthday Honours List for services to scholarship.

Evans, in his own estimation, was chosen to appear as an expert in the *Irving* trial because of his combined knowledge of twentieth-century German history, ability to read old German handwriting, and command of the main issues in historical epistemologies as demonstrated in *In Defence of History*.[66] Since the *Irving* trial, Evans has become a spokesperson for objective history, has published a three volume history of the Third Reich, and focused his work on the clash of epistemologies when history enters the courtroom.[67]

Peter Longerich

At the time of the trial, Longerich was Director of the Holocaust Research Centre at Royal Holloway, University of London. Longerich's research focused on the history of the Weimar Republic, the Third Reich, the Second World War, and the Holocaust.[68] Throughout his career, Longerich has acted as a visiting chair and Senior Scholar in Residence to many institutes significant within the realms of Holocaust Studies, including the Fritz Bauer Institute in Frankfurt (2002-2003) and the United States

[65] For a full list of Evans's extensive publications, see: [https://www.richardjevans.com/publications-category/complete-book-list/]. Accessed: 24 March 2020.
[66] Professor Sir Richard J. Evans (President of Wolfson College, Cambridge), interviewed by Amber Pierce. London. 12 March 2020.
[67] Professor Sir Richard J Evans. University of Cambridge, Faculty of History. Accessed: 24 March 2020. [http://www.hist.cam.ac.uk/directory/rje36@cam.ac.uk]; Daniel Snowman, 'Richard J. Evans', *History Today*, Vol. 54, No. 1 (2004). Accessed: 21 January 2020. [http://www.historytoday.com/daniel-snowman/richard-j-evans]
[68] Longerich's work includes: *Holocaust: The Nazi Persecution and Murder of the Jews* (Oxford: Oxford University Press, 2010); *Heinrich Himmler: A Life* (Oxford: Oxford University Press, 2011); *Goebbels: A Biography* (London: Vintage, 2015).

Holocaust Memorial Museum in Washington, DC (2003-2004).[69] Longerich's expert report on Hitler resulted in a major contribution to Holocaust scholarship and the wider debate concerning a 'Hitler Order'.[70]

Expert Reports

Evans instructed all the expert witnesses on the orders of their reports, working alongside Julius.[71] Van Pelt, Browning, and Longerich were to prepare submissions to the Court that concentrated 'particularly on the positive demonstration of points denied by Irving': Auschwitz (van Pelt); the wider activities of the Third Reich, the mass shootings in Eastern Europe, gas vans, Operation Reinhard, the death camps, and the Wannsee Conference (Browning); and Hitler's antisemitism and the Final Solution (Longerich).[72] Evans was to prepare a submission focusing specifically on Lipstadt's claims that Irving 'falsifies and distorts history, denies the Holocaust, and admires Hitler.'[73]

All experts have noted that they had eighteen months to prepare their reports, with first drafts completed by December 1998 and final drafts submitted in the summer of

[69] Peter Longerich. Royal Holloway, University of London. Profile. Accessed: 24 March 2020. [https://pure.royalholloway.ac.uk/portal/en/persons/peter-longerich(c47ee7e2-1296-4634-9da8-0fcb3963f10a).html]
[70] Peter Longerich, *The Unwritten Order: Hitler's Role in the Final Solution* (Stroud: Tempus Publishing Limited, 2003).
[71] Letter to Mark Bateman from Richard J. Evans. 6 July 1998. pp.1-2. CBP. RG6.4.2. Box 10, File 1.
[72] Evans. A Note on Expert Witnesses and Briefings. p.2; Robert Jan van Pelt, *The Case for Auschwitz: Evidence from the Irving Trial* (Bloomington: Indiana University Press, 2002), pp.406-411; Longerich, *The Unwritten Order,* p.9; Browning, 'Law, History, and Holocaust Denial', p.207.
[73] The final reports were titled: Richard J. Evans, *David Irving, Hitler and Holocaust Denial*; Robert Jan van Pelt, *The Van Pelt Report*; Peter Longerich, *The Systematic Character of the National Socialist Policy for the Extermination of the Jews* and *Hitler's Role in the Persecution of the Jews by the Nazi Regime*; Christopher Browning, *Evidence for the Implementation of the Final Solution*. Letter to Mark Bateman from Richard J. Evans. p.1. For the expert reports, see: Holocaust Denial on Trial. Witness Statements and Documents. Accessed: 24 March 2020. [https://www.hdot.org/trial-materials/witness-statements-and-documents/]

1999.[74] In correspondence with Browning during the leadup to the *Irving* trial, Evans stated 'it is *up to us to advise the lawyers* on what to change in the Pleadings' [emphasis added].[75] Evans's language suggests that there was greater equality between the roles of the historian and the lawyer during the *Irving* trial than earlier Holocaust trials. Arguably this was in response to the differing evidentiary standards between criminal and civil law, and the focus on historical practice, meaning that everyone involved in the *Irving* trial sought and worked towards a more balanced interdisciplinary relationship. As Evans recalled, following the final submission of all expert reports, Rampton's primary focus was 'how can I use this material in the court'.[76]

The Defence only provided guidelines to the reports: they could not specify the type of research that the expert historians should undertake or the conclusions they should reach.[77] Both van Pelt and Evans stated that they had not reviewed any expert reports from earlier Holocaust trials when writing their own reports for the *Irving* trial. Van Pelt commented that whilst he had read *Anatomy of the SS State* and the 1988 *Zündel* trial transcripts to understand Leuchter and the context of the 1988 *Zündel* trial, it was not to determine the content of an expert report or the structure of a Holocaust denial trial. It must be recognised that differences between legal jurisdictions may affect learning from earlier trials as seen through the reports and testimony of the expert witnesses during the Frankfurt-Auschwitz trial which followed the German Penal Code and was

[74] Evans. A Note on Expert Witnesses and Briefings. p.4; Letter to Christopher Browning from Richard J. Evans. 8 August 1998. p.3. CBP. RG6.4.2. Box 10, File 1.
[75] Letter to Christopher Browning from Richard J. Evans. 8 August 1998. p.1.
[76] Evans. Interview.
[77] Ibid.

a criminal Holocaust trial. Thus, for van Pelt, the expert testimony in the Frankfurt-Auschwitz trial was not a 'particularly useful precedent'.[78]

However, given that the 1988 *Zündel* trial and the *Irving* trial were both Holocaust denial trials, it is surprising that the trial transcripts, or communicating with Browning about his experience in 1988, were not utilised more. As chapter five demonstrates, benefits can accrue from cross-trial comparisons, although reading earlier work by other academics may adversely influence and compromise the independence of the report being produced. Van Pelt's assessment of the 1988 *Zündel* trial transcripts demonstrates that expert witnesses do consult previous Holocaust trial testimony when it is deemed to provide relevant context. Referring to the 1988 *Zündel* trial, van Pelt added that it was useful to see Irving's testimony as an expert witness to anticipate what Irving may be like as a cross-examiner.[79] However, for Evans the decision not to review earlier expert testimony or reports was not for reasons of 'objectivity', but rather, in Evans's own assessment, the uniqueness of his report meant that there was no precedent for him to follow.[80]

Trial Proceedings

For all the expert witnesses, the examination-in-chief was brief. Due to the case being a bench trial, Gray had read the reports prior to each expert appearing in the witness box. Consequently, aside from establishing that each witness was indeed the author

[78] Van Pelt. Interview.
[79] Ibid.
[80] Evans. Interview.

of their report and that they still stood by their report conclusions, the experience of each expert during the *Irving* trial centred on cross-examination.

Van Pelt was the first expert witness to appear for the Defence. Hearing van Pelt's testimony first was largely strategic due to the focus of his report on Auschwitz. As van Pelt recalled, 'I was told we will take Auschwitz first because we need to turn the judge's mind … about where the merits of the case are'.[81] Unlike Evans and Longerich, van Pelt had experienced cross-examination prior to the *Irving* trial, appearing as a material witness in a non-Holocaust related criminal trial. During his previous experience as a material witness, van Pelt noted he was cross-examined by a 'very aggressive lawyer' with a clear focus of the 'box' they wanted to place van Pelt in. By contrast, van Pelt reflected, Irving was 'lousy'.[82] As van Pelt, Browning, and Evans all confirmed, Irving, representing himself, did not have the skill to anticipate where his line of questions would lead the cross-examination. Consequently, each expert experienced a barrage of repetitive questions. For van Pelt, the most repetitive focus within his cross-examination was the wider denial argument of 'no holes, no Holocaust'. 'No holes, no Holocaust' refers to the argument that no holes can be seen in the aerial shots of Auschwitz, where the Zyklon B gas pellets were inserted into the gas chambers through holes in the roof. As Irving summarised, '[i]f there are no holes in that roof, there are no holes now and there were no holes then, and that totally demolishes the evidence of your so-called eyewitnesses'.[83] Irving's presentation of the 'no holes, no Holocaust' argument, reflected the tactic used by deniers to focus on one specific detail within existing evidence on Auschwitz in an attempt to undermine the

[81] Van Pelt. Interview.
[82] Ibid.
[83] *Irving*. 26 January 2000. p.10.

validity of the research of Holocaust scholars. Irving sought to undermine van Pelt and other Holocaust scholars by asserting to the Court that he was shocked that they had not been 'frantically looking for those holes to prove [Holocaust deniers] wrong'.[84] However, Irving's concentration on one specific argument resulted in him being frequently interrupted by Gray due to the amateurish style of cross-examination.[85] Given the emphasis placed on arguments such as 'no holes, no Holocaust', van Pelt affirmed that it was still the most significant battle within his career: 'I really felt that a weight of history ... was on my shoulders at that moment and if I would fail badly that this would be very bad for the memory of Auschwitz'.[86] Nonetheless, Irving's inability to stick to one line of questioning and avoid undermining himself in the process, meant that the general experience of cross-examination 'did not lead to any results'.[87]

Irving's poor cross-examination skills only strengthened the Defence's argument that he manipulated evidence. Irving attempted to confront the degree of interpretation within the historical discipline during Evans's testimony, challenging Evans's concept of the 'objective' historian: '[i]t is a terrible problem, is it not, that we are faced with this tantalising plate of crumbs and morsels … and nowhere … through the archives do we even find one item that we do not have to interpret'.[88] Evans's response to Irving demonstrated a clear understanding of the evidentiary standards being tried during

[84] Ibid, p.22.
[85] Van Pelt, *Case for Auschwitz,* p.467.
[86] Van Pelt's testimony was a catalyst for forensic studies of the crematoria at Auschwitz. *The Case for Auschwitz* expanded upon the findings in van Pelt's expert report for the trial. Furthermore, *The Evidence Room* provides evidence of the crematoria at Auschwitz, countering denial claims of no forensic studies or evidence of gassings occurring at Auschwitz. Consequently, van Pelt's involvement in the *Irving* trial had positive ramifications for the memory of Auschwitz. Van Pelt. Interview; Van Pelt, *The Case for Auschwitz*; Robert Jan van Pelt, *The Evidence Room* (Toronto: University of Toronto Press, 2016).
[87] Van Pelt, *Case for Auschwitz,* p.467; *Irving*. 15 March 2000. pp.159-170; Guttenplan, *Holocaust on Trial*, pp.194-195.
[88] *Irving*. 17 February 2000. pp.195-196.

the Court: '[n]o, I do not accept that at all, it is because you want euphemisms as being literal and that is what the whole problem is … the way in which you manipulate and distort the documents.'[89] Though Evans's body language and temperament towards Irving during cross-examination has been criticised (see Browning's testimony below), Evans's answer supports the argument as to why the evidentiary standard of the 'balance of probabilities' suited both the historian and lawyer. At the heart of Evans's report, and the Defence's strategy, was proving Irving's manipulation of historical evidence. Evans's remark concerning 'euphemisms' was reflected in Irving's closing address.[90] When discussing Longerich's testimony and a 'Hitler Order', Irving argued, 'none of the experts [were] willing to give documents their natural meanings'.[91] Irving's consistent decision to understand Nazi terminology literally was thus viewed as evidence falsification for both the historian and the Court.

Longerich's focus on the 'Hitler Order' and euphemistic language when discussing the Final Solution saw the Court engage with similar epistemological debates that had been present in earlier Holocaust trials. As Longerich established, Hitler would often use 'camouflage language' to discuss the Final Solution with those closest to him because, while it may not have been explicit, everyone knew what the language meant. Yet, rather than Irving, it was Gray that responded to Longerich's argument of 'camouflage language': '[b]ut if [Hitler] knew … about the death camps … what puzzles me … about this camouflage theory is I do not quite see why it was necessary to talk about the Jews at all?'[92] Gray's question arguably demonstrates the struggle between

[89] Ibid.
[90] Christie employed similar denial rhetoric in his cross-examination of Browning in 1988, see chapter five. Evans, 'History, Memory, and the Law', pp.340-341.
[91] *Irving*. 15 March 2000. p.183.
[92] *Irving*. 23 February 2000. p.174.

the law's demand for clarity and factuality, against the degree of interpretation within historical conclusions. His phrasing, 'I do not quite see why it was necessary to talk about the Jews at all', suggests that Gray was seeking an explicit explanation for the behaviour for the language used by Hitler and his subordinates. Such an expectation reflects the legal requirement for a clear interpretation of the evidence, and thus a conclusion that can be confidently used within a judgement without the concern of misinterpretation. Longerich's explanation (citing Himmler), '[i]t is a history which has not been written which will never be written', demonstrates the degree of ambiguity and interpretation that is required of historians when discussing contentious topics such as Hitler's language surrounding the Final Solution.[93] As a judge, Gray's response does pose a valid question, and could be seen as Gray simply trying to understand Longerich's argument so as to follow the line of cross-examination being pursued. Nonetheless, Gray's language and demand for specificity does reiterate the wider scholarly concern for historiographical issues being discussed or misunderstood in court. Longerich's testimony was essential to the Defence's case to prove that Irving manipulated evidence relating to Hitler in order to exculpate him of responsibility relating to the Final Solution. However, the arguments presented by Longerich, and Gray's response, serve as a reminder that regardless of the legal environment (civil or criminal), epistemological boundaries continue to exist, and historians should be wary of them when acting as an expert witness.

Interdisciplinary Relationship

Van Pelt, Evans, and Longerich have all recognised the struggle that expert historians can face within the courtroom. Supporting van Pelt's testimony regarding the

[93] Ibid, p.175.

historiography of Auschwitz, Evans noted that as a historian, the experience of the courtroom can be disconcerting because 'what you say is taken as the absolute gospel truth'.[94] Moreover, despite the success of the expert testimony during the *Irving* trial, Longerich noted that the cross-examination demanded 'a painfully exact presentation of evidence … going beyond the standards customary in the Humanities.'[95] Even within the civil courtroom, historians as expert witnesses have a weight of expectation placed upon their testimony, as they are perceived to be speaking for the historical practice as a whole.

Nonetheless, though Longerich's testimony demonstrated that disciplinary differences between history and law could exist within any courtroom, it cannot be denied that the civil jurisdiction is a better environment for historical testimony. Even within the context of a Holocaust denial trial, Raul Hilberg's testimony in the 1985 *Zündel* trial demonstrates how unattainable the criminal standard of 'beyond reasonable doubt' can be for the expert historian, particularly when faced with intense cross-examination. The criticisms made by Henry Rousso against the involvement of historians as expert witnesses were discussed primarily within the context of a criminal courtroom setting, and the constraint and pressure that expert historians can feel to satisfy the standard of 'beyond reasonable doubt'. By comparison, the Court's receptiveness to van Pelt's, Evans', and Longerich's testimony demonstrates that within the civil courtroom there is a greater integration of epistemologies. As van Pelt's reflections after the trial suggest, 'there was almost no law in the whole case because … we had a defence by

[94] Evans. Interview.
[95] Evans, *Telling Lies About Hitler*, p.195.

justification'; the Defence's strategy and evidential argument was a culmination of the two disciplines working together on an equal platform.[96]

The denial format of the *Irving* trial, challenging historical misconduct and falsifications, lends itself towards an improved interdisciplinary relationship and greater emphasis on the testimony of the expert witness. Historical expert testimony in criminal cases has been confined to providing historical contextual knowledge upon which the judge and jury could form their verdicts, with the exception of Browning's testimony in the 1988 *Zündel* trial. In contrast, due to the claims of defamation and the defence of justification throughout the *Irving* trial, the issue of historical truth became much more important. As van Pelt summarised post-verdict, 'I enjoyed an increasingly rare satisfaction … that the way we historians go about our business also matters.'[97]

Van Pelt, Evans, and Longerich all noted from a historiographical point of view that their experience as an expert witness in the *Irving* trial affected their subsequent post-trial publications. For Evans, the experience of picking through Irving's historiography made Evans more careful about the accuracy of his references and footnotes.[98] Moreover, in response to Rampton's and Julius's questions concerning whether a large-scale up-to-date history on Nazi Germany existed, after the trial Evans published his three volumes on Nazi Germany.[99]

Van Pelt and Longerich also helped advance literature within Holocaust Studies as a result of the research they undertook for the *Irving* trial. Longerich's treatment of the

[96] Van Pelt. Interview.
[97] Van Pelt, *Case For Auschwitz*, p.xi.
[98] Evans. Interview.
[99] Ibid.

mass documentary evidence which focused on Hitler's public and private advocacy, helped debates regarding a 'Hitler Order' and Hitler's knowledge of the Final Solution.[100] Likewise, within the historiography of Auschwitz, prior to 2000, there had not been any substantial forensic investigation concerning the structure of the gas chambers. Whilst *Anatomy of the SS State* had been pivotal to the field of Holocaust Studies, the expert reports within *Anatomy* gave a broad historiography of the Third Reich but omitted the forensic detail, particularly of Auschwitz. Thus, van Pelt's combination of forensic research and historiography of Auschwitz saw a major advancement in the contemporary understanding of why the gas chambers were designed and put into operation.[101] Consequently, the post-trial experience for all the expert witnesses furthers the argument that both history and law can benefit from the process of a Holocaust trial.

Both Douglas and D. D. Guttenplan continue to hold clear reservations about the role of the expert witness; how their testimony may be used by the Court, and the wider implications of historical scrutiny under cross-examination on the history and memory of a specific event.[102] However, Lawrence McNamara argues that whilst defamation action is not the correct platform to discuss historical matters, the framework of defamation laws 'are amenable to an evaluation of history in a unique manner.'[103] For McNamara, defamation law means that 'history can enter the court as history', with the focus being on the expert historians' understanding of the historical facts, as

[100] Longerich, *Unwritten Order*, p.13; Evans, 'History, Memory, and the Law', pp.342-343.
[101] Since 2000, Goldsmiths College, University of London, have introduced a degree in 'Forensic Architecture'. Van Pelt's testimony during the *Irving* trial is seen as the foundation for this new architecture sub-discipline. Van Pelt, *Case for Auschwitz*; Evans, 'History, Memory, and the Law', p.434.
[102] In his review of *Holocaust on Trial*, David Cesarani gives an articulate summary of Guttenplan's use of the trial transcripts and presentation of the expert witness testimony. Cesarani, 'Holocaust on Trial', pp.289-293; Douglas, *Memory of Judgment*, pp.222-223, 258.
[103] The 'History Wars' centres on disputes amongst Australian historians concerning the aboriginal history of Australia. McNamara, 'History, Memory and Judgment', pp.357-367.

opposed to lawyers presenting history to suit a particular argument, as is the case within criminal trials.[104] Consequently, the role of the historian as an expert witness can deal directly with the historiographical issues at hand and engage with different levels of interpretation, thereby enabling the Court to judge historians 'without directly authorising one particular historical narrative.'[105]

McNamara's distinction of the demands on the historical expert is not a new dimension to the role of the expert witness. In 1904, Francis Wellman argued 'it becomes necessary for success in any avocation to know something of everything and everything of something'.[106] Wellman's observation of the role of the expert witness in civil and criminal cases is more acutely articulated by van Pelt's concept of the expert historian as a 'jack-of-all-trades'. Despite van Pelt being a professor at the University of Waterloo's school of architecture, he had to defend his report against his lack of formal qualification in architecture. Van Pelt responded to Irving during his cross-examination by stating, 'I am going to give evidence, I hope, on the history of Auschwitz, and the architectural documents are a very important historical source.'[107] Building upon his experience in the *Irving* trial, van Pelt distinguishes the position of a historian as an expert witness within common law and civil law who 'acts as a more or less neutral expositor of facts, acting with an authority accepted by both parties'.[108] Consequently, within a Holocaust denial context, the need for the historian's 'jack-of-all-trade' skills are fundamental to the trial's proceedings; without which a judgement cannot be reached.[109]

[104] Ibid, p.392.
[105] Ibid, p.393.
[106] Wellman, *The Art of Cross-Examination*, p.43.
[107] Van Pelt, 'A Jack-of-all-Trades', p.58.
[108] Ibid.
[109] Ibid, p.47.

TRIAL PROCEEDINGS: CHRISTOPHER BROWNING

Browning's testimony during the *Irving* trial only received attention from a handful of newspaper articles reporting the trial and summaries of Browning's testimony provided by Guttenplan and Evans. Mark Greif of *The American Prospect* praised Browning's cross-examination: '[n]othing captured scholarship's success more vividly … the professor turned the exchange, momentarily, into something resembling a scholarly debate, a debate in which Browning simply gave a better account on every point, until even Irving seemed affected.'[110] Greif's acknowledgement of Browning's presence during his cross-examination demonstrates how Browning's experience and, by 2000, familiarity with the role of the expert witness had developed. Yet, Greif does not evaluate Browning's testimony in depth, nor assess the impact that Browning's report and testimony had within the wider Defence strategy and on Gray's judgement.

This section thus seeks to provide an in-depth evaluation of Browning's experience within the *Irving* trial through assessing the purpose of Browning's report within the Defence's strategy, his testimony, and role as an expert witness. This analysis will ultimately contribute to the existing academic literature. I argue that civil law results in fewer epistemological challenges for the historian when acting as an expert witness, demonstrated by comparing Browning's experience in the *Irving* trial against that of the 1988 *Zündel* trial and *Sawoniuk* trial. The assessment confirms that the civil-denial Holocaust trial is the most receptive to expert historical testimony out of all the Holocaust trial formats that have been studied throughout this dissertation.

[110] Mark Greif, 'The Banality of Irving', *The American Prospect* (24 April 2000), p.36. CBP. RG6.4.2. Box 10, File 18.

Defence Strategy

Like the other Defence expert witnesses, Browning's general role within the Defence's strategy was to provide historical evidence to the Court upon which it could base its judgement. Thanks to his prior experience, Browning was more aware of the multifaceted role of the expert witness within this strategy, than perhaps van Pelt, Evans, and Longerich. As Browning commented, 'as a historian my job was [to address] what is historical evidence, [and] how do you prove historical evidence?'[111] Similar to the 1988 *Zündel* trial, the evidentiary standard in the *Irving* trial was still high due to the attention on the denier's 'state of mind'. As Gray noted during Rampton's closing speech, despite Irving's falsifications, 'if somebody is … anti-Semitic and extremist, he is perfectly capable of being, as it were, honestly anti-Semitic and honestly extremist in the sense that he is holding those views and expressing those views because they are, indeed, his views.'[112] Hence, the primary role of the historian as an expert witness within the Defence's strategy was to demonstrate that Irving engaged in falsifying evidence and historical malpractice, thereby proving that Irving was not mistaken, or a poor scholar, but was lying.

Report Orders

Browning was instructed by Evans to focus his report on the wider activities of the Third Reich: the mass shootings in Eastern Europe, gas vans, Operation Reinhard, the death camps, and the Wannsee Conference.[113]

[111] Browning. Interview.
[112] *Irving*. 15 March 2000. p.47.
[113] An 'unnamed researcher' was noted within the initial trial correspondence to assist Browning with his research 'in Germany'. However, the assistant researcher is not mentioned in any later

In addition, Browning, alongside Longerich, was requested to provide evidence for the systematic and co-ordinated nature of the Final Solution.[114] In correspondence with Browning, Evans recorded that it was his decision to have both Longerich and Browning research the Final Solution.[115] Evans does address that this decision risked 'substantially differing accounts of this subject'.[116] Within the context of the trial, on the one hand such differing accounts could give weight to Irving's assertion that 'his account is just another argument'.[117] On the other, Browning's and Longerich's disagreement on factors such as the Wannsee Conference (for example, within his report Longerich argued that the decision to exterminate Europe's Jews occurred after the Conference), could serve as an example to the Court of how historians working with shared disciplinary norms can have legitimate differences despite access to the same evidence. Within this scenario, Irving's conclusions would be firmly established as 'out of the ball-park'.[118] Both considerations of the Court's receptivity to the differences between Browning's and Longerich's conclusions are valid, particularly given the evidentiary standards required by the Court. Yet, given that Evans had to consider the possibility of the former outcome demonstrates that whilst the evidentiary standard of the 'balance of probabilities' suited the historical discipline more than 'beyond reasonable doubt', there was still an acute awareness that historical interpretations were being presented in court. Thus, the evidence had to appear as robust as possible.

correspondence or in Browning's reflections of the trial. Letter to Mark Bateman from Richard J. Evans. 6 July 1998. p.2. CBP. RG6.4.2. Box 10, File 1.

[114] Evans. A Note on Expert Witnesses and Briefings. p.3.

[115] Letter to Christopher Browning from Richard J. Evans. 8 August 1998. p.2.

[116] Evans. A Note on Expert Witnesses and Briefings. p.3.

[117] Reflecting on his involvement in the *Wagner* Case (1992), Martin Dean noted that in a criminal trial, 'beyond reasonable doubt is immediately called into question when experts can't agree on very small simple matters'. Hence, the Court was more receptive to Browning and Longerich's different interpretations due to the evidentiary standard of a 'balance of probabilities' permitted within a civil jurisdiction. Ibid; Dean. Interview.

[118] Evans. A Note on Expert Witnesses and Briefings. p.3.

Expert Report

Browning focused his report on: 'the implementation of a policy to kill the Jews on German-occupied Soviet territory through shooting'; 'the implementation of a policy to kill Jews by means of gas in camps other than Auschwitz, and particularly in the camps of Belzec, Sobibor, and Treblinka'; 'the emergence and existence of an overall plan of the Nazi regime to kill the Jews of Europe'; 'the importance and purpose of the Wannsee Conference'; and finally, 'the naming and purpose of "Operation Reinhard".'[119] Whilst Evans's report had analysed the falsifications within Irving's work, Browning's report, alongside van Pelt's and Longerich's, demonstrated to the Court that Irving had selectively referenced and ignored certain evidence, so as to fit his ideological perspective.

Browning established in his report that there are four types of evidence commonly used by historians, reiterating his testimony in 1988: contemporary documentation, witness testimony (from survivors, perpetrators, and bystanders), material evidence, and circumstantial evidence.[120] Browning directly targeted the claims made by deniers that 'no evidence' exists regarding the implementation of the Final Solution by addressing the different varieties of evidence available to a historian. In the section 'Documentary Evidence for the Emergence of a Program to Kill the Jews of Europe', Browning asserts that it is 'quite normal' for historians to debate Hitler's precise role in this decision-making process, indirectly referencing both Longerich's report as well as

[119] Christopher R. Browning. *Evidence for the Implementation of the Final Solution*. Holocaust Denial on Trial. Accessed: 24 January 2020. [www.hdot.org/browning_toc/]
[120] Browning. *Evidence for the Implementation of the Final Solution*.

the debate between the functionalists and intentionalists.[121] Browning also notes that the four forms of evidence are also used by 'judicial authorities in the conducting of trials'.[122] Browning's language is thus a direct reflection of the civil 'balance of probabilities', requiring the same evidentiary standard for both history and law, and thus affirming how the civil courtroom is better suited to historical testimony. The constant reference throughout Browning's report to 'the evidence with which scholars and judicial authorities' work, establishes the evidential similarities and the notion of the two disciplines working together to reach a just verdict.

A clear example of this interdisciplinary relationship is Browning's focus on the testimony of Kurt Gerstein, a covert anti-Nazi who infiltrated the SS and became head of the Disinfection Services of the Waffen-SS.[123] Throughout the 1988 *Zündel* trial, Christie focused extensively on Gerstein's testimony, arguing that the inaccuracies within Gerstein's testimony provided evidence of the unreliability of eyewitness testimony and against the high number of Jewish victims in the Final Solution.[124] Given Christie's focus on Gerstein, and Irving's expert testimony during the 1988 trial, Browning was able to anticipate Irving's emphasis on Gerstein within the *Irving* trial.

[121] See chapter one and chapter five for the intentionalist-functionalist debate concerning a 'Hitler Order'.
[122] Browning. *Evidence for the Implementation of the Final Solution*.
[123] Gerstein was based at Belzec concentration camp. His testimony focused on the gas chambers and his task to disinfect the clothing taken from the Jews for extermination. Gerstein's testimony is particularly problematic concerning his relationship with Odilo Globocnik (an associate of Adolf Eichmann, and leading role in Operation Reinhard), and gross over-exaggerations to events that Gerstein was not an eyewitness to, such as the alleged gassing of 25 million Jews. Nonetheless, the crux of Gerstein's testimony:he did serve at Belzec and witnessed the gassing of a transport of Jews from Lwow, corroborated with other witnesses from Belzec along with the testimony of Wilhelm Pfannenstiel, Professor of Hygiene at the University of Marburg/Lahn. Saul Friedländer also published a biography of Gerstein, focusing on the paradoxes within Gerstein's involvement with the SS. For Friedländer, Gerstein was punished for not behaving like the preconceived notion of a 'good' German and only waiting to testify about the Final Solution once the war had ended. Browning. Evidence for the Implementation of the Final Solution; Saul Friedländer, *Counterfeit Nazi: The Ambiguity of Good* (London: Weidenfeld and Nicolson, 1969).
[124] Browning, 'Law, History, and Holocaust Denial', p.212.

Rampton questioned Browning as to the relevance of including every error within Gerstein's testimony during the report drafting process.[125] However, as Browning argued, 'I knew the best defence was to take away every single thing they might raise and put it out front first'.[126] Indeed, if Browning's report only included a handful of Gerstein's exaggerations, then Irving would be able to present new information to Gray during the trial, consequently raising questions regarding the transparency of Browning's report. Browning's response to Rampton not only demonstrates the worth of drawing upon the experiences of expert witnesses in other trials, it also demonstrates the understanding by both disciplines concerning the evidence that is needed to present 'the best defence' possible.

Testimony

Prior to hearing the testimony given by the expert witnesses, Rampton cross-examined Irving on the content of the expert reports. When concentrating on Browning's report, Irving conceded that 'at least one-half and perhaps even one and one-half million Soviet Jews' were systematically killed with Hitler's consent and knowledge. Irving admitted that the Polish Jews that had been deported during Operation Reinhard 'obviously' had 'something ugly' happen to them.[127] However, he maintained that historians 'are still short of a smoking gun' in terms of definitive documentary evidence regarding the concentration and death camps.[128] Irving asserted that it would be 'amateurish' to base one's conclusions on eyewitness

[125] Gerstein's testimony is included in the report section titled 'Documentary Evidence for the Emergence of a Program to Kill the Jews of Europe'.
[126] Browning. Interview.
[127] Browning, 'Law, History, and Holocaust Denial', p.210.
[128] Ibid.

testimony and circumstantial evidence. Thus, the camps could not be viewed 'solely' as 'purpose-built death camps'.[129] Given Irving's testimony, it was the evidence relating to the Final Solution that became the centre of Browning's cross-examination.

Cross-Examination

Irving announced that Browning's cross-examination would be a 'joint journey of discovery and exploration' concerning the available documentation.[130] As Browning summarised: '[Irving] couldn't be nice to Longerich because his *Führer* was under attack, he couldn't surrender the Battleship Auschwitz [to van Pelt] ... and … Evans attack[ed] [Irving's] own scholarship'.[131] By contrast, Browning's evidence on the wider Third Reich 'would show that … we might have minor disagreements, but we were two colleagues that could debate this like historians'.[132] Thus the rapport between Browning and Irving distinguished Browning's experience as an expert witness as undoubtedly unique.[133] As Guttenplan acknowledged, Browning's testimony brought a 'moment of relief' from 'the wake of the court's consideration of the high tragedy of Auschwitz and the low farce of Irving's social views'.[134]

[129] Ibid.
[130] Ibid; *Irving*. 7 February 2000. pp.30-31.
[131] Browning. Interview.
[132] Ibid.
[133] In post-trial correspondence, Irving wrote that Browning would have 'detected how much I enjoyed our "conversations".' Irving's language reiterates his view of the 'special relationship' and the 'scholarly engagement' that existed between Browning and Irving during the trial. Email to Christopher Browning from David Irving. 12 May 2000. CBP. RG6.4.2. Box 10, File 17.
[134] Throughout the trial, Rampton cross-examined Irving about his racist and antisemitic views and association with right-wing extremists. In one instance, Rampton read to the Court a poem that Irving spoke to his (at the time of the diary entry) nine-month-old daughter when 'half-breed' children went past: 'I am a baby Aryan, not Jewish or sectarian. I have no plans to marry an ape or a Rastafarian'. Though Irving argued to the Court that he did not think that such a poem was racist or antisemitic, the poem clearly displayed Irving's social views. Guttenplan, *Holocaust on Trial*, pp.209-210; *Irving*. 2 February 2000. pp.96-97.

Browning's response to Irving demonstrated a clear understanding of his expert report throughout his cross-examination, as well as what Browning wanted the judge to hear, thereby giving strength to the Defence's argument.[135] In one example, Irving questioned Browning: 'if one has a certain mind set, Professor, is it correct that one might read a document the wrong way?'[136] Not only is Irving's language ironic given Lipstadt's claims against him, but Irving proceeds to cite a translation mistake made by Browning in his expert report as an example of a deliberate misreading of historical documentation. Browning had mistranslated a document that stated 'the Jews will be deported by waterway to the reception camp in the east', concerning the plural and the singular of the camps.[137] According to Irving, such a mistake, to refer to a singular camp, instead of the plural reception camps, would be an example of a historian having a predisposed mindset regarding the Operation Reinhard camps. However, as Browning retorted '[t]o have it in the singular was against interest; an error on my part, but certainly not one … that I would have made willingly'.[138] In fact, as Browning noted, Irving's argument that there were a plural of reception camps, as opposed to a singular camp, actually strengthened Browning's argument.[139] Thus, Irving's attempt to undermine Browning resulted in a clear distinction between conscious falsification and innocent error.

Browning's cross-examination by Irving not only revealed Irving's poor skills as a cross-examiner, but reaffirmed Irving's perceived purpose of the trial: his scholarly reputation. Irving sought to establish himself alongside Browning in terms of historical

[135] Browning's cross-examination lasted for two days.
[136] *Irving*. 8 February 2000. p.108.
[137] Ibid.
[138] Ibid, p.110.
[139] Ibid.

respectability by engaging in an amicable rapport with Browning and seeking to address that Browning too had made mistakes as a result of his predetermined historical argument. Yet as James Dalrymple summarised, Irving 'like[d] nothing better than being the centre of attention … [t]he London Law Courts have often been his stage and the atmosphere of the courtroom is like a drug to him'.[140] Christie's cross-examination, in both the 1985 and 1988 *Zündel* trials, grabbed the media's attention and became the dominant focus of the trial within subsequent existing literature. However, both Zündel and Christie were driven by ideology, with a wider political purpose underlying the trial.[141] By contrast, Irving 'wanted to save his reputation and get himself back in business as a bestseller author'.[142] Irving's main priority during the trial was publicity, rather than the specificities of the relevant legal arguments. It was Irving's persistent focus on his version of the truth; providing the Court with first hand evidence of his falsifications and denial of historical evidence, while satisfying his 'outrageous need for attention', that resulted in Irving's inability to follow one line of argument during cross-examination.[143]

The amicable rapport that Irving sought to establish at the outset of Browning's cross-examination, as well as Irving's poor cross-examining skills, meant that Browning dominated his cross-examination in a way that would not have been possible in a criminal courtroom. As Irving noted in his diary, 'Browning is … an honest witness: the sort perhaps that defence counsel hate.'[144] On the second day of Browning's cross-

[140] James Dalrymple, 'He Says Auschwitz is a Myth, But He Has Never Set Foot in the Place, Never Seen the Evidence', *The Independent* (12 April 2000), p.5. CBP. RG6.4.2. Box 10, File 7.
[141] Irving mirrored Christie's argument concerning Browning's status as a non-Jewish Holocaust historian. However, this line of questioning was quickly dismissed by Gray as irrelevant. David Irving. 'A Radical's Diary'. 7 February 2000. CBP. RG6.4.2. Box 10, File 19.
[142] Browning. Interview.
[143] Ibid.
[144] Irving. 'A Radical's Diary'. 7 February 2000.

examination, Irving asked: '[i]f an historian writes a book, just a hypothetical historian … and then between that publication of that book and the publication of the next edition … he makes deletions from the text of the original edition of his book, is this reprehensible necessarily?'[145] For those that had not studied the transcripts of the *Zündel* trials, Irving's 'hypothetical' language may have appeared as another example of fabricated evidence. However, Irving was referring to the revised second edition (1985) of Hilberg's *Destruction of the European Jews* in which Hilberg omitted a reference to a 'Hitler Order'. Though Irving did not address Hilberg specifically in his question, Browning's response removed any level of doubt for the Court as to the focus of Irving's question: '[i]n my review of the second edition of Raul Hilberg, I noted where he made changes.'[146] Irving's reply, '[y]ou are running ahead', demonstrates Browning's awareness of Irving's questions and the impact that the 1988 *Zündel* trial had on the *Irving* trial. Not only did it demonstrate Irving's mirroring of Christie's questions, but had Browning not appeared as an expert witness in 1988, his ability to dominate his cross-examination in 2000 would arguably not have occurred. Browning's awareness of the attacks against Hilberg reiterates the importance of comparative methodology. Given Evans' and van Pelt's lack of engagement with the *Zündel* trial transcripts, it could be fair to argue that had Irving targeted the question relating to Hilberg towards them, they would not have been able to anticipate and refute it as easily as Browning. Browning's ability to pre-empt Irving's questions demonstrates his familiarity with the arguments of Holocaust deniers, an additional consequence of his testimony in 1988.[147] Finally the reference to Hilberg, as well as other historians who had appeared as expert witnesses in earlier Holocaust trials,

[145] *Irving*. 8 February 2000. pp.117-118.
[146] Ibid.
[147] Ibid, pp.22-25.

serves to demonstrate the legal impact that the testimony of historians can have on contemporary trials.[148] Thus, not only was Browning's testimony unique due to the courtroom rapport, but Browning's previous experience as an expert witness fully equipped him to appear in the *Irving* trial.

Behaviour of Expert Witness

As chapter two demonstrates, the primary function of the expert witness is to provide the Court with information that is beyond its traditional remit. However, while the testimony of an expert witness may be firmly established by their academic credentials, it is the body language and general conduct of an expert witness that can determine the impact of their testimony within the courtroom.

The importance of an expert witness presenting composed body language has consistently been noted throughout the Holocaust trials assessed in this dissertation.[149] In the *Hostage* Case, defence expert witness Professor Georg Stadtmüller was more composed in his cross-examination by lead prosecutor Theodore F. Fenstermacher than the other defence expert, Dr. Rudolf Ibbeken. The impact of Stadtmüller's body language was reflected in the Prosecution's closing speech. Whilst the Prosecution was critical of both Ibbeken and Stadtmüller, the Prosecution argued that the Defence were 'suitably embarrassed' by Ibbeken's

[148] During the first day of cross-examination, Browning cited the evidence of German historian Wolfgang Scheffler (see chapter two). *Irving*. 8 February 2000. pp.17-21.
[149] When assessing Robert Donia's appearances as an expert witness in the ICTY, both Donia and Richard Wilson note that part of Donia's success should be attributed to his body language. As Wilson notes, Donia 'avoided convoluted responses and gave straight forward answers', delivering abstract and complex terms in every-day language. For Donia, expert testimony is only truly effective if one makes a point of 'staying calm but being firm'. Wilson, *Writing History*, p.125; Donia. Interview.

testimony and thus sought to produce 'a slightly more informed Balkan expert in the person of Professor Georg Stadtmüller.'[150]

The impact that an expert's body language can have on the Court's receptiveness of the expert evidence was even more notable within the *Irving* trial. Browning had a commanding presence during the *Irving* trial. Even Irving commented that Browning was a good witness, 'professional and urbane … [and] has good command of the subject and good recall'.[151] Without doubt, Irving's academic integrity was rigorously scrutinised within the courtroom, and his untrustworthiness could be equally applied to his diary which he published daily on his website. Irving's diary should not be treated as a stand-alone source due to his fabrications of the trial proceedings. However, Irving's observations of Browning's and Evans's body language is reflected in the trial summaries produced by Browning, van Pelt, Evans, and Guttenplan. In contrast to Browning's confident performance under cross-examination, Irving commented that Evans appeared as 'a small scowling Welshman who bristles with hostility'.[152] Irving's account of Evans's conduct could reflect Irving's disdain at the content of Evans's report. However, Irving's comments concerning the damage that Evans's combative body language could do to the Defence's argument does seem relevant. Evans himself remarked that looking Irving in the eye on his first day testifying was a mistake and meant that he became 'irritated', and thus 'did not make a good impression on the court.'[153] As both Browning and Irving noted, Evans's body language caused the Defence to 'panic' and fear that Evans's testimony 'might be counterproductive'.[154]

[150] *Wilhelm List et al.* 3 February 1948. p.9,569.
[151] Irving, 'A Radical's Diary'. 8 February 2000.
[152] Ibid. 10 February 2000.
[153] Evans, *Telling Lies About Hitler*, p.206.
[154] Browning. Interview; Irving, 'A Radical's Diary'. 10 February 2000.

Irving's assertion in his diary that he would have 'submitted a motion to the Court for [Evans's] removal as an expert witness' would have been possible had Evans continued to appear hostile to Irving.[155] However, after the first day of cross-examination, Evans notes that he changed his tactic and was 'able to take [the questions] in an impersonal manner and answer them in relative calm.'[156]

Evans's own reflections on the trial suggest that similar to familiarity with the courtroom environment and providing expert testimony, appropriate body language develops alongside the broader experience of being an expert witness. Again, had Evans consulted the *Zündel* trial transcripts, he may have seen the differing responses to cross-examination by Hilberg and Browning, and thus behaved differently during the *Irving* trial. Considering the above assessment, understanding the factors that contribute to a successful testimony (jurisprudential, interdisciplinary, and body language), could influence the experience of expert historians in future war crime trials.

CLOSING SPEECHES

The Defence's closing speech confirmed how influential the expert testimony had been on the trial. Referring to Longerich's testimony (though equally applicable to the testimony from other expert witnesses), Rampton stated that the Court had to accept that '[Longerich] knows a lot more about [the Holocaust] than we do'.[157] However, whilst Rampton's closing speech confirmed the progression of the interdisciplinary

[155] Irving, 'A Radical's Diary'. 10 February 2000.
[156] Evans, *Telling Lies About Hitler*, p.207.
[157] *Irving*. 15 March 2000. p.36.

relationship between the historian and the lawyer; Irving demonstrated a level of continuity with the selective reinterpretation of the historical expert testimony.

Defence

The Defence's closing speech summarised the conclusions from each expert witness, and how they supported the defence of justification.[158] As Rampton addressed, 'upon examination, virtually every single one of the links in Mr Irving's chain crumbled in his hands'.[159]

Rampton concisely drew upon the key conclusions from each expert witness. Rampton reiterated to the Court that Longerich had testified that the notion that a Holocaust historian who could argue that Hitler did not authorise the Final Solution, in whatever rubric, was 'absolutely absurd'.[160] Longerich's report was used to support Evans's research which found 'deliberate falsification on a grand scale', not just regarding Irving's research on Hitler, but also amongst his other more successful works that had built Irving's reputation as a historian.[161] Evans's 'control sample' examining the bombing of Dresden in February 1945, demonstrated that there was a 'gross inflation' of the number of German civilians killed. Rampton argued that such a conclusion reflected Irving's antisemitism and distorted version of history, viewing the German population as the true victims of the Second World War.

[158] Ibid, p.187.
[159] Ibid, p.7.
[160] Ibid, pp.16-17.
[161] Ibid, pp.7-8.

The attention that Rampton gives to van Pelt's testimony is reflective of the centrality of Auschwitz to the Defence's overall argument. As Rampton established to the Court, Irving's denial of the crematoria at Auschwitz was Irving's 'last line of defence'.[162] Rampton addressed each challenge from Irving to firmly establish that each of Irving's denial claims had been addressed and disproved before the Court due to Irving's persistence concerning 'Battleship Auschwitz'. These claims were 'easily demolished' through the evidence 'clearly explained by Professor van Pelt'.'[163]

Despite the experience of Browning as an expert witness, and the impact of his testimony within the courtroom, Rampton only mentioned Browning in a summative sentence: 'in the face of overwhelming evidence presented by Professor Robert Jan van Pelt, Professor Christopher Browning and Dr Longerich', Irving had been 'driven' to concede that the gassings during the Final Solution, including at Auschwitz, were systematic.[164] As the assessment of Browning's testimony above shows, the control of his testimony, providing the Court with the essential information and successfully undermining Irving in the process, could have only strengthened the Defence's case. However, Rampton's brief reference to Browning reflects that he was not a leading witness for the Defence.

Irving

Throughout his closing argument, Irving sought to dismiss all claims made by Evans and thus by inference, the Defence's argument of justification, to 'smear and defile' his

[162] Ibid, p.24.
[163] Ibid, pp.22-24.
[164] Ibid, pp.21-22.

reputation as a historian.[165] Irving's closing speech heavily resembled the closing arguments made by Christie during the *Zündel* trials, and the arguments made by Holocaust deniers in general. When reflecting on Browning's cross-examination, Irving focused on the second edition of Hilberg's *Destruction of European Jews* and the testimony of Gerstein, using the latter as an argument that eyewitness testimony is not a reliable source of evidence.[166] Irving did not focus heavily on Browning's testimony, arguably due to the 'scholarly discussion' during cross-examination. However, the language that Irving used when summarising Browning's testimony is telling of his overall views on the arguments presented by the Defence. Irving switches between using the names of the expert witnesses and simply referring to them as 'the expert'. In one instance, Irving draws attention to Browning's testimony concerning the level of documentation on camps such as Treblinka and Sobibor: '[h]ere, the expert cannot find even one contemporaneous document.'[167] Irving's focus on documentary evidence follows the arguments pursued by Holocaust deniers that there is a lack of hard documentary evidence concerning the Final Solution. The term 'the expert' adds a pejorative tone to Irving's closing argument. Browning was presented to the Court as an expert in the Final Solution, yet the fact that Browning could not find 'even one' document is something to be mocked: Browning cannot be an 'expert' because, for Irving, an 'expert' would know everything. Irving's language not only seeks to question Browning's status as an expert witness before the Court, but also demonstrates Irving 'playing up' to other Holocaust deniers watching the trial by attempting to undermine the established academics' position with the arguments of Holocaust denial.

[165] Ibid, p.200
[166] Ibid, pp.150, 181-182.
[167] Ibid, p.181.

Irving's derogatory approach to the expert evidence continued to be used throughout Irving's closing speech. Irving argued that 'these experts were more expert in reporting each other's opinions … than in what the archives actually contain' despite Browning establishing four types of evidence that both historians and lawyers use.[168] Indeed, when focusing on the testimony of van Pelt, Irving presents the expert testimony as a manipulation of the evidence and unjust conclusions. Returning to the denial argument 'no holes, no Holocaust', Irving argued that to believe the testimony of 'the witness van Pelt' (seemingly demoted from the status of 'expert'), 'we would have to believe that the Nazis deliberately created … architectural relics'.[169] During Irving's assessment of van Pelt's evidence Rampton objected, arguing that Irving's closing speech was 'quite frankly, a continuous misrepresentation of the evidence'.[170] Despite Irving's attempt to disregard the evidence presented by van Pelt, Browning, Evans, and Longerich, as Rampton concluded, 'Mr Irving's Holocaust denial is thus exposed as a fraud.'[171] Though the testimony of the expert witnesses received differing amounts of attention during the closing speeches, Rampton's above statement, 'in the face of overwhelming evidence' presented by the expert witnesses, confirmed that the trial could not have been conducted without the expertise of historians.[172]

JUDGEMENT

Following the closing speeches, Gray presented his 350-page judgement on 11 April 2000, concluding that the nineteen instances presented by the Defence of Irving's

[168] Ibid, p.66.
[169] Ibid, pp.166-168.
[170] Ibid, pp.162-163.
[171] Ibid, p.29.
[172] Ibid, pp.21-22.

distortion of evidence were 'almost invariably well founded.'[173] Gray's judgement followed the structure of the claims that the Defence sought to prove, with Evans's report acting as a foundation for this. Consequently, Gray's judgement served as confirmation that historical testimony is better suited for the civil standard of a 'balance of probabilities', and supported the observations made within the 1988 *Zündel* trial judgement regarding the centrality of the expert historian's testimony to the overall proceedings and legal arguments of a Holocaust denial trial.

Interdisciplinary Relationship

Gray affirmed that it was not his duty as the trial judge to determine the events within Nazi Germany, '[t]hat is a task for historians.'[174] The primary focus of the judgement was to determine 'whether the available evidence, considered in its totality, would convince any objective and reasonable historian' that Auschwitz was an extermination camp, designed to implement the systematic execution of European Jews.[175] Hence those reading the judgement 'should bear well in mind the distinction between [the] judicial role in resolving the issues arising between these parties and the role of the historian seeking to provide an accurate narrative of past events.'[176]

Gray's address on the differing roles between the historian and the lawyer reiterated the distinction that was made at the beginning of the trial between the 'Holocaust on

[173] Gray rejected Irving's attempt to appeal the verdict on the grounds that Gray had 'failed to understand him'. Irving applied to the Court of Appeal, however Lord Justice Pill ruled that Gray was 'fully entitled to hold that the defence of justification succeeded'. Consequently, the permission to appeal the verdict was refused. Evans, *Telling Lies About Hitler*, pp.236-237; Appeal Judgment. Lord Justice Pill. 20 July 2001. 102. Accessed: 2 April 2020. [https://www.hdot.org/apjudge/]
[174] *Irving*. Judgement. 1.3.
[175] Ibid. 7.5.
[176] Ibid. 1.3.

trial' and 'history on trial'. However, from an interdisciplinary perspective, the beginning of the judgement also affirmed the differing roles of the historian and the lawyer. Gray's phrasing informs the reader that history and law are fundamentally different disciplines: history is continually based on interpretation, and within a criminal trial context, can only serve to establish contextual fact; likewise, the lawyer is centred on presenting his argument of a particular event, employing undisputable evidence. Though the civil format of the *Irving* trial demonstrated a cooperative interdisciplinary relationship, Gray's judgement seeks to remind the reader that the *Irving* trial, and thus the role of the historian as an expert witness within it, is wholly unique.

Expert Witnesses

The weight given to the expert witness testimony in the overall verdict proved fundamental despite Gray's distinction between the historical and legal disciplines. Gray accepted the evidence presented in the expert reports confirming that he was satisfied that van Pelt, Browning, Evans, and Longerich were 'all outstanding in [their] field'.[177] Gray summarised the report conclusions and testimony of the expert historians.[178] Due to both Browning and Longerich providing evidence for the systematic and co-ordinated nature of the Final Solution, the Wannsee Conference, and Operation Reinhard, Browning's conclusions were often discussed alongside Longerich's report. Moreover, as Browning's testimony was supplementary to Evans's conclusions, and with Irving accepting most of Browning's report during his cross-examination by Rampton, Browning's testimony did not receive as much attention in

[177] Ibid. 13.10.
[178] Browning's report and testimony is largely summarised in section 6.10 to 6.141, with occasional references elsewhere in the judgement.

the *Irving* verdict in comparison to the 1988 *Zündel* trial and *Sawoniuk* trial where Browning was the only expert historian to appear for the Prosecution.[179]

Similar to Rampton's omission of Browning's testimony during his closing speech, the focus on Evans within the overall judgement does not imply that the testimony provided by van Pelt, Browning, or Longerich, was not considered within the verdict. Indeed, Gray asserted that Evans's conclusions against Irving did not 'stand-alone', noting that '[i]n the narrower fields covered by their evidence van Pelt, Browning and Longerich level similar criticisms at [Irving]'.[180] Nonetheless, as reflected in the pre-trial correspondence, the expert testimony of van Pelt, Browning, and Longerich was supplementary to Evans's research and was therefore treated in the judgement as such. As Gray noted, Evans was the 'principal protagonist amongst the Defendants' witnesses'.[181] Gray's treatment of the expert testimony consequently makes it difficult to assess the weight Gray placed on the overall conclusions of van Pelt, Browning, and Longerich as their evidence is often referred to in 'support' of Evans's conclusions.[182]

Objective Historian

Assessments of the verdict have noted the use of the phrase 'objective historian'.[183] Gray supported Evans's assertion that the objective historian 'must spell out clearly to

[179] Throughout the judgement Evans is mentioned 240 times. By comparison, Browning is cited eighty times.
[180] *Irving*. Judgement. 5.6.
[181] Ibid. 5.5.
[182] Ibid. 13.10.
[183] The debates within existing literature concerning the general concept of the 'objective historian' are discussed in chapter two. For perspectives relating specifically to the *Irving* trial, see: Stanley Fish, 'Holocaust Denial and Academic Freedom', *Valparaiso University Law Review*, Vol. 35, No. 3 (2001): p.517; Evans, *Telling Lies About Hitler*, pp.253-271; Robert Jan van Pelt, '*Ex Malo Bono*: Does this

the reader when [they are] speculating rather than reciting established facts', affirming that Evans had justified 'each and every one of the criticisms' against Irving made by the Defendants.[184]

Gray's support of Evans's original concept of the 'objective historian' demonstrates how influential expert witness testimony was in shaping the verdict of the trial. Gray's confirmation of the 'objective historian' establishes that in pursuit of evidential facts, history and law adopt the same research methods. Indeed, Gray repeated that Irving's conclusions were so 'perverse and egregious' that they were 'unlikely to be innocent', and thus proved that 'Irving was motivated by a desire to present events in a manner consistent with his ideological beliefs'.[185] Gray's language affirms that shared disciplinary norms exist within the civil courtroom, and to use the language of Barbara Herrnstein Smith, both disciplines follow the same definition of 'material manipulation'.[186]

The bench trial enabled Gray to address the complex historiographical issues raised during the trial in the judgement, reflecting extensively on the historical evidence presented.[187] Though libel trials have been frequently criticised for their alleged attack on free speech and apparently unjust verdicts, the civil proceedings and judgement during the *Irving* trial resulted in two firm conclusions. Firstly, the judgement reiterated

Latin Proverb Apply to Holocaust Denial? The Cunning of Reason', in *Antisemitism Before and Since the Holocaust: Altered Contexts and Recent Perspectives*, eds. Anthony McElligott and Jeffrey Herf (Cham: Palgrave Macmillan, 2017), pp.380-385.

[184] *Irving*. Judgement. 13.10, 13.22.

[185] Ibid. 13.143.

[186] Herrnstein Smith, *Belief and Resistance*, p.136.

[187] Gray asserted that as a military historian 'Irving has much to commend'. However, when focusing on Irving's research on Hitler's attitude towards the Jews and the Final Solution, Gray stated that he was satisfied in most of the instances presented by the Defence that Irving had 'significantly misrepresented what the evidence, objectively examined, reveals.' *Irving*. Judgement. 13.7-13.9.

the centrality of historical evidence presented during the trial. Secondly, Gray's ruling on the 'objective historian' and proper historical conduct reflected the wider interdisciplinary relationship between history and law concerning the similar standards of evidentiary research within a civil courtroom.

SUMMARY

In contrast to earlier Holocaust trials, the *Irving* trial was undoubtedly unique. The civil law evidentiary standard of a 'balance of probabilities' had a profound impact on the interdisciplinary relationship between the historian and the lawyer. When comparing the 1988 *Zündel* trial, *Sawoniuk* trial, and *Irving* trial, Browning commented that criminal trials are more 'straightforward' for the expert witness where the historian is there primarily to provide historical background for the Court to make an informed judgement on the eyewitness evidence. Moreover, the arguments presented during a Holocaust denial trial, both criminal and civil, are much more nebulous than a criminal perpetrator trial. Whereas in the *Sawoniuk* trial Browning had to present historical context in an objective manner, 'the denial trials just had this whole open dimension that really is all about where are the boundaries of [the] historical profession'.[188] Thus in many ways a Holocaust denial trial, and a civil trial, demand more from the historian, emphasising their duty to the Court as an expert witness. Nonetheless, whereas criminal cases impose a standard that is beyond the normal expectations of a historian, the civil case is closer to the way that historians engage with research, with van Pelt, Browning, Evans, and Longerich experiencing fewer of the epistemological

[188] Browning. Interview.

challenges often cited by historians as justification for not testifying as an expert witness, such as the misinterpretation of historical testimony by the Court.

The defence of justification pursued by the Defence greatly affected the overall impact of the expert testimony. Irving's poor performance as a cross-examiner, motivated by his priority to salvage his academic reputation and to take advantage of the opportunity for publicity, meant that the testimonies of van Pelt, Browning, Evans, and Longerich, had their intended impact. Irving's lack of discipline and inability to follow one line of questioning during the cross-examination meant that Browning was able to control the direction and overall content of his testimony. Arguably, if Irving had decided upon legal representation during the trial, the cross-examination of the expert witnesses would have been structured and direct. Nonetheless, the ability for Browning to control the pace of his testimony during the *Irving* trial is in stark contrast to the rapid-fire pace of criminal cross-examination, thus furthering the distinctiveness of the *Irving* trial within the overall experience of the historian as an expert witness.

Finally, the defence of justification and concentration on historical misconduct consolidated the importance of the historian as an expert witness within Holocaust civil libel trials. Without doubt, the courtroom is not an appropriate environment to debate historical interpretation and should be avoided if possible. However, as van Pelt commented, the issue of 'truth' became much more important during the *Irving* trial than within criminal trials. Indeed, the civil setting of the *Irving* trial meant that it was the duty of the expert historian to establish the professional integrity of 'reasonable' historians, with the lawyers merely presenting the historical expert evidence to the Court to comply with the legal format. Though the legal strategy of the *Irving* trial was

a joint enterprise by the expert historians and lawyers, the historians became the dominant force: the *Irving* trial would not have reached such a resounding verdict both against Irving and for the historical discipline, but for the testimony and experience of van Pelt, Browning, Evans, and Longerich.

PART FIVE

CONCLUSION

VIII

Conclusion

> 'We are not only scholars completely detached from the topic … We are part of the scene now.'
>
> Henry Rousso[1]

INTRODUCTION

At first glance it does appear that there is 'no place for history' within the courtroom when one studies the literature surrounding the interdisciplinary relationship between history and law. Yet, whilst there may be relationship limitations between the legal and historical professions, this dissertation has sought to demonstrate that not only have historians as expert witnesses played an important role within Holocaust trials since their first use in the 1947 *Hostage* Case, but their influence has evolved to the point where they are arguably indispensable to future Holocaust trials.

This chapter draws conclusions from the five case studies assessed throughout this dissertation, highlighting the uniqueness of the research aided by the adopted comparative methodology and interviews, and the relevance of the historian as an expert witness within Holocaust-related trials. The findings of the research are then presented within the wider historiographical framework together with the 'consensus of critique' and referenced against the research questions stated at the beginning of this dissertation. Clearly there is an ongoing debate concerning the general suitability

[1] Elisabeth Bumiller, 'A Historian Defends His Leap from Past to Present', *The New York Times* (31 January 1998). Accessed: 20 May 2020. [https://www.nytimes.com/1998/01/31/books/a-historian-defends-his-leap-from-past-to-present.html]

of historical expert testimony within the courtroom. As Raul Hilberg, Christopher Browning, Henry Rousso, and Richard Evans have all noted; the rule of hearsay; the distortion of history to fulfil a particular legal narrative; the law's demand for precise evidence; and the intense scrutiny of historical testimony, all serve as examples of why the courtroom is a challenging setting to discuss historical matters. Whilst such observations are valid and should aid preparations prior to the historian appearing as an expert witness within Holocaust trials, the engagement with the historical record in the courtroom is changing. The legal arguments presented by prosecutor Sir John Nutting QC in the 1999 *Sawoniuk* trial demonstrate a complex understanding of the wider historiographical debates relating to Holocaust perpetrators and the 'intentionalist-functionalist' debate. Additionally, Defence counsel William Clegg QC's engagement with the historical expert evidence presented by Browning for the Prosecution in 1999 was unprecedented within criminal Holocaust trials, thus demonstrating a shift by legal counsels in acknowledging the need for historical evidence within the courtroom.

It is no exaggeration to say that without the evidence presented by expert historians, not only would Holocaust trials be ill equipped to discuss the legal arguments surrounding the indictment, but the wider historical record would also be damaged through the absence of historical truth.

CHAPTER SUMMARIES

The research assessing the *Hostage* Case (chapter two) found that detailed analysis of Dr. Rudolf Ibbeken's and Prof. Georg Stadmuller's testimony had been overlooked

within existing literature, and hence is unique to this dissertation. The status of Ibbeken and Stadtmüller as expert witnesses for the Defence challenges assertions within academia that the use of expert historical evidence began in 1952 with the *Remer* Trial. From one perspective it could be argued that Ibbeken and Stadtmüller do not fit the 'traditional' role of the historian as an expert witness (provider of historical contextual knowledge only). However, just as *Buckley v Rice* (1554) is acknowledged to be the first recorded use of expert witness evidence within civil proceedings, the *Hostage* Case can therefore be regarded as the baseline for the evolution of the historian as an expert witness in Holocaust trials.

Whilst this research has identified a small number of instances where expert historians have contributed to non-Holocaust related trials prior to 1947, the *Hostage* Case can be regarded as the first instance where a professional historian has been used in the capacity as an expert witness as we know it today. As chapter three stated, the IMT and other NMT trials saw historians presented to the Courts as eyewitnesses only. The testimony of Ibbeken and Stadtmüller therefore acts as a bridge between the use of historians as providers of eyewitness evidence and the developing professionalisation of the role that occurred from the 1950s. The request by Defence counsel Dr. Mueller-Torgow during Stadtmüller's testimony to testify as an expert as opposed to an eyewitness, demonstrates the unprecedented nature of the dual role adopted by Ibbeken and Stadtmüller. Both expert historians had to finely balance the duties between where expert testimony ended and hearsay began, as well as to ensure that their responses stayed within the parameters of expert knowledge and did not rely on interpretation drawn from their personal experiences.

The *Hostage* Case saw the first use of interdisciplinary arguments against the use of expert testimony, particularly regarding disputes over 'fact', 'truth', and historical interpretation. The arguments presented by Prosecution counsel Theodor F. Fenstermacher demonstrate that such objections against historical evidence are consistent throughout criminal Holocaust trials until the 1990s, where the uniqueness of Clegg's stance towards Browning's expert evidence in the *Sawoniuk* trial (chapter six) challenges this assertion. The insistence by the Defence in 1947 that the historical evidence was essential to discuss the legal issues of the trial, and the reference within the judgement regarding the consideration of the presented historical context, demonstrates that historical expert evidence did have a place within Holocaust trials from their earliest occurrence. By the Frankfurt-Auschwitz trial (chapter four), an interdependent relationship existed between legal arguments and Holocaust historiography: just as research for Holocaust trials came to influence Holocaust historiography and legal presentation of evidence, so too did the legal narratives presented in trials influence the wider narrative of the Holocaust within the public domain. Indeed, the publication of *Anatomy* highlighted that Holocaust trials can act as catalysts to fundamental historical research.

The wider geopolitics during the 1960s, concerning the 'juridical politics of the past' within West Germany and the broader context of the Cold War, had an impact on how the legal counsels and the Court engaged with the historical evidence as the closing speeches and judgement of the Frankfurt-Auschwitz trial demonstrated.[2] The closing address by presiding judge Hans Hofmeyer highlighted the interdisciplinary tensions, at least from a legal perspective, of having to accommodate historical reports and

[2] Pendas, 'Seeking Justice', pp.352-354.

testimony based on interpretation which did not necessarily comply with the legal (criminal) standard of objective factual evidence. Nonetheless, though the law sought to preserve its legal objectives and viewed history as trying to lead the court proceedings 'astray' (to use the language of Hofmeyer), the historical nature of a Holocaust trial meant that it was impossible to hold proceedings without acknowledgment of the relevant historical context.[3]

The research produced for the Frankfurt-Auschwitz trial and its profound impact within Holocaust Studies arguably acted as a precursor to the evolution of the expert historian seen from the 1980s onwards. The importance of the historical expert reports produced for the Frankfurt-Auschwitz trial affirmed the role of the expert historian as essential within the trial proceedings, and the bridge between law and the practice of history. However, the introduction of Holocaust denial trials resulted in challenges on the Holocaust narrative not otherwise seen within a courtroom. Holocaust denial trials meant that the 'bridge' that the expert historian played between law and history was brought to the forefront of the legal proceedings as historical conduct came under legal scrutiny. Thus, within the denial trial framework, the expert historian not only provided expert evidence but also acted as a spokesperson for the practice of history.

The cross-examination of Raul Hilberg by Douglas Christie during the 1985 *Zündel* trial (chapter five) is often referred to as 'one of the most gruelling and lengthy cross-examinations … ever seen' within the studies of Holocaust-related trials.[4] The lack of preparation by the Prosecution before the trial, the underestimation of Christie as a

[3] Naumann, *Auschwitz*, p.414.
[4] Letter to Raul Hilberg from Peter Griffiths. 8 March 1985. RHP. RG-074-005. Carton 21, Folder 5.

legal counsel, and the politicisation of the trial, were all reflected in the cross-examination of Hilberg. It was only at the end of the third day of Hilberg's cross-examination that Christie began to question Hilberg on the content of defendant Ernst Zündel's published pamphlet, *Did Six Million Really Die?*, as opposed to the wider history and proof of the Holocaust.[5] From an interdisciplinary perspective, the uncomfortable similarity between denial rhetoric and the legal requirement of specific evidence under criminal law raised questions over the suitability of complex topics, such as the Holocaust, for courtroom debate.[6] Consequently, despite the initial guilty verdict, when one reads about the 1985 trial, the focus is on Christie, the success of his courtroom tactics, and the denial rhetoric used against Hilberg and the survivor witnesses.

Browning's role as an expert witness in the 1988 *Zündel* re-trial (chapter five) following a successful appeal, demonstrated a shift in the role of the historian as an expert witness. Browning's contribution towards the Prosecution's strategy was unprecedented compared to earlier Holocaust perpetrator trials. Consequently, Browning's examination-in-chief was the culmination of a positive interdisciplinary working relationship between the expert historian witness and the lawyer.

Whilst Browning's trial preparation and examination-in-chief saw an improvement from past Holocaust trials, Browning's cross-examination by Christie revisited the arguments about the distinctiveness between history and law as seen during the *Hostage* Case and the Frankfurt-Auschwitz trials. Browning's cross-examination saw

[5] *Zündel*. Volume VI. 18 January 1985. p.1184.
[6] Ibid. Volume XX. 25 February 1985. p.4489.

an interesting discussion regarding the types of evidence and methodology that both history and law use. Yet as Browning noted in his correspondence with Hilberg, the process of cross-examination typifies the dangers of the courtroom for the historian. According to Browning, 'there is a built-in frustration and inequality' whereby the Defence counsel has time to prepare the questions that they will ask during cross-examination, but the witness 'has only a few seconds to ponder the most appropriate answer'.[7] Both Hilberg and Browning reflected after their trials that they had 'the experience of thinking about better answers after [their] testimony.'[8] From this perspective, caution comes from the fact that the historian as an expert witness is being repeatedly asked to do something that is anathema to their discipline: offer a response without sufficient time to appropriately weigh the evidence. As Browning noted upon reflection of the 1988 trial, 'I am afraid the whole tempo and theatre of a trial is something we academicians are poorly trained for, so there again we are at an inherent disadvantage.'[9]

It is worth remembering that the circumstances that led to Browning's increased agency occurred due to the unique context of the 1988 trial. Research conducted on existing literature for this dissertation found no evidence to suggest that legal counsels and expert witnesses in earlier Holocaust trials studied past transcripts, and thus pre-empted the strategy of the opposing counsel. The topic of Holocaust denial meant that the historian's testimony would hold greater weight in determining the trial's verdict. Nonetheless, thanks to the reciprocal relationship between Browning and lead

[7] Letter to Raul Hilberg from Christopher Browning. 10 March 1988. RHP. RG-074-005. Carton 8, Folder 6.
[8] Letter to Raul Hilberg from Christopher Browning. 28 February 1989. RHP. RG-074-005. Carton 8, Folder 6; Letter to Christopher Browning from Raul Hilberg. 24 March 1989. RHP. RG-074-005. Carton 8, Folder 6.
[9] Letter to Raul Hilberg from Christopher Browning. 10 March 1988; Browning. Interview.

prosecutor John Pearson, the expert historical testimony in 1988 was presented in the best format possible. Whilst Browning's involvement in shaping the Prosecution's courtroom strategy was arguably a response by Pearson to Hilberg's inadequate preparation in 1985, the strength of Browning's examination-in-chief serves as a guide to future legal counsels and expert witnesses involved in war crime trials, to understand the dynamics of the courtroom and how best to utilise the historian as an expert witness.

The comparison between the treatment of Browning's expert evidence presented in the 1988 *Zündel* trial and the 1999 *Sawoniuk* trial (chapter six) demonstrates how the purpose of a trial can impact the use of historical expert testimony. Historical testimony became central to the court proceedings due to the denial focus in the *Zündel* trials, with historians becoming key witnesses whilst demonstrating good historical conduct in contrast to denial rhetoric. Yet, the *Sawoniuk* trial reaffirmed that within criminal Holocaust perpetrator trials, the expert historian only ever adopts a role as a provider of contextual knowledge (albeit essential to establishing the foundation for the case) due to the legal requirements of criminal law (chapter two).

Browning did note that the reciprocal relationship that existed between Nutting and Browning throughout the 1999 trial proceedings, led to a mutual understanding of the role that the historical evidence played within the wider framework of the trial. However, Nutting's post-trial recollections of directing Browning to 'prove' the Holocaust in five documents, as well as reiterating the differences between the role of the lawyer and the expert historian, highlight that within Holocaust criminal perpetrator

trials, the historical narratives produced during the trials were influenced by the legal counsel's perception of what particular narrative would win the case.[10]

As Browning reflected after the trial, he did not view his testimony within the *Sawoniuk* trial to be anything particularly significant. Whereas Hilberg's 1985 and Browning's 1988 testimony in the *Zündel* trials demonstrated that Holocaust denial trials require a certain kind of expert historian, Browning argued that 'any good historian' could have testified in *Sawoniuk*.[11] Consequently, despite the exceptional circumstances of a Holocaust perpetrator trial, in terms of the historical context of the Holocaust within the public history and memory, the *Sawoniuk* trial was unremarkable.

In fact, what made Browning's experience as an expert witness in 1999 noteworthy was the treatment of Browning's evidence by the Defence. Unlike the opposing counsel in the *Hostage* Case and the Frankfurt-Auschwitz trial, Clegg accepted the historical evidence by Browning and did not seek to dispute it, even along interdisciplinary grounds. Clegg's cross-examination of Browning regarding the level of choice that Sawoniuk had in joining the Schutzmannschaft, saw a deeper engagement with Holocaust historiography than previously witnessed in Holocaust perpetrator trials. The discussion within the proceedings of the Frankfurt-Auschwitz trial regarding the status of grassroot perpetrators and language such as 'willing executioners' emphasised the intertwined relationship between Holocaust historiography and law. The grassroot perpetrator historiography debate meant that

[10] It is acknowledged by the author that such conclusions about the treatment of expert evidence within Holocaust trials have been drawn from only five case studies out of thousands. For more detailed conclusions, a wider sample of Holocaust trials that used expert historical testimony would need to be assessed. However, this is beyond the scope of this thesis.
[11] Browning. Interview.

Browning's cross-examination in 1999 resembled more of an academic discussion than the combative forms of cross-examination witnessed in other case studies assessed for this dissertation.

Clegg's acceptance of Browning's evidence arguably saw a more subtle development in the role of the historian as an expert witness. Given the development of Holocaust historiography over the postwar period, and the increasing rapport between the expert historians and the Court, lawyers no longer sought to dispute expert historical evidence. Though Browning did not mention Sawoniuk in his report for the trial, Clegg commented after the trial that he believed that Browning had gone beyond the objective history that expert historians are enlisted to provide by arguing that perpetrators (in general) did have a choice in participating in crimes committed during the Holocaust.[12] However, the academic discussion that occurred during the *Sawoniuk* cross-examination resulted in a stronger historical narrative, supporting Lynne Humphrey's argument that Holocaust trials can produce 'good history' and countering the 'consensus of critique' that exists within Holocaust historiography.

Browning's experience as an expert witness in the 1988 *Zündel* trial and the *Sawoniuk* trial had a clear impact on his testimony and his relationship with the other expert witnesses during the *Irving* trial (chapter seven). As lead historical expert witness Richard Evans noted in the pre-trial correspondence, 'I greatly value your expertise in these cases'.[13] Browning's experience of Christie's cross-examination techniques meant that he was prepared for plaintiff David Irving's cross-examination and was able

[12] Clegg QC. Interview.
[13] Letter to Christopher Browning from Richard J. Evans. 8 August 1998. p.2.

to anticipate Irving's line of questions, resulting in a dominant courtroom performance. Moreover, the progressive interdisciplinary relationship that existed between Pearson and Browning in 1988, and Nutting in 1999, continued into the *Irving* trial with Browning insisting on the relevance of Kurt Gerstein's testimony within Browning's expert report to Defence counsel Richard Rampton QC.

Browning's experience shaped his testimony, both in terms of what the Court wanted to hear and how to act whilst testifying. Both of these factors, combined with the procedural aspects of the *Irving* trial (the civil standard of evidence, the defence of justification, and plaintiff David Irving representing himself), contributed towards a positive environment for Browning's testimony. As Browning noted when reflecting on his time as an expert witness: as his experience grew, so too did his ability to feel comfortable on the stand, to respond well, and to 'close the trap'.[14] Consequently, Browning's prior experience clearly aided the Defence strategy: firstly through his understanding of the interdisciplinary relationship and how best the expert witness can serve the Court; and also the impact that comparative methodology learnt from earlier trials can have on contemporary trial proceedings.

The assessment of Browning's expert testimony in the 1988 *Zündel* trial, 1999 *Sawoniuk* trial, and 2000 *Irving* trial provides unique research comparing the testimony and experience of the same expert historian across different jurisdictions, decades, and trial purposes, previously not covered within existing literature. The comparative approach to Browning's evidence has highlighted patterns in: judicial approaches to expert evidence and the problems with such rulings given the historical context of

[14] Browning. Interview.

Holocaust trials; the differing uses of expert testimony within different legal settings; and the impact that changing historiography can have on the arguments presented by legal counsels and thus the Court's use of the expert evidence within the verdict.

OVERALL CONCLUSIONS

This dissertation has established how the role of the historian expert witness has evolved over the postwar period by examining the development of the role through comparing the extent that expert witnesses were involved in the trial proceedings; the content of their testimony; experience of cross-examination; and the impact of their testimony in the overall judgement.

Relating to the first research question of this thesis, the examination of all five case studies has demonstrated how the role of the expert witness has developed from 1947-2000. This progression can be identified in three main stages: dual role; professionalisation; and spokesperson for history. The evolution of the expert historian from an eyewitness and an expert in 1947, to an expert of historical context from the 1950s onwards, and subsequently as an historical authority contributing to the legal strategy, highlights that the role not only became more refined but also fostered a cooperative understanding between the historical discipline and the legal arguments presented. The progression of the expert historian into a spokesperson for the practice of history whilst providing expert historical evidence, highlights how the changing purpose of Holocaust trials can impact the level of influence and relevance that historical expert testimony has to the overall proceedings. Indeed, within Holocaust

denial trials, historical expert testimony became central to the trial proceedings not only presenting 'historical context' but also as a primary witness to the 'truth'.

The *Hostage* Case, the Frankfurt-Auschwitz trial, and the *Sawoniuk* trial also demonstrate consistencies that exist throughout the role of the historian as an expert witness. The primary function of the historian expert witness within perpetrator trials has not changed since the first use of expert testimony in 1947. Indeed, the testimony of Stefan Hördler during the trials of Reinhold Hanning (2016) and Bruno Dey (2020) similarly focused on the historical context surrounding the crimes committed by the defendants.[16] However as demonstrated in the *Sawoniuk* trial, and the cross-examination of Browning, whilst the legal definition of the expert witness has remained the same, subtle developments in the role of the expert historian have occurred. In the *Sawoniuk* trial, the cross-examination shifted from a combative 'fishing expedition' seen in other Holocaust trials, to an academic engagement. Moreover, in the conclusions of the Hanning trial, Hördler noted that 'it is very likely that [Hanning] was a member of the unit that was on the ramp'.[17] Hördler's report provides historical

[16] Hördler is a Lecturer and Postdoctoral Research Associate at the Institute for Economic and Social History, University of Göttingen. Hanning was convicted in a Detmold court as an accessory to 170,000 murders in 2016. Dey was an SS guard in the Stutthof concentration camp and charged with assisting in the murder of 5230 people. Dr. Stefan Hördler. Georg-August-Universität Göttingen. Accessed: 20 May 2020. [https://www.uni-goettingen.de/en/614254.html]; Alison Smale, 'Reinhold Hanning, Former Auschwitz Guard Convicted a Year Ago, Dies at 95', *The New York Times* (1 June 2017). Accessed: 20 July 2018. [https://www.nytimes.com/2017/06/01/world/europe/reinhold-hanning-dead-convicted-auschwitz-ss-guard.html]; Eliza Gray, 'Inside One of the Last Nazi Death Camp Trials', *TIME* (12 February 2016). Accessed: 20 July 2018. [http://time.com/4219187/nazi-reinhold-hanning-trial-auschwitz/]; 'Legal Proceedings Against the Former SS Man Reinhold Hanning', *Buchenwald and Mittelbau-Dora Memorials Foundation*. Accessed: 22 May 2020. [https://www.buchenwald.de/en/317/date////gerichtsverfahren-gegen-den-ehemaligen-ss-mann-reinhold-hanning/]; Julian Feldmann, 'The Trial Against A Concentration Camp Guard Continues Despite the Corona Crisis', *Jüdische Allgemeine* (14 May 2020). Accessed: 22 May 2020. [https://www.juedische-allgemeine.de/politik/unter-anklage/]; Turner, *Historians at the Frankfurt Auschwitz Trial*, p.174.

[17] 'Nazi SS Officer Accused of Being Complicit In 170,000 Murders at Auschwitz Faces Court', *The Daily Express* (25 April 2016). Updated: 25 April 2016. Accessed: 22 May 2020.

context but also draws conclusions regarding the specific involvement of the defendant. Hördler's assertion against Hanning is in contrast to earlier Holocaust trial proceedings which sought impartiality. Indeed, when discussing the historical brief for the *Sawoniuk* trial, Martin Dean commented that in all of the trials he had contributed towards, there 'was the instruction to not mention the defendant at all'.[18]

Given the differences between Hördler's experience as an expert witness and expert historians in earlier Holocaust trials, it could be argued that the degree of objectivity of historical expert testimony has shifted as Courts' have increasingly relied on the knowledge of expert historians. However, such a conclusion is just a rational inference and research is required into how the historian as an expert witness in contemporary Holocaust trials compares to those in earlier Holocaust trials.

The conclusions drawn from comparing Browning's expert testimony across the 1988 *Zündel* trial, 1999 *Sawoniuk* trial, and the 2000 *Irving* trial address the second research question for this thesis. As noted by Browning, the role of an expert historian within criminal perpetrator trials is arguably straightforward, although the experience of cross-examination can be anathema to the historical discipline, and the legal interpretations of historical evidence can result in questions regarding the version of historical truth that is being presented to the Court. For Evans, the need to offer moral judgment or help assert findings of guilt or innocence is not something that the historian is trained in, and thus the Court should not ask a historian to perform such duties. If historians are directed to make these judgements, Evans argues, they should

[https://www.express.co.uk/news/world/664110/nazi-ss-Reinhold-Hanning-auschwitz-murders-court-trial]

[18] Dean. Interview.

provide evidence in the form of a written affidavit or report, giving them time to take a considered view and account for every aspect: something that is not possible under intense cross-examination.[20] The historian will then have the opportunity to present the Court with a historically accurate report that has been thoroughly researched and concisely written, and is beyond the reach of an opposing counsel's influence and interpretation. The expert historian would also have the means to further historiography through undertaking original research that is outside the Court's remit.

Furthermore, the expert historian in a denial trial, not only has to present their evidence and give a robust performance when under cross-examination, but also has to counter denial rhetoric and act as a spokesperson for history.. Hence, expert historians who appear in denial trials need to be thoroughly prepared for all types of cross-examination questions (personal and historiographical) and know how to combat denial rhetoric. Indeed, as demonstrated through the comparison of the behaviour of Hilberg and Browning in the *Zündel* trials, and Evans and Browning in the *Irving* trial, the behaviour of an expert can have a notable impact on how the Court receives the expert evidence being presented.

A comparison between a criminal denial and a civil denial trial demonstrated how the different types of jurisdictions affected the way historical evidence is presented and received within trial proceedings. Understanding the development that Holocaust trials have undergone since 1945 underscores the significance of this dissertation in two main ways. First, the introduction of Holocaust denial trials shows that different trial formats can influence how the Court and legal counsels engage with the historical

[20] Evans, 'History, Memory, and the Law', p.342.

narrative, and in some cases seek to reshape the evidence. Second, as Browning's observations assert, the different trial formats can heavily influence the use and content of expert testimony. Though the 1988 *Zündel* trial engaged with historical practice, the criminal evidentiary standard of 'beyond reasonable doubt' meant that the Prosecution had to prove that Zündel willingly published the pamphlet knowing that the content was false. By contrast, the civil standard of 'a balance of probabilities' applied within the *Irving* trial meant that the evidence that was considered to be false in the eyes of the historian, was also seen as falsification by the Court. As Browning noted, the evidentiary standard within the *Irving* trial was still very high. In contrast to criminal law which sought to generate clear, binary historical narratives, the civil standard permitted differing interpretations of the evidence, as observed between the Defence expert historians Peter Longerich and Browning. It can therefore be concluded that a Holocaust denial trial conducted within a civil jurisdiction is better suited to presenting historical testimony, due to the centrality of historical testimony within the trial and the interdisciplinary similarities regarding the evidentiary standard of proof.

Understanding the impact that different trial formats can have on the expert historian is not only relevant for future Holocaust trials, but war crime trials in general. Whilst the International Criminal Tribunal for Rwanda and ICTY have now officially closed (2015 and 2016 respectively), war crime trials are still occurring within the International Criminal Court and historians will continue to be called upon to provide historical context. Consequently, this dissertation has provided knowledge to advise future historians on what to expect and prepare when appearing as an expert witness in trials that deal with traumatic memory. The conclusions to the first and second research

questions highlight the impact that expert historical testimony can have on the memory of an event, but also that despite dealing with traumatic memory, lawyers and judges within all trial formats seek to engage with exceptional testimony through standard legal practice. As this dissertation has argued, when discussing the interdisciplinary relationship between law and history, and linking to the 'consensus of critique' discussed below, it is important to distinguish between the interdisciplinary relationship as an expert historian in general, and an expert historian in war crime trials. Future expert historians can thus learn from the findings of this dissertation regarding how trials deal with traumatic history and memory within the wider socio-political context, and hence become more effective in what could be regarded as a hostile environment to the discipline of history.

Finally, addressing the third research question for this thesis, the complex relationship between the historian as an expert witness and the legal actors presented within chapter two, were found to be generic to expert witnesses across all disciplines. Indeed, the factor that makes the role of the expert historian stand out is not the interpretative nature of the historical discipline, but the context of the Holocaust trial itself. The notion of a Holocaust trial is distinctive: dealing with mass atrocities now committed over seventy years ago which still hold a prominent place within the history and memory of society. The impact of Holocaust trial verdicts on both historiography and public engagement, such as the *Eichmann* trial and the Frankfurt-Auschwitz trial, demonstrate the significance of the trial format in generating and contributing towards historical narratives. Given the influence that war crime trials have on the public's understanding of these events, there is a moral duty that trials produce accurate accounts of history. As Devin Pendas notes, Holocaust trials are inherently political

because of the balance that must be achieved to engage with justice, history, and memory in equal measure.[22] Whilst this may mean that historical expert testimony risks being shaped to suit an ulterior legal objective, historians have an obligation to ensure that the correct historical narrative is presented. Given the complexity of historiographical debates and the potential for misrepresenting the evidence, historical research cannot be left to the lawyers because of the likely impact on the public memory. If a trial was conducted using historical documentation alone then nuanced historiographical debates, such as those addressed in the *Sawoniuk* trial, may not be engaged with. Thus, the public would not understand the depth of the wider context, distorting the memory of an event. Consequently, it is the exceptional circumstances of a Holocaust trial (civil and criminal) that makes the role of the historian as an expert witness unique.

As demonstrated throughout this dissertation, despite the exceptional nature of the Holocaust, the law's insistence to abide by standard legal treatment of expert evidence, most notably the judicial ruling for juries to accept 'all, some, or none' of the expert evidence, is certainly questionable. Such judicial rulings, if followed by juries, are indeed one of the sources of the abovementioned 'consensus of critique'. Yet, following a shift in the relationship between the expert historian and the lawyer during the 1980s, and developments in the wider Holocaust historiography, more Courts have acknowledged the exceptional nature of Holocaust trials. In the ruling of the 1988 *Zündel* trial, Judge Thomas addressed that it was inherent through the nature of historical evidence that Browning's testimony would include hearsay.[23] By noting that

[22] Pendas, 'Seeking Justice', pp.362-363.
[23] *Zündel*. Volume XXXVI. 10 May 1988. p.10378.

historians' documents include hearsay, and thus the hearsay rule cannot apply to expert historical testimony (at least within the 1988 trial), Thomas suggested that Holocaust trials have exceptional circumstances due to their exceptional content. This assertion not only addresses the distinctiveness of Holocaust trials against wider criminal proceedings, but within the context of Holocaust denial trials, it establishes an acceptable standard of evidence for 'a careful and competent historian' both within history and the courtroom, successfully countering any arguments made by Holocaust deniers. Moreover, Holocaust trials, namely the Frankfurt-Auschwitz trial and the *Irving* trial, have acted as catalysts for pivotal research without which Holocaust historiography would be incomplete.

Three distinct conclusions can be drawn regarding why historians continue to appear as expert witnesses, despite a 'consensus of critique' that argues otherwise. Firstly, as Pearson noted in 1988 and Dean has since reaffirmed, there has been a shift in the mentality of lawyers towards the types of evidence that could be used within Holocaust trials from the 1980s onwards: as survivor witnesses were declining, expert historical testimony became one of the few remaining forms of evidence left for legal counsels to use.[24] Moreover, the introduction of denial trials in the 1980s meant that Holocaust survivors were not suited, or arguably relevant, to the charges being made against the defendant.

Secondly, in his publications reflecting on his involvement in Holocaust trials, Browning notes the 'consensus of critique' surrounding the relationship between history and law, and the role of the historian as an expert witness within this. One alternative proposed

[24] Browning, 'Law, History, and Holocaust Denial', pp.200-201; Dean. Interview.

by Richard Wilson regarding future historical involvement, is the establishment of international criminal research units that are independent of both the Defence and Prosecution as a medium to preserve the valuable historical research and protect historical testimony from the political interests of the Court.[25] Similarly, Robert Donia has argued that for historians appearing as expert witnesses in contemporary war crime trials, there needs to be 'a much better guide on how to be a historical expert witness'.[26] For Donia, expert historians need to fully understand the research and type of testimony that is required for a criminal trial, and an expert's duty to the Court; to adequately prepare themselves for the courtroom; and to practice 'sound answers', particularly in anticipating 'insulting' questions during cross-examination.[27] The 'consensus of critique' is right to address the specific trial contexts within which expert testimony is used. In reality, trials are used for a specific purpose within this wider socio-political context when engaging with the memory of traumatic history. Donia's argument reinforces the importance of understanding the experience of an expert witness. Future expert historians, in both Holocaust and war crime trials, need to have an awareness of any ulterior trial purpose prior to agreeing to testify and how the wider socio-political context can impact their testimony within the courtroom. Hence, it is understandable why some historians are hesitant or refuse to appear as expert witnesses. By comparing and learning from the experiences of expert witnesses across five case studies, this dissertation has provided guidance for future expert historians on what preparation and what to expect when entering the courtroom. This dissertation has compared the behaviours of expert historian witnesses, what is deemed to be good and bad expert testimony, the impact that different trial formats

[25] Wilson, *Writing History in International Criminal Trials*, p.225.
[26] Donia. Interview.
[27] Ibid.

can have on expert testimony, and finally, arguments used against experts under cross-examination. As Browning asserts, where the 'issue is forced', such as Holocaust denial trials, historians have an obligation to the wider historical discipline and memory of the Holocaust to appear in court.[28]

Finally, throughout this dissertation it has been clear that historical expert evidence is fundamental to Holocaust trials, albeit to varying degrees depending on the purpose of the trial. Given the intertwined relationship between Holocaust historiography and the legal arguments presented during the trials, it is in the interest of 'good history' for historians to continue to appear as expert witnesses. The law, particularly in criminal trials, will continue to present binary narratives of history to comply with the exceptionally high evidentiary standard that the courtroom demands. If historians did not appear as expert witnesses, it would be left to the lawyers to research, interpret, and present the historical evidence they deem relevant for the trial. Such an instance could result in a narrow interpretation of history, thereby damaging the wider narrative of the Holocaust within public memory. Historians would arguably do more harm to the historical record by not entering the courtroom than by appearing as expert witnesses. For this reason, historians should continue to appear as expert witnesses, though informed of the realities of a courtroom experience. Whilst it is the duty of the legal counsel to deliver a case to a courtroom, the research and presentation of historical evidence should reside with the profession that understand it most: the expert historians.

[28] Browning, 'Historians and Holocaust Denial', pp.777-778.

Appendix

Appendix A

Content of Expert's Report:[1]

19.4. Where rule 19.3(3) applies, an expert's report must:

a) give details of the expert's qualifications, relevant experience and accreditation;
b) give details of any literature or other information which the expert has relied on in making the report;
c) contain a statement setting out the substance of all facts given to the expert which are material to the opinions expressed in the report, or upon which those opinions are based;
d) make clear which of the facts stated in the report are within the expert's own knowledge;
e) where the expert has based an opinion or inference on a representation of fact or opinion made by another person for the purposes of criminal proceedings (for example, as to the outcome of an examination, measurement, test or experiment):
    (i) identify the person who made that representation to the expert,
    (ii) give the qualifications, relevant experience and any accreditation of that person, and
    (iii) certify that that person had personal knowledge of the matters stated in that representation;
f) where there is a range of opinion on the matters dealt with in the report:
    (i) summarise the range of opinion, and
    (ii) give reasons for the expert's own opinion;
g) if the expert is not able to give an opinion without qualification, state the qualification;
h) include such information as the court may need to decide whether the expert's opinion is sufficiently reliable to be admissible as evidence;
i) contain a summary of the conclusions reached;
j) contain a statement that the expert understands an expert's duty to the court, and has complied and will continue to comply with that duty; and
k) contain the same declaration of truth as a witness statement.

[1] The Criminal Procedure Rules. 19.4. October 2015. Amended April 2018 and April 2019. Accessed: 25 March 2020. [https://www.justice.gov.uk/courts/procedure-rules/criminal/docs/2015/crim-proc-rules-2015-part-19.pdf]

Abbreviations

CBP. RG6.4.2.	Christopher R. Browning Papers. 1967-2015. RG6.4.2. Pacific Lutheran University, Archives and Special Collections.
CBP. IRN 81871.	Christopher R. Browning Papers. IRN 81871. United States Holocaust Memorial Museum Archives, Washington, DC.
CPS	Crown Prosecution Service, (United Kingdom)
DP	Displaced Person
ECHR	European Court of Human Rights
EDES	National Democratic Hero Organisation
GDR	German Democratic Republic, (East Germany)
ICTY	International Criminal Tribunal for the Former Yugoslavia
IfZ	*Institut fur Zeitgeschichte* (Institute of Contemporary History)
IMT	Trial of Major War Criminals before the International Military Tribunal, 1946-1947
KPD	Communist Party of Germany
NMT	Nuremberg Military Tribunals, 1946-1949
PLU	Pacific Lutheran University
POW	Prisoner of War
QC	Queens Counsel
RHP. RG-074-005.	Raul Hilberg Papers, University of Vermont Special Collections Library.
SS	*Schutzstaffel* (Protection Squad)
StGB	German Penal Code
StPO	German Code of Criminal Procedure

TAE	Trial of Adolf Eichmann, 1961
UK	United Kingdom
USA	United States of America
USSR	Soviet Union

Abbreviated Cases

Andrews v Powis	*Andrews v Powis* (1728) 1 Lee 242, 161 ER 90
Barbie Trial	*Fédération Nationale de Déportés et Internés Résistants et Patriotes and Others v Barbie 78 ILR 125* (1987)
Belsen Trial	*Trial of Josef Kramer and Forty-Four Others* (British Military Court, Luneburg, 1945)
Brown v Board of Education	*Brown v Board of Education of Topeka,* 347 U.S. 483 (1954)
Buckley v Rice	*Buckley v Rice*, Thomas, 1 Plowden 118, 124, 75 Eng. Rep. 182, 192 (1554)
Celebici Case	*Prosecutor v Zejnil Delalic, Zdravko Mucic (aka "Pavo"), Hazim Delic, and Esad Landžo (aka "Zenga")*, ('*Celebici* Case'). IT-96-21-T. [1998]
Dey Trial	Trial of Bruno Dey (Hamburg, 2020)
Dachau Trial (1945)	*Trial of Martin Gottfried Weiss and Thirty-Nine Others* (General Military Government Court of The United States Zone, Dachau, German, 1945)
Daubert	*Daubert v Merrell Dow Pharmaceuticals, Inc.,* 509 U.S. 579 (1993)
Demjanjuk Trial (First)	*In the Matter of Extradition of John Demjanjuk,* 457 U.S. 1016 (1986)
Demjanjuk Trial, 1992	*State of Israel v. Ivan (John) Demjanjuk* (1992)
Emma Craft v Vanderbilt	*Craft v Vanderbilt University*, 940 F. Supp. 1185 (M.D. Tenn. 1996)
Eichmann Trial	*AG of the Government of Israel v Eichmann* (1961) 36 ILR 5

Einsatzgruppen Case	*The United States of America vs. Otto Ohlendorf, et al., Case No. 9* (United States Military Tribunal, Nuremberg, 1947-48)
Folkes v Chadd	*Folkes v Chadd* [1782] 3 Douglas 157. 99 ER 589
Foubert v de Cresseron	Foubert v de Cresseron (1698) Shower PC 194, 1 ER 130
Frankfurt-Auschwitz Trial	4 Ks 2/63. *Criminal Proceedings Against Mulka and Others* (Frankfurt am Main, 1963-65)
Geibel Trial	Trial of Paul Otto Geibel (Poland, 1954)
Hanning Trial	Trial of Reinhold Hanning (Detmold, 2016)
High Command Case	*The United States of America vs. Wilhelm von Leeb, et al. Case No. 12* (United States Military Tribunal, Nuremberg, 1947-48)
Hostage Case	*United States v Wilhelm List et al., Case No.7* (United States Military Tribunal, Nuremberg, 1947-48)
IMT	*Trial of Major War Criminals before the International Military Tribunal* (Nuremberg, 1946-1947)
Irving v Lipstadt (*Irving* Trial)	*Irving v Penguin Books Limited, Deborah E Lipstadt* [2000] EWHC QB 115
Kisluk Case	*Canada (Minister of Citizenship and Immigration) v. Kisluk,* (1998) 141 F.T.R. 155 (TD)
Koch Trial	Trial of Erich Koch (People's Court, Warsaw, 1958-59)
Koziy Case	*United States v Koziy,* 540 F. Supp. 25 (S.D. Fla. 1982)
Krupp Case	*The United States of America v Alfried Krupp, et al.* (Case No. 10) (United States Military Tribunal, Nuremberg, 1947-48)
Kungys Case	*Kungys v United States,* 483 U.S. 1017 (1987)

Leighton v Moore	*Leighton v Moore*. Libel File 68, No.108, 1600-01 (1600)
Linnas Case	*United States v Linnas*, 527 F. Supp. 426 (E.D.N.Y. 1981)
Lord Abinger v Ashton	*Lord Abinger v Ashton (1873) 17 LR Eq 358*
Lucas-Box v News Group Newspapers Ltd	*Lucas-Box v News Group Newspapers Ltd* [1986] 1 WLR 147
Medical Case	*United States of America v. Karl Brandt, et al.* (Case No. 1) (United States Military Tribunal, Nuremberg, 1946-1947)
Ministries Case	*United States of America vs. Ernst von Weizsäcker, et al.* (Case No. 11) (United States Military Tribunal, Nuremberg, 1948)
Osidach Case	*United States v Osidach*, 513 F. Supp. 51 (E.D. Pa. 1981)
Papon Trial	Trail of Maurice Papon (France, 1997-1998)
Popović et al.	*Prosecutor v Vujadin Popović, Ljubiša Beara, Drago Nikolić, Radivoje Miletić, Vinko Pandurević*. IT-05-88-A. [2015]
Polyukhovich Case	*Polyukhovich v The Commonwealth of Australia and Another* (1991) 172 CLR 501, [1991] HCA 32
Sawoniuk Trial	*R v. Sawoniuk* (1999)
Second Auschwitz Trial	*Der zweite Auschwitz-Prozess* (1965-66)
Second Treblinka Trial	Otherwise known as the Stangl Trial (Trial of Franz Stangl, Düsseldorf, 1970)
Serafinowicz Trial	*R v Serafinowicz* (1997)
Sprogis Case	*United States v Sprogis*, 763 F.2d 115 (2d Cir. 1985)
Ulm Trial	Ulm Einsatzkommando Trial (West Germany, 1958)

R v Keegstra	*R v Keegstra,* 1984 CanLII 1313 (AB QB)
R v Mohan	*R v Mohan*, 1994 CanLII 80 (SCC), [1994] 2 SCR 9
Remer Trial	Trial of Major Otto Remer (West Germany, 1952)
RuSHA Case	*United States of America vs. Ulrich Greifelt et al* (Case No. 8) (United States Military Tribunal, Nuremberg, 1947-48)
Wagner Trial	*R v Heinrich Wagner*, 4222 (Supreme Court of South Australia, Australia, 1993)
Woolmington v DPP	Woolmington v DPP [1935] UKHL 1
Zola Trial	Trial of Émile Zola (1898)
Zündel Appeal (1987)	*R v Zündel* (No.1) (1987), 31 C.C.C. (3d) 97 (Court of Appeal Ontario)
Zündel Appeal (1992)	*Ernst Zündel v Her Majesty the Queen.* [1992] 2 SCR 731. Case No. 21811
1985 *Zündel* Trial (First)	*R v Zündel* (1985)
1988 *Zündel* Trial (Second)	*Her Majesty the Queen v Ernst Zündel.* (No. 1) (1987), 31 C.C.C. (3d) 97

Glossary

Actus Reus	A criminal act that was the result of voluntary bodily movement.
Agency (of an expert witness)	A person who acts on his/her own behalf, make an informed and voluntary decision based on their knowledge.
Allied (powers, Second World War)	Great Britain, France, Soviet Union, and United States of America (Postwar Germany/ Berlin Sectors).
Bar	Legal profession as an institution, otherwise referred to as 'the Bar'.
Bench Trial	Trial by judge, as opposed to a trial by jury.
Common Law	A legal system based on the concept of judicial precedent. Within common law jurisdictions, it is the role of the Court to rely on precedents established in earlier common law trials and interpret the laws as they feel is appropriate to certain cases.
Cross-Examination	The examination of a witness who has already testified in order to check or discredit the witness's testimony, knowledge, or credibility.
Counsel	Legal Counsel, a term used to describe a barrister.
Examination-in-Chief	The questioning of a witness by the party which has called that witness to give evidence, in support of the case being made.
Expert Witness	An individual with knowledge or experience of a particular field or discipline beyond that to be expected of a layman.
Ghetto	An area of a city, especially a very poor area, where people of a particular race or religion live closely together and apart from other people; Nazi-created ghettos were built to

	segregate and force Jews to live together in small sections of towns and cities, furthering their dehumanisation.
Hearsay	An out-of-court statement, made in court, not based on the evidence presented in court.
Indictment	A formal charge or accusation of a serious crime.
Mens Rea	The intention or knowledge of wrongdoing that constitutes part of a crime.
R.	In legal case titles, *R.* refers to 'Regina'. *R.* refers to Her Majesty the Queen or the state.
Tribunal	A court of justice.
Voir-Dire	A preliminary examination of a witness or the jury pool by a judge or counsel.
Witness	A person who sees an event, typically a crime or accident, take place.

Glossary of German Terminology

Einsatzgruppen	*Schutzstaffel* (SS) Nazi paramilitary death squads that were responsible for mass killings, primarily by shooting. The units included members of the SS, the Security Police, and Order Police, and acted as mobile killing units.
Ergänzungsrichter	Substitute judge.
Führer	Leader.
Gutachten	Expert reports.
Institut fur Zeitgeschichte	IfZ, Institute of Contemporary History
Judenrat	A Jewish council, or administrative agency, imposed on Jewish communities during Nazi Occupation.
kapo	Prisoner assigned by SS guards to supervise forced labour and carry out administrative tasks.
Kommissarebefehl	Commissar Order.
Kristallnacht	Night of the Broken Glass (1938).
Lebensraum	Living space.
Nebenkläger	Adjunct Prosecutor or Co-Plaintiff.
Reichkommissar	Reich Commissioner.
Schutzmannschaft (Schuma)	Local Police Unit/ Auxiliary Police made up of native policemen serving in territories of the Soviet Union occupied by Nazi Germany during the Second World War (singular: *Schutzmanner*).

Sonderkommando	Work units made up of Nazi death camp prisoners, on threat of their own lives.
Volksdeutsche	German Folk.
Weltanschauung	World View.

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