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Survivors v. Adolf Eichmann: Staging an Atrocity Trial in the Gap Between History and Memory

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Introduction

In the early 1960s, international criminal courts were in a "no man's land" and the trial of Adolf Eichmann was a pivotal moment of the latter half of the twentieth century's understanding of international criminal law. Fifteen years prior, World War II ended and the ad hoc International Military Tribunal (IMT) in Nuremberg prosecuted high-ranking Nazis for crimes against humanity and war crimes.[1] It was not until the 1990s that the world saw another international ad hoc tribunal of this kind in Rwanda and the former Yugoslavia, far removed from the Nazi atrocities of World War II. In the interim, however, Nazi atrocities did not go unjudged. Rather, Nazis went on trials in national courts, where national judges took the helm in punishing Nazi atrocities in the decades after WWII.

The most famous of these interim trials, which was nationally held, yet universally watched, was the trial of Adolf Eichmann in Israel. To this day, it is a topic of discussion as to why Israel tried Eichmann and if it had the authority to do so. Nazi atrocities were not committed in Israel and, further, Israel was not even a country during the time of the crimes. This paper will explore Israel's multitude of reasons for wanting to try Adolf Eichmann on Israeli soil. It will further explore the challenged validity of those reasons and the ethical implications those reasons had on the production of a fair trial.

In Part I, this paper will explore why the trial of Adolf Eichmann even had to take place and what made Adolf Eichmann such a prominent figure that Israel wanted to try. In Part II, the paper will discuss the various reasons for holding the trial according to contemporary figures. Part III will discuss the ethical implications of the reasons put forth by contemporaries of the

[1] The discussion of Nuremberg in this paper focuses on the International Military Tribunal beginning in November 1945 and ending in October 1946.

trial. Finally, Part IV will distill my conclusion into a narrow pinpoint. The Eichmann trial finally presented the story of the Holocaust on a legal and didactic scale. The IMT was unable to meet purposes other than to establish guilt as a result of Nazi atrocities. The trial of Adolf Eichmann, on the other hand, was a vehicle for developing a universal Holocaust consciousness. It met this purpose more so than even obtaining a conviction. Although a conviction was important and the lack of one would have been ruinous, conviction was far from the only goal in this trial. Contrary to the most outspoken critic of the trial, Hannah Arendt, I will argue that convictions do not need to be the only goals in a war crimes trial. Justice is not just composed of a conviction of the perpetrator, and the Eichmann trial, in all of its controversial imperfections showed how the purpose to convict and the purpose to educate as a form of justice can come together to obtain the utmost justice.

I. Why Adolf Eichmann?

Immediately after the Second World War, the Allied victors came together for The Nuremberg Trial, where they set up the IMT and prosecuted high-ranking Nazis for crimes against humanity and war crimes. It was the first international court of its kind and was also seen as a model for any international criminal courts to come. Nuremberg was a prototype in which the Allied Powers banded together to try international war crimes. It "was a model of speed and efficiency."[2] Primarily relying on documentary material written by the Nazis themselves, the prosecutors at Nuremburg used hard documentary proof to show the heinous nature of the crimes committed. During the Nuremberg Trial, investigators used material written by the Nazis themselves; they traced every step of Hitler's regime and the war crimes committed. Through the

[2] Stephan Landsman, *The Eichmann Case and the Invention of the Witness-Driven Atrocity Trial*, 51 Colum. J. Transnat'l L. 69, 72 (2012).

primary use of documentary evidence, the Nuremberg prosecutors were also able to avoid the dangers of live witness testimony and instead used words found in Nazi archives.[3]

A. Who is Adolf Eichmann?

The name, Adolf Eichmann, first came up in the IMT on January 3, 1946, where he was labeled as the man who ran the Final Solution, the Nazi plan for Jewish genocide.[4] At that time, Eichmann was being held in an American prisoner-of-war camp, posing as a low-level German air force soldier instead of his actual position as a Lieutenant-Colonel.[5] After escaping, Eichmann absconded to Argentina under a false name.[6] At the IMT, he was implicated by Rudolf Hoess, commander of Auschwitz, who told the Tribunal that he discussed with Eichmann the use of Zyklon B gas to kill Jews, and Hoess further labelled Eichmann as the Nazi who continuously sent Jews to Auschwitz for extermination. In his memoirs, Hoess wrote that Eichmann "was totally obsessed with the idea of destroying every Jew he could get his hands on."[7]

Ten years later, Eichmann was mentioned directly on numerous occasions at the libel trial of Rudolph Kastner in Israel. Rudolph Kastner was the Head of the Zionist Rescue and Relief Committee in Budapest during World War II. He was accused of negotiating with Adolf Eichmann for the release of 1,700 prominent Jews, without telling the Budapest Jewish community what he had learned from Eichmann about the Final Solution.[8] At the time of the Holocaust, to Hungarian Jewish leaders like Kastner, Eichmann was seen as someone who held full control over Hungarian Jews; "he was the one responsible for the destruction of the Jewish

[3] Landsman, *supra* note 2, at 73.
[4] Bruce Brager, *The Trial of Adolf Eichmann: The Holocaust on Trial* 17 (1999).
[5] *Id.*
[6] *Id.*
[7] *Id.* at 80.
[8] Michael Shaked, *The Unknown Eichmann Trial: The Story of the Judge*, 29 Holocaust & Genocide Stud. 1, 3 (2015).

people, but he also symbolized hope since it was he who could save them."[9] In the opinion of that libel case, Judge Benjamin Halevi (who later went on to serve as one of the three judges in the Eichmann Trial) distinguished Adolf Eichmann as someone solely responsible for the destruction of Hungarian Jewry and compared him to the devil.[10]

It was not until August 1959, that a man living in Argentina tipped off the Israeli government to Eichmann's location.[11] After this information was verified, a group of Israeli Mossad agents arrived in Argentina to enact a kidnapping of Adolf Eichmann. When the Mossad captured Adolf Eichmann in Argentina, it was originally done illegally, without accordance to international law standards, and condemned by the United Nations Security Council.[12] However, by the time the District Court put Adolf Eichmann on trial, Argentina forgave Israel for that violation of sovereignty, allowing the Court to reject any of Eichmann's claims that his kidnapping had breached international law.[13]

If Israel's action of kidnapping Eichmann in Argentina was illegal at the time of the kidnapping under international law and unarguably risky, the best alternative to Israel's action would have been the following: "[I]nstead of capturing Eichmann and flying him to Israel, the Israeli agents could have killed him right then and there, in the streets of Buenos Aires."[14] Undoubtedly, this would have been the easier option, but only if "the Israelis merely wanted to punish Eichmann… The Israeli government had motives other than mere revenge."[15] At this

[9] Katie Cranford, *"Why Didn't Our Boys Just Shoot Him and Leave a Little Note?": The Trial of Adolf Eichmann in Israel*, 8 Mapping Politics 107, 109 (2017).
[10] Stephan Landsman, *Crimes of the Holocaust: The Law Confronts Hard Cases* 67 (2005).
[11] Moshe Pearlman, *Capture and Trial of Adolf Eichmann* 42 (1963).
[12] Question relating to the case of Adolf Eichmann, UN Doc. S/RES/138 (1960); UN Doc. S/PV.865–868 (1960).
[13] William Schabas, *The Contribution of the Eichmann Trial to International Law*, 26 LJIL 667, 684 (2013).
[14] Hannah Arendt, *Eichmann in Jerusalem* 265 (1965).
[15] Brager, *supra* note 4, at 12.

point in Israel's history, the government had already exercised its powers of targeted assassinations numerous times during hostilities with Arab countries they fought during these decades. So, the question remains: Why didn't the Mossad just kill Adolf Eichmann when they had the chance? They knew who he was and it is not like it would have been novel for the Mossad to conduct an assassination operation. However, the Israeli government kidnapped Eichmann, and put him on a plane to Israel to give him what they deemed a fair trial.

B. The Need for a Fair Trial

When Eichmann was kidnapped, the global community reacted in many different ways. The IMT and Eichmann trial, although only fifteen years apart, "occurred in fundamentally different historical contexts."[16] At Nuremberg, aggressive warfare was the central focus of the trial rather than crimes against the Jewish people. The objective goal was for documents to provide the main evidence necessary to convict, not survivor testimony. The Eichmann trial, according to the court, the prosecution, and others who had a hand in what was said at the trial, had to be different from Nuremberg because Nuremberg was simply not enough. Nuremberg only put forth a legal historical narrative of WWII Nazi atrocities, but that "did not suffice, since it did not articulate the victims' story but subsumed it in the general political and military story of the war."[17] The destruction of European Jewry was not the centerpiece of the narrative. According to an eyewitness of the Eichmann Trial, among the numerous "volumes of the Nuremberg judgments

[16] Laura Jockusch, *Prosecuting "Crimes against the Jewish People": The Eichmann Trial and the History of a Legal Concept*, *in* The Eichmann Trial Reconsidered 75, 76 (Rebecca Wittmann ed., 2021).
[17] Shoshana Felman, *Theaters of Justice: Arendt in Jerusalem, the Eichmann Trial, and the Redefinition of Legal Meaning in the Wake of the Holocaust*, 27 Critical Inquiry 201, 235 (Winter 2001); Lawrence Douglas, *The Memory of Judgment: Making Law and History in the Trials of the Holocaust* 107 (2001) (underscoring "the failure of the Nuremberg trial adequately to address the Nazi's most spectacular crimes" and characterizing the Nuremberg trial as having an approach which placed the Holocaust on the margins of what was legally relevant).

there were only six pages on the crimes committed against the Jews!"[18] Although Nuremberg began the process of "public awareness of the Nazi genocide of European Jews, only the Eichmann trial provided the details and narratives that would build Holocaust consciousness."[19] This is not to say that Nuremberg was a legal failure insofar as it established Holocaust consciousness. Without a doubt, Nuremberg brought attention to the Holocaust; but, it was done in such a way that survivors' stories were still silenced and remained as such for fifteen more years.

If Eichmann was going to be tried in Israel, by an Israeli court, as opposed to an international court, it needed to be done differently than Nuremberg. The documents accumulated by Israel prior to the trial were sufficient to convict Eichmann, but many felt that there needed to be something more. Nuremberg, by relying solely on documentation evidence, was boring, alienating, and distanced from the public.[20] If Israel was going to go through the trouble of finding Eichmann in Argentina, bringing him to Israel, trying him before a court of law in Israel, and going through all of the motions of a fair criminal trial, a conviction was not enough. This trial needed to be emotionally powerful. Therefore, although documents were of some importance to establish the prosecution's case, "it was the words of the survivors that provided the dramatic focus of the trial and that built a bridge from the accused to the 'world of ashes.'"[21]

II. Purposes of the Trial in the Words of Contemporaries

[18] Sergio I. Minerbi, *The Eichmann Trial Diary: An Eyewitness Account of the Trial That Revealed the Holocaust* 13 (Robert L. Miller trans., 2011).
[19] Jockusch, *supra* note 18, at 76.
[20] Shaked, *supra* note 10, at 16.
[21] Douglas, *supra* note 19, at 104–105.

What the trial of Adolf Eichmann was supposed to do for the world was of great controversy to contemporaries of the trial. The controversies boiled down to judging whether the purposes of an atrocity trial could be met by securing a conviction, or if there needed to be more. In arguing the didactic purposes against the judicial purposes, philosophers, politicians, and judges, formed drastically different opinions that are still debated in recent literature.

From the debate on Eichmann's kidnapping from Argentina, to the universal jurisdiction Israel claimed, to the prosecutorial strategy, to the final result of the death penalty, the trial was, from beginning to end, a contemporary debate. This section will provide some of the most important perspectives that are necessary for understanding why the plethora of survivor testimony was not only an important feature of the trial, but an integral aspect of historical understanding.

This section takes four different perspectives. First, it is important to mention Hannah Arendt as she was the foremost critic of the trial whose theory has become an essential element of judging war criminals. Second, Israeli Prime Minister David Ben Gurion presented the jurisdictional perspective of why it was so important to have the trial in Jerusalem. Third, the Attorney-General Gideon Hausner's perspective allows insight into the charges, his conduct throughout the trial, and reasons for serving various didactic purposes beyond the legal. Lastly, it is important to consider the panel of three judges and how they coped with the controversy of holding this trial.

A. Hannah Arendt

Contemporary political philosopher, Hannah Arendt, strongly felt that a courtroom was not meant to be "an emotional stage for spectacular public expression."[22] As a matter of jurisprudence, Arendt argued, nothing more than Eichmann's deeds should have been on trial. According to Arendt, "this case was built on what the Jews had suffered, not on what Eichmann had done."[23] Arendt further criticized the trial for its lack of universality. According to her, Nazi crimes were universal in nature because they affected all humanity. She felt as though the trial was too ethnocentric, focusing on the Jewish victims only.[24] For Arendt, the victims' stories should not be the centerpiece of the trial, rather, it is the perpetrator, alone, whose deeds should be on trial. However, the prosecutor and his supporters had a very different image of what the trial should be.

Arendt claims that the "purpose of a trial is to render justice, and nothing else."[25] Surely, Arendt's proposition leaves out what many other parties to the Eichmann Trial felt the trial should consist of. Although Arendt makes a valid claim that the purpose of a trial is to render justice, her claim is narrowly tailored to justice in the sense of the defendant. What other parties to the trial deciphered was that any defendant deserves a just trial, but that in some cases, it is more important to mete out justice for the victims and survivors of the perpetrator.

B. David Ben Gurion

Throughout the 1950s, Israeli society was formed from members of the *Yishuv* (the Jewish population in Israel prior to the formation of the State of Israel in 1948), Arabs, and one-fourth

[22] Felman, *supra* note 19, at 223.
[23] Arendt, *supra* note 16, at 6.
[24] *See id.* at 269–70; Shaked, *supra* note 10, at 26.
[25] Arendt, *supra* note 16, at 253.

of the population were refugees from the Holocaust.[26] However, the Holocaust was not yet considered to be integrated into the Jewish-Israeli pathos. High-ranking Israeli officials, including Prime Minister David Ben Gurion, had not yet figured out how to politically cope with the Holocaust. Commemorating the Holocaust with speeches and memorials was, at best, a liability. Instead, "the building of the new State of Israel, and not the construction of memorial sites and institutions, was the only fitting monument to the victims of the Holocaust."[27]

Once Adolf Eichmann was captured and brought to Jerusalem, Ben Gurion's viewpoint changed drastically. The Eichmann trial began to serve as "a national symbol of the State of Israel."[28] Immediately after the Israeli Parliament was informed of Eichmann's capture, Ben Gurion stated the importance in the actual trial was not just retribution; in fact, retribution was not "an appropriate response" to Nazi atrocities.[29] By December of 1960, Ben Gurion clarified his earlier arguments and emphasized the need for a rewritten Nuremberg, one that tells a Jewish story.[30]

Jewish organizations around the world criticized Israel's claim of jurisdiction. After all, Israel did not even exist as a country when the atrocities occurred.[31] Dr. Nahum Goldmann, who was then serving as President of the World Zionist Organization suggested another ad hoc international court, having representative judges from all areas that were under Nazi occupation

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[26] By the end of the 1950s, approximately 500,000 Holocaust survivors were living in Israel. Michael J. Bazyler & Julia Y. Scheppach, *The Strange and Curious History of the Law Used to Prosecute Adolf Eichmann*, 34 Loy. L.A. Int'l & Comp. L. Rev. 417 (Spring, 2012).
[27] Yehiam Weitz, *The Founding Father and the War Criminal's Trial: Ben Gurion and the Eichmann Trial*, 36 Yad Vashem Studies 211, 212 (2008).
[28] Yechiam Weitz, *In the Name of Six Million Accusers: Gideon Hausner as Attorney-general and His Place in the Eichmann Trial*, 14 Israel Studies 26 (2009).
[29] Cabinet Meeting, May 29, 1960, ISA 12968/10C.
[30] *See* Cabinet Meeting, December 4, 1960, ISA 12969/8C.
[31] However, it should be noted that Israel was recognized as a cobelligerent because of the active Jewish participation in World War II, and in 1954, was invited to formally terminate the state of war with West Germany. *See* Brager, *supra* note 4, at 59.

during the War.[32] Jewish theologian, Martin Buber, agreed with Goldmann, stating that since Nazis committed crimes against all of humanity, all of humanity should judge and rule on Eichmann.[33] Judge Joseph Proskauer, former president of the American Jewish Committee suggested that Eichmann be tried in West Germany.[34]

In his memoir, Attorney-General Gideon Hausner sardonically assesses these arguments: "It was the irony of fate that the Jews had to fight even for their right to try Eichmann, as they had had to fight so often in the past for rights accorded without question to others."[35] Additionally, Ben Gurion fervently rejected these options. For Ben Gurion, "limiting Israel's jurisdictional sovereignty was not an option once Jews had their own legal system."[36] This argument, legal or extralegal, was "remarkable, conjuring as it does the embryonic state in which the exterminated Jews of Europe are imagined as absent would-be citizens."[37]

Ben Gurion did not, at first, see the trial as an important historical event, which would allow for an international education of the Holocaust. Rather, the importance of this event is where it was to take place: "It is not the punishment that is the main thing here but the fact that the trial is taking place, and is taking place in Jerusalem."[38] Thus, one of Ben Gurion's most important objectives in having this trial was to show the strength of Israel as a safe haven for all the world's Jews. The trial was "a symbol of Hebrew sovereignty."[39] Ben Gurion helped to ensure

[32] Weitz, *supra* note 30, at 216–17.
[33] "Eichmann's Sentence," Martin Buber's letter to the *Haaretz* editorial board, December 27, 1961; *see* Weitz, *supra* note 30, at 218.
[34] Deborah E. Lipstadt, *The Eichmann Trial* 32–33 (2011).
[35] Gideon Hausner, *Justice in Jerusalem* 288 (4th ed. 1977).
[36] Jockusch, *supra* note 18, at 85.
[37] Douglas, *supra* note 19, at 120.
[38] Letter from David Ben Gurion to Yitzhak Y. Cohen (April 10, 1961).
[39] Weitz, *supra* note 30, at 247.

not only there was an educational message to the trial, but a Zionist message. In a response to New York Times journalists, he stated:

> To the new generation in Israel; born on the soil of Israel the homeland; who grew up in a free climate of a Jewish state; and never felt the taste of exile; to those who perhaps also did not know all that happened to the Jewish people 20 years ago; this trial revealed the whole tragic depth of a people in a foreign country, at the mercy of strangers and abandoned to the arbitrariness of despots and Jew haters.[40]

By trying Adolf Eichmann in the State of Israel, the trial became "a central piece in the Zionist project of nation-building."[41] Only in Jerusalem, could the victimization of the Jews be, for the first time, "*legally articulated*. In doing justice and in exercising Israeli jurisdiction, the Eichmann trial tries to legally reverse the long tradition of traumatization of the Jew by means of law."[42]

Besides a Zionist message, Ben Gurion had three other prominent motives:

> [1] To show the Israeli public, and in particular Israeli youth who knew nothing of that period, the spiritual and human wealth of the Jewish Diaspora [Jewish community outside of Israel] that was destroyed in the Holocaust… [2] To stress that the Holocaust of European Jewry was a unique phenomenon in all human history… [because] only in the Holocaust was there complete extermination… [and 3] To show the great damage that antisemitism causes.[43]

According to Ben Gurion, it was solely "the duty of the State of Israel, the only sovereign authority of the Jews, to tell in the greatest detail all there is to know about its scope and dreadfulness.[44] In other words, it was Israel's "historic duty" to the six million Jewish victims of the Holocaust to try Adolf Eichmann in an Israeli court.[45] What was so important to Ben Gurion

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[40] Answers to questions from journalists of the New York Times, February 9, 1961, 6341/178/c.
[41] Sonali Chakravarti, *More than "Cheap Sentimentality:" Victim Testimony at Nuremberg, the Eichmann Trial, and Truth Commissions*, 15 CONSTELLATIONS 223, 226 (2008).
[42] Felman, *supra* note 19, at 221.
[43] *See* Weitz, *supra* note 30, at 246–47.
[44] June 2, 1960, The Kiryah Tel Aviv, BGA, Correspondence.
[45] Neal Bascomb, *Hunting Eichmann* 304 (2009).

is that this was a trial about the murder of six million Jews, who were going to be tried by Jewish prosecutors, witnessed by Jewish survivors, in the Jewish state. Emphasizing this, Ben Gurion knew that this trial was not just a trial of Adolf Eichmann: "[F]or the first time in Jewish history, historical justice is being done by the sovereign Jewish people… It is not an individual that is in the dock at this historical trial, and not the Nazi regime alone but anti-Semitism throughout history."[46] Therefore, the trial was Ben Gurion's "symbolic assertion of Israel's right to represent Jews past and present, a display of Jewish sovereignty that had been impossible before 1948."[47] For this trial to be successful in the eyes of Ben Gurion, the government had "to show that Jews could find safety from virulent anti-Semitism only in Israel."[48]

Ben Gurion was deeply concerned that Israeli youth did not know about the Holocaust, nor about the European Jewish world that was lost.[49] He wanted "to impress the lessons of the Holocaust on the people of Israel, especially the younger generation."[50] Not only that, but it was important to Ben Gurion that the new generation changed their perspective, where Holocaust survivors were not fully integrated into the national community and were still seen as the weak European Jews who did not fight back against the Nazis.[51] Thus, the trial was to be a vehicle for Holocaust education. Not only was it to make sure that the Israelis and the international public knew that the Holocaust happened, but that the survivors were heroic.

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[46] Ben Gurion, *Israel: A Personal History* 599 (1972).
[47] David Cesarini, *Becoming Eichmann: Rethinking the Life, Crimes, and Trial of a "Desk Murderer"* 240 (2004).
[48] Symposium, *Victim Participation and Social Impact: Contemporary Lessons of the Eichmann Trial*, 31 Minn. J. Int'l L. 35, 38 (Summer, 2022). *See* Arendt, supra note 16, at 8 ("The trial was supposed to show [Israelis] what it meant to live among non-Jews, to convince them that only in Israel could a Jew be safe.").
[49] *See* Weitz, *supra* note 30, at 246.
[50] Tom Segev, *The Seventh Million* 327 (1991); *see* Symposium, *supra* note 52, at 38.
[51] *Id.*

During the trial itself, Ben Gurion was not present, because of traditional judicial principles. He "emphasized the need to respect the rules of the trial as in any ordinary criminal case. He strictly enforced the principle of separation" between the executive and the judiciary.[52] However, he did break that core democratic principle, as he became involved with the Chief Prosecutor's opening address. Prior to the trial, Attorney-General and Chief Prosecutor Gideon Hausner sent Ben Gurion a draft on which he commented extensively, encouraging Hausner to tell the whole story of the Holocaust (rather than just Eichmann's specific crimes) and asking Hausner to avoid certain issues such as the Nazi-Jewish negotiations (in which Eichmann played a significant role, but could cause Jews to be viewed in a less than heroic light).[53] Besides the opening statement, "[t]he indictment of Eichmann that emerged from Hausner's fevered exertions reflected his own preferences for the trial and the political imperatives handed down by Ben Gurion."[54]

C. Gideon Hausner

Mere weeks into his tenure as the Attorney-General of Israel, Gideon Hausner appointed himself as Chief Prosecutor of Adolf Eichmann even though he had never managed a criminal trial.[55] This was deliberate, as even prior to his appointment as Attorney-General, Hausner expressed his desire to be the prosecutor of Adolf Eichmann.[56] However, the question of strategy, for Hausner, was of great importance, as he was at first unclear of what the goals of this trial should be.

[52] Weitz, *supra* note 30, at 241.
[53] Cesarini, *supra* note 51, at 256.
[54] *Id.* at 252.
[55] Hanna Yablonka, *The State of Israel vs. Adolf Eichmann* 78 (2004).
[56] Weitz, *supra* note 31, at 30.

The power of the indictment and the shaping of the prosecution was solely up to Gideon Hausner. He decided the charges and the scope of which the evidence should take. As noted, he worked on his opening statement with Ben Gurion, whose vision was also laid out through Hausner's prosecution. In his memoir, Hausner extrapolated on his thought process in developing the course of the trial. A documentary approach

> was the course adopted at the Nuremberg Trials—a few witnesses and films of concentration camp horrors, interspersed with piles of documents… In order merely to secure a conviction, it was obviously enough to let the archives speak; a fraction of them would have sufficed to get Eichmann sentenced ten times over. But I knew we needed more than a conviction; we needed a living record of a gigantic human and national disaster.[57]

Unlike Nuremberg, Chief Prosecutor Gideon Hausner abhorred the idea of a narrow, document-focused proceeding; rather, he desired to present a detailed narrative of the Holocaust.[58]

Instead of putting forth documentary evidence, which he believed could "alienate and distance the public and the media,… [Hausner created] an experience made emotionally powerful through the oral testimony of living witnesses."[59] This narrative effort was Hausner's method of achieving justice:

> Hausner treated the Nazis' central crime as both the act of physical annihilation and the more profound attempt to erase memory itself – both of the cultural life of a people and of the crimes of the final solution. The act of creating an opportunity for the public sharing of the narratives of the survivors, the proxies of the dead, was itself a way of doing justice.[60]

Instead of limiting the case to documentary evidence featuring witnesses, Hausner put survivor testimony as the foundation of what this trial would mean for the act of bearing witness to the

[57] Hausner, *supra* note 38, at 291.
[58] *Id.* at 292.
[59] Shaked, *supra* note 10, at 16.
[60] Douglas, *supra* note 19, at 106.

Holocaust.[61] As Hausner prepared the indictment, "it was the Israeli Holocaust survivors who brought pressure to bear in favor of expanding the scope of the trial," which Hausner further embraced.[62] The trial, for Hausner, allowed "an event to be staged on behalf of the survivors in order to fulfill an obligation to them."[63]

Further, Hausner had the option to restrict his indictments. Hausner, alone, decided "whether the charge sheet would be limited, specifying particular acts about which Israeli evidence was strongest."[64] Hausner, too, rejected this model, although it would have made the case easier: "This would have undoubtedly simplified the legal argument. But then I would have to limit my evidence to these incidents alone and thus miss the point of the trial: the covering of the whole Jewish disaster."[65] Hausner was permitted, throughout the trial to expand the limits of evidence rules. Hannah Arendt heavily criticized Hausner's focus on the Holocaust rather than on Eichmann's actions and was against Hausner's parade of "witness after witness on the stand to testify to things that, while gruesome and true enough, had no or only the slightest connection with the deeds of the accused."[66]

Hausner's prosecutorial strategy was to reach beyond the conviction of Adolf Eichmann.[67] He even admitted as such although his words were not recorded in the trial record: "There are

[61] Symposium, *supra* note 52, at 42.
[62] Hanna Yablonka, *Preparing the Eichmann Trial: Who Really Did the Job?*, 1 THEORETICAL INQUIRES L. 369, 370 (2000).
[63] Douglas, *supra* note 19, at 162.
[64] Brager, *supra* note 4, at 44.
[65] Hausner, *supra* note 38, at 298.
[66] Arendt, *supra* note 16, at 285; *see* Molly Wilder, Note, *CURRENT DEVLOPMENTS 2013-3014: When a Prosecutor Should Introduce Irrelevant Evidence: Testimony and Ethics in the Eichmann Trial*, 27 Geo. J. Legal Ethics 935, 937 (Summer, 2014).
[67] *See id.*; *also see* Douglas, *supra* note 19, at 106.

plenty of incriminating testimonies against the accused, but there is also the history aspect. My aim is to turn this trial into a history of the Holocaust."[68]

There, also, was a dramatic aim to Hausner's approach to the trial.[69] Throughout the trial, Hausner "used exaggerated gestures in cross-examining Eichmann, constantly waving his index finger at the defendant, shouting at him, scolding him, and mocking him."[70] Although his dramatic prose was present throughout the entirety of the trial, it was most pushed forward in his opening statement in which he parsed out his reasons for a dramatic and unapologetically Jewish view of the trial: "The calamity of the Jewish People in this generation was the subject of consideration at a number of trials conducted in the wake of Germany's defeat in World War II,… [b]ut in none of those trials was the tragedy of the Jewry as a whole the central concern."[71] Ten days in, Hausner further invoked the Judaic aspect of this trial in addition to a portrayal of dramatic force: "When I stand before you here, Judges of Israel, to lead the prosecution of Adolf Eichmann, I am not standing alone. With me are six million accusers. But they cannot rise to their feet and point an accusing finger… Their blood cries out but their voice is not heard."[72] Hannah Arendt criticized Hausner's use of the metaphor for the blood of innocents, stating that the prosecution's metaphor "gave substance to the chief argument against the trial, that it was established not in order to satisfy the demands of justice but to still the victims' desire for and, perhaps, right to vengeance."[73]

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[68] *Yedioth Aharonoth*, May 5, 1961; *see* Weitz, *supra* note 31, at 38.
[69] *See* Harry Mulisch, *Criminal Case 40/61, The Trial of Adolf Eichmann: An Eyewitness Account* 50 (2005).
[70] Shaked, *supra* note 10, at 11; *see* Lipstadt, *supra* note 37, at 122–24.
[71] The Trial of Adolf Eichmann: Record of the Proceedings in the District Court of Jerusalem, 6 vols. (Jerusalem: Ministry of Justice, State of Israel, 1992–95, 1:63; *see* Douglas, *supra* note 19, at 102.
[72] The Trial of Adolf Eichmann: Record of the Proceedings in the District Court of Jerusalem, 6 vols. (Jerusalem: Ministry of Justice, State of Israel, 1992–95, 1:63.
[73] Arendt, *supra* note 16, at 239.

Lastly, it is important to note the similarities between Hausner and Ben Gurion. To be truthful, there were not many differences. Hausner literally served as an extension of Ben Gurion, who had taken great interest in his arguments and opening statements. However, Ben Gurion could not be present in order for this trial to be deemed legitimate. Therefore, Hausner's voice included Ben Gurion's who could not necessarily state the extent of his opinions.

D. The Judges[74]

The first issue with the judges, where we saw their perspectives on the trial, was in an argument against them. As soon as Eichmann was asked to state his pleas to the charges, his lawyer, Robert Servatius, took the time to question the judges' objectivity. Servatius objected that since all Jews were affected by the Holocaust, any Jewish judges (not just the three presiding Israeli judges) could not avoid their biases.[75] He contended that the presence of these judges presented "an unacceptably great risk that the judges harbored prejudice against the defendant because they had" relatives who were harmed by the charges brought against Eichmann.[76] In Interlocutory Decision No. 3, the three judges rejected Servatius's argument:

> [T]he judge, in the exercise of his duties, does not cease to be a man of flesh and blood, and with feelings, but the law requires that he know how to dominate his feelings and his emotions, for otherwise, he would never be capable of judging in a criminal case, which gives rise to feelings of horror.[77]

As the trial went on, Servatius and even Eichmann himself gained a respect for the judges' handling of the trial. Even Hannah Arendt complimented the judges for their objectivity. She specifically argued that Judge Landau "protected the integrity of the trial and secured a

[74] Much of the scholarship in this section is based on Judge Landau due to the article, Michael Shaked, *supra* note 10.
[75] Brager, *supra* note 4, at 56.
[76] Landsman, *supra* note 12, at 67.
[77] Quoted in Schabas, *supra* note 15, at 696.

reasonable measure of justice for the defendant."[78] Stephan Landsman further commends Judge Landau stating that he "labored day in and day out to keep the proceedings fair by insisting on decorum, by protecting the defendant from prosecutorial excesses, by carefully considering the evidentiary ramifications of proffered materials."[79] Judge Landau "rebuked Hausner for his 'unwillingness to sacrifice the social and educational value' of the trial" and often addressed Hausner's use of irrelevant testimony.[80]

Regardless of his personal feelings toward Gideon Hausner's behavior, Judge Landau recognized the significance of the symbolism of this trial and the fact that it was held in Israel. In his own words, Judge Landau wanted "to demonstrate to the people in Israel and in the world at large that here, our free state sits in justice and has a right to pronounce judgment on the persecutors of our people… I drew strength whenever I looked at the state emblem under which we sat in judgment."[81]

III. Ethical Implications of Meeting Those Purposes

This section will explore the primary implications of meeting the purposes set forth by Hausner and Ben Gurion. Their vision is what was primarily argued against in contemporary and later literature and their didactic purposes, without a doubt, did have ethical implications. Ben Gurion's behavior before the trial allowed the world to believe that he thought Eichmann was guilty before the trial even took place. Also, the allowance of Hausner's "parade of witnesses" had ethical implications that tended to often clash with the legal pursuits of a criminal trial. This

[78] Landsman, *supra* note 12, at 69; *see* Arendt, *supra* note 16, at 4.
[79] Landsman, *supra* note 12, at 69.
[80] Quoted in Shaked, *supra* note 10, at 16.
[81] *Id.* at 18. Landau's memoirs were never published as a work and are written in Hebrew. Michael Shaked cites the memoirs with his own translations. "Memoirs" 54.

section is here to show that there were issues with the didactic purposes that Hausner and Ben Gurion sought. It is a question as to whether the implications were so damaging so as to transform the trial into a spectacle rather than a judicial trial.

A. Guilty Before Proven Innocent?

On May 23, 1960, Prime Minister Ben Gurion announced to the Israeli Parliament (Knesset): "[A] short time ago the security services apprehended one of the most infamous Nazi criminals, Adolf Eichmann, who was responsible, together with the Nazi leadership for what they called, 'the final solution to the Jewish problem.'"[82] A few months later and before the trial began, a member of the Israeli Knesset announced: "This trial is not necessary for this defendant… This trial is necessary because we need to remind the world of what happened during World War II, something many would like to consign to oblivion."[83]

This begs a question: Was Eichmann guilty before he was even tried in the District Court? After Ben Gurion's announcement, the media described Eichmann as a "monster," "butcher," and "mass murderer."[84] By pronouncing Eichmann as "one of the most heinous Nazi war criminals, responsible for the extermination of six million Jews," Ben Gurion violated judicial principles.[85]

In addition, some of the judges in his trial detailed Eichmann's involvement in the Holocaust before he was brought to Israel. Judge Benjamin Halevi who later served as one of the three judges in the trial distinguished Adolf Eichmann as someone solely responsible for the destruction of Hungarian Jewry and compared him to the devil during the libel trial of Rudolf

[82] David Ben-Gurion, 23 May 1960, *KP*, XXIX:1291.
[83] Knesset Proceedings, XXIX: 2106, 8 August 1960; quoted in Segev, *supra* note 54, at 333; Brager, *supra* note 4, at 13.
[84] *See* Weitz, *supra* note 30, at 240.
[85] Yablonka, *supra* note 59, at 121–22; *see* Yehiam Weitz, *supra* note 30, at 241.

Kastner.[86] Given the fact that Adolf Eichmann was kidnapped from Argentina and proclaimed as a heinous Nazi war criminal prior to his trial, it suffices to say that many people saw him as guilty before he even entered the courtroom.

B. Evidentiary Limitations

As a precursor, it is important to note the most drastic deviation from a criminal trial that the Eichmann Trial presented. The defense witnesses, many of whom would have been Nazis or Nazi sympathizers, refused "to travel to Israel out of concern they would themselves be arrested and charged with war crimes… [T]he Attorney-General would not give them a safe conduct."[87] Eichmann's defense witnesses were never cross-examined in accordance with traditional criminal trial procedure, rather they submitted affidavits of their testimony. This presented a controversial move as the option to do this was in Gideon Hausner's hand, but he refused to allow defense witnesses to travel to Jerusalem with a safe conduct. Hanna Yablonka notes that this refusal of defense witnesses "was the only deviation of which everyone who wrote about the trial, whether in favour or against, disapproved."[88]

Regarding witnesses, Decision 13 ruled that "the prosecution was free to produce evidence of any act encompassed by the indictment whether or not Eichmann could be shown to have had substantial connection with that act."[89] Further, courts undertaking cases under the Nazi and Nazi Collaborators (Punishment) Law of 1950 were encouraged to "deviate from the rules of evidence if it is satisfied that this will promote the ascertainment of the truth and the just handling of the

[86] Landsman, *supra* note 12, at 67.
[87] Schabas, *supra* note 15, at 694.
[88] Yablonka, *supra* note 59, at 237; *see* Schabas, *supra* note 15, at 694.
[89] Landsman, *supra* note 2, at 82.

case."[90] Stephan Landsman goes as far as to say that the "court made up new rules to govern questions concerning relevance, the use of prejudicial materials, references to the character traits of the accused, and recital of hearsay or secondhand information."[91]

Hausner used this to his advantage not to secure a conviction, but to paint a full picture of the Holocaust of European Jewry. Rather than focusing on the personal actions of Adolf Eichmann, the prosecutor presented a history of the Holocaust.[92] He not only did this through his use of persuasive language inundated with references to Jewish history and law, but with 121 Holocaust survivors, witnesses to the tragedies of the Holocaust. Hausner called witnesses to *Kristallnacht*, the "Night of Broken Glass" in which Jewish businesses were ransacked, events in Poland, and the daily operations of Nazi death camps. However, Eichmann had no bearing on what went on during *Kristallnacht*, in Poland, or the daily operations of Auschwitz, Treblinka, Chelmno, and Majdanek. Evidently, by the time Hausner called all of the witnesses, at least forty of the 121 witnesses did not mention Eichmann or his role in their suffering.[93] Stephan Landsman saw this as an utter failure of the trial, stating that the trial "ceased to focus on Eichmann. It became preoccupied with atrocity… The heart of the case became the recollections of victims who were attempting to describe events that had transpired more than fifteen years before the trial, many of which had no connection to Eichmann's crimes."[94]

Adolf Eichmann's lawyer, Robert Servatius, objected to this as often as he could especially at the beginning and the judges later ruled that the prosecution must prove both that acts in question were committed and that Eichmann was responsible. However, this did not stop Hausner; he

[90] Nazi and Nazi Collaborators (Punishment) Law, 5710-1950, 4 LSI 154, § 15 (1949-1959) (Isr.).
[91] Landsman, *supra* note 12, at 93.
[92] *Id.* at 93–94.
[93] *Id.* at 94.
[94] Landsman, *supra* note 2, at 71–72.

"had no intention of curbing his witnesses and restricting their testimony to areas of direct relevance to Eichmann's activity."[95] It was challenging for the court to police irrelevant evidence because Hausner

> forced the court to balance the legal integrity of the trial against the testimonial need for survivors. It was, for the court, a double bind, as legal integrity came at the cost of insulting the memory of the dead and the experience of survivors, while fully accommodating the narrative impulse would have distorted the conventional legal form upon which the court believed its legitimacy rested.[96]

Further, when the evidence was most reliable, it was when survivors spoke of their personal stories and suffering in the Holocaust; but, when it was most relevant in discussing Adolf Eichmann's actions, it was least reliable.[97] Regardless of its ethical implications however, Hausner's "parade of witnesses" served what would be the most important purpose of this trial. Without the "parade of witnesses" there would simply be another Nuremberg, where the stories of the destruction of European Jewry were set aside.

IV. Securing the History of the Holocaust for All Mankind

The last section will detail the importance of the "parade of witnesses" and its impact on what witness-testimony means today in the law. These eye-witnesses, regardless of their impact on the decision making process, served the purpose of allowing the Holocaust to become part of the Jewish collective memory. For the first time, "trials undertaken in the aftermath of mass atrocities serve distinct expressive purposes beyond their primary function of determining a defendant's criminal responsibility."[98] The "parade of witnesses" transformed the trial into a

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[95] Cesarini, *supra* note 51, at 265; *see* The Trial of Adolf Eichmann: Record of the Proceedings in the District Court of Jerusalem, 6 vols. (Jerusalem: Ministry of Justice, State of Israel, 1992–95, 1:366–67.
[96] Douglas, *supra* note 19, at 138.
[97] *Id.* at 142; Brager, *supra* note 4, at 86 ("The more dramatic the testimony, the less it seemed to relate to Eichmann.").
[98] *See* Symposium, *supra* note 52, at 48.

"legitimation of both [legal] narratives [and storytelling] that could go beyond fact in a legal context and of catharsis as a necessary event."[99]

Starting with the indictment in which Eichmann was charged with his crimes against the Jewish people, Hausner "literally frames the accusations in the victims' names, as though speaking for the dead and giving voice" to the victims of the Holocaust.[100] Gideon Hausner wrote in his memoir:

> It was mainly through the testimony of witnesses that the events could be reproduced in court, and thus conveyed to the people of Israel and to the world at large… so it would not remain the fantastic, unbelievable apparition that emerges from Nazi documents. For the whole extent of the Jewish catastrophe surpasses human comprehension.[101]

Although the Nuremberg Trials presented the story of World War II Nazi atrocities, "there was no precedent for the portrayal of the Holocaust in a judicial context."[102] It was the *portrayal* of the Holocaust that made this trial so different from the Nazi atrocity trials before it. For Gideon Hausner, the only way to meet his and David Ben Gurion's didactic aims was to revolve the trial around survivor testimony.[103] In stark contrast to the IMT, "the Israeli government constructed the Eichmann prosecution to place the Holocaust and its Jewish victims at the center—literally as witnesses, figuratively as the prosecuting authority, and politically as crucial legitimation for the young State of Israel."[104]

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[99] Juliet Rogers, *Nostalgia for a Reconciled Future – Scenes of Catharsis and Apology in Israel and Australia*, 20 Griffith L. Rev. 252, 256 (2011).
[100] Felman, *supra* note 19, at 213–214.
[101] Hausner, *supra* note 38, at 292.
[102] Shaked, *supra* note 10, at 2.
[103] *See* Symposium, *supra* note 52, at 48.
[104] *Id.* at 46–47.

The Eichmann trial provided the first forum of the presentation of survivor testimony surrounding the Holocaust. The stories gave the victims a voice and the survivors a chance to tell their stories to the world. Before the Eichmann trial, Israelis were hesitant to speak about the Holocaust. However, "[i]n bearing witness in the courtroom, the survivors broke that silence.[105] The prior silence was deafening. In his book, *The Seventh Million*, Tom Segev labels the Eichmann trial as a "'national group therapy,' a ritual of national catharsis in which a public space was made available in which to grieve for traumatic private memory."[106]

By trying Adolf Eichmann in the State of Israel, by Jewish judges, by Jewish prosecutors, and through the use of Holocaust survivor testimony, the destruction of European Jewry served to be "the centerpiece" of the trial.[107] At the trial, Israel, "a sovereign Jewish state acted as the direct representative" of the six million killed.[108] Shoshanna Felman describes this as a "monumental history… [where] the monument the trial seeks to build in judging Eichmann is erected not to romantic greatness (not to those who make or *have made* history) but to the dead (a monument to those who *were subject* to history)."[109] The trial, even without its verdict, produced a living history of the Holocaust and in speaking for the dead, Gideon Hausner and his parade of witnesses made this trial into a legal monument, even more so than a case with precedential effect.

Through the parade of witnesses, the prosecution transformed each survivor witness "into a trope of the rebirth of the Jewish people in the state of Israel… Hausner ultimately turned the

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[105] Shaked, *supra* note 10, at 17.
[106] Douglas, *supra* note 19, at 109; Segev, *supra* note 54, at 351; *see* Felman, *supra* note 19, at 227 (arguing that the trial is "a *legal process of translation* of thousands of private, secret traumas into one collective, public, and communally acknowledged one").
[107] Lipstadt, *supra* note 37, at 54.
[108] Jockusch, *supra* note 18, at 84.
[109] Felman, *supra* note 19, at 215.

trial itself into an expression of the very powers of will and memory that made individual survival possible."[110] French historian Annette Wieviorka believes that through their testimony, Holocaust survivors created their own identity as survivors and invented the witness as "an embodiment of memory, attesting to the past and to the continuing presence of the past… the [Holocaust] came to be defined as a succession of individual experiences with which the public was supposed to identify."[111] The trial itself, with its "parade of witnesses," "demands, then to be viewed as a legal success insofar as it transformed understandings of what the law can and should do in the wake of traumatic history."[112]

When it came down to the final judgment of the trial, survivor testimony served a limited impact.[113] Hanna Yablonka notes that from a legal perspective, the judges' evidentiary balancing barely took survivor testimony into account, in contrast to the Israeli public who were deeply affected by victim narratives.[114] In their judgment, the justices took special care to emphasize the extrajudicial value of survivor testimony, labelling the testimony as "by-products of the trial."[115] In making their decision, therefore, the judges primarily relied on documents instead of the survivor testimony in making their decision.[116]

Regardless of its evidentiary impact, Shoshanna Felman notes that the victims' story was created for the first time; it was "a groundbreaking narrative event that is itself historically and

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[110] Douglas, *supra* note 19, at 172–73.
[111] Annette Wieviorka, The Era of the Witness 88 (2006). *See* Michael Bachmann, *Theatre and the Drama of Law: A 'Theatrical History' of the Eichmann Trial*, 14 LTC 94, 107 (2010).
[112] Douglas, *supra* note 19, at 174.
[113] Jockusch, *supra* note 18, at 91.
[114] *Id.*; *see* Hanna Yablonka, *As Heard by the Witnesses, the Public, and the Judges: Three Variations on the Testimony in the Eichmann Trial*, *in* Holocaust Historiography in Context: Emergence, Challenges, Polemics and Achievements (David Bankier and Dan Michman, eds., 2008), 585.
[115] The Trial of Adolf Eichmann: Record of the Proceedings in the District Court of Jerusalem, 6 vols. (Jerusalem: Ministry of Justice, State of Israel, 1992–95, 5:2083.
[116] Yablonka, *supra* note 118, at 585.

legally unprecedented."[117] In Jerusalem, "for the first time victims were legitimized and validated and their newborn discourse was empowered by their new roles, not as victims, but as prosecution witnesses within the trial."[118] In the District Court of Jerusalem, the survivors of the Holocaust who were called upon the witness stand, were, for the first time empowered to tell their stories to a listening world. It was a world where they were no longer victims, but they themselves could be Eichmann's prosecutors.

Conclusion

The trial of Adolf Eichmann was a trial that could not have even been imagined thirty years prior. It was a slow process of ensuring heart-wrenching witness testimony from over 120 prosecution witnesses and 1,400 documents submitted as exhibits. It was the "Holocaust, rather than Eichmann's own crimes [that] set its agenda."[119] In this way, eyewitness testimony of atrocities served as the centerpiece of the trial, thus paving the way for Truth Commissions and other international criminal tribunals.

Regardless of its limitations, the Eichmann Trial's impact on international criminal law cannot be understated. Leora Bilsky writes that the impact on the law comes from Hausner's "unique interpretation of the meaning of justice, an interpretation that not only insists on telling the untold story but also acknowledges the importance of who tells it."[120] The IMT was unable to meet purposes other than to establish guilt as a result of Nazi atrocities. The trial of Adolf Eichmann was a vehicle for developing a universal Holocaust consciousness and a method of education. It met these purposes more so than even obtaining a conviction. Although a

[117] Felman, *supra* note 19, at 225.
[118] *Id.* at 232.
[119] Stephan Landsman, *supra* note 12, at 56.
[120] Leora Bilsky, Transformative Justice: Israeli Identity on Trial 114 (Ann Arbor, 2004).

conviction was important it was far from the only goal in this trial. That being said, convictions do not need to be the only goals in a war crimes trial. Justice is not just composed of a conviction of the perpetrator, and the Eichmann trial, in all of its controversial imperfections showed how the purpose to convict and the purpose to educate as a form of justice can come together to obtain the utmost justice.