

FIFTY YEARS AFTER: A CRITICAL LOOK AT THE EICHMANN TRIAL

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The Prosecution in the Eichmann trial exaggerated Eichmann's role in the Holocaust, due to political considerations and ignorance. New information, including the reports of a trial observer, a German prosecutor experienced in Nazi crimes, helps to establish the level of knowledge available in 1961. Placed into the context of investigation files dealing with the most important Holocaust related crimes up to 1961, an in-depth assessment of the extent to which the prosecution's case against Eichmann reflected the historical facts is possible. Hannah Arendt and other commentators' assertion, that the Eichmann trial was instrumental in starting a wave of prosecutions of Nazi crimes in Germany, can now be shown to be unfounded. A close look at the Prosecution's evidence demonstrates the problems associated with the utilization of post-war affidavits of Nazi perpetrators and the selective use of survivor testimony. This makes the didactic significance doubtful, with recent commentators attributed to the case.

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I. A VIEW ON THE PAST FROM THE PRESENT

At the time of a major anniversary—a half century—we do not only look back at the past event, but also measure the distance between then and now. What has happened in between? Has our knowledge increased? Has our view of the past changed?

Concerning the Eichmann trial, recently discovered Israeli archival findings provide an in-depth view on the political background of the case. Likewise, the reports of a trial observer, a prosecutor experienced in the investigation of Holocaust crimes, now help us to assess whether the case against Eichmann correctly reflected the level of knowledge about Nazi crimes available in 1961. These two sources can assist us in taking a critical look at opinions about the Eichmann trial voiced in the literature in the last fifteen years. Was the trial instrumental in empowering Holocaust survivors by giving them a voice? Is the didactic result, the narrative generated, equally or more important than the strict observation of the rule of law?

II. THE POLITICAL FACTOR

The findings of Israeli historians add a new dimension to our knowledge of the political background of the Eichmann trial.¹ David Ben-Gurion, then Prime Minister of Israel and a towering figure in Israeli politics, set the tone when he announced Adolf Eichmann's capture to the Knesset on May 23, 1960, calling Eichmann "the greatest war criminal of all time."² The trial was meant to remind the world that "the Holocaust obligated them to support the only Jewish state on earth;"³ to establish the Holocaust as a unique historical event; to educate the younger generation in Israel about the past; to strengthen the Zionist narrative; and to create a link between the Arabs and the Holocaust. "The trial was only a medium . . . the real purpose of the trial was to give voice to the Jewish people, for whom Israel claimed to speak in the ideological spirit of Zionism."⁴ Consequently,

¹ See HANNA YABLONKA, *THE STATE OF ISRAEL VS. ADOLF EICHMANN* (Ora Cummings & David Herman trans., 2004) (2001) (utilizing newly available archival sources); see also TOM SEGEV, *THE SEVENTH MILLION* (Haim Watzman trans., 1993) (1991) (on the impact of the Holocaust and Eichmann trial on Israel).

² Hanna Yablonka, *Preparing the Eichmann Trial: Who Really Did the Job?*, 1 THEORETICAL INQUIRIES IN L. 369, 370–71 (2000) (quoting and translating Ben-Gurion's speech, as recorded in 29 DIVREI HAKNESSET 1291 (1960)); accord JACOB ROBINSON, *AND THE CROOKED SHALL BE MADE STRAIGHT: THE EICHMANN TRIAL, THE JEWISH CATASTROPHE, AND HANNAH ARENDT'S NARRATIVE* 105 (1965) (providing a translation of the same statement as "one of the greatest Nazi war criminals . . .").

³ SEGEV, *supra* note 1, at 327.

⁴ *Id.* at 358; cf. IDITH ZERTAL, *ISRAEL'S HOLOCAUST AND THE POLITICS OF NATIONHOOD* 108 (2005) ("The desire to legitimize the will to power was the sub-text of the entire trial and the discourse which grew out of it.").

Ben-Gurion attacked critics who argued that Eichmann should be tried by an international court as anti-Semites or Jews with an inferiority complex.⁵ The Israeli government invested a lot to give the trial as much media prominence as possible.⁶ A specific view on history—“The subject of the trial was Jewish suffering: the Jewish nation was presented as a constant victim throughout history”⁷—was clear not only from Ben-Gurion’s statements, but also from the language used throughout the trial by Attorney General and chief prosecutor Gideon Hausner. Several contemporaneous observers have commented on that.⁸

What had not been known was the extent of political interference, and how accommodating the prosecution had been.⁹ For example, Ben-Gurion vetted Hausner’s opening speech and influenced the report of the historical expert Salo Baron.¹⁰ Foreign Minister Golda Meir wanted prominent mentioning of the former Mufti of Jerusalem, Al-Husseini, in order to create a link between the Nazis and the Arab national movement.¹¹ Several countries had specific wishes how the past should be presented.¹² Politics, presumably even to the level of party politics, played a role in the selection of witnesses. In the mid-fifties another Holocaust-related trial, the Rudolf Kasztner trial, had had negative political repercussions for Ben-Gurion’s

⁵ Ylana N. Miller, *Creating Unity Through History: The Eichmann Trial as Transition*, 1 J. MODERN JEWISH STUD. 131, 135 (2002); accord SEGEV, *supra* note 1, at 332.

⁶ Michael Patrick Murray, A Study in Public International Law: Comparing the Trial of Adolf Eichmann in Jerusalem with the Trial of the Major German War Criminals V-57, n.51 (1973) (unpublished Ph.D. dissertation, George Washington University) (on file with the Ohio State University Depository). The courtroom provided space for 500 journalists. Given their financial investment, the Israeli government was disturbed by the flagging interest of the media after a few weeks. *Id.*; see also 1 MINISTRY OF JUSTICE, STATE OF ISRAEL, THE TRIAL OF ADOLF EICHMANN 1–2 (1992) (describing the decision of the trial court to allow live coverage of the trial).

⁷ YABLONKA, *supra* note 1, at 251.

⁸ See, e.g., HANNAH ARENDT, EICHMANN IN JERUSALEM: A REPORT ON THE BANALITY OF EVIL (1963).

⁹ See YABLONKA, *supra* note 1, at 46–120 (discussing the role of political leaders in shaping prosecution strategies). The Israeli police force responsible for the investigation, Bureau 06, resented the interference. *Id.* at 64, 79–87.

¹⁰ Baron was an eminent historian from Columbia University. YABLONKA, *supra* note 1, at 102 (mentions Ben-Gurion’s insistence that the expert should refer to the poet Bialik). Accord 1 MINISTRY OF JUSTICE, *supra* note 6, at 179 (obligingly, answering a question from the Attorney General, Baron praised a number of Jewish thinkers and leaders, including Bialik and Ben-Gurion); see also SEGEV, *supra* note 1, at 340.

¹¹ YABLONKA, *supra* note 1, at 84–86; see also ZERTAL, *supra* note 4, at 98–103.

¹² YABLONKA, *supra* note 1, at 74–75. Yugoslavia, for example, did not want reference to Croat collaboration with Nazi Germany, but only to former Minister of the Interior, Andrija Artukovitch. *Id.*

party. According to historian Tom Segev, the party wanted “to reassert its control over the heritage of the Holocaust.”¹³

Records declassified after the political changes in Communist countries allow insight in their concerted efforts to utilize the Eichmann trial for an attack on the capitalist West, embodied by the Federal Republic of Germany. The direct target was Hans Globke, who was considered Chancellor Konrad Adenauer’s right-hand man. The aim was to implicate Globke in the Holocaust and make him appear a collaborator of Eichmann.¹⁴ While the campaign itself is well-known, newly available records of GDR authorities now provide more detail.¹⁵ They show widespread cooperation among politicians and secret services in various Communist countries and the utilization of publicists and historians, some of them linked to the Eichmann trial.¹⁶ The Federal Republic, in turn, launched a countercampaign to limit the

¹³ SEGEV, *supra* note 1, at 328; see also YABLONKA, *supra* note 1, at 115 (“Did party consideration influence the selection of witnesses? The written records are rather sparse, but one may assume with considerable certainty that this was the case.”). For more information on the Kasztner trial, see generally LEORA BILSKY, TRANSFORMATIVE JUSTICE: ISRAELI IDENTITY ON TRIAL 19–82 (2004); PNINA LAHAV, JUDGMENT IN JERUSALEM 121–44 (1997).

¹⁴ ERIK LOMMATZSCH, HANS GLOBKE (1898–1973): BEAMTER IM DRITTEN REICH UND STAATSSSEKRETÄR ADENAUERS (2009). Globke’s title was “*Staatssekretär im Bundeskanzleramt*” [State Secretary at the Federal Chancellery]. In 1963, the GDR staged a show trial against him. Globke’s activities in the Nazi period span writing the legal commentary on the 1935 “Nuremberg Laws” and involvement in anti-Nazi resistance. I believe that the allegations about Globke’s participation in Eichmann’s crimes are false. Lommatzsch’s book provides a balanced view on Globke. *Id.* Ben-Gurion and his government supported Adenauer. See CHRISTINA GROBE, DER EICHMANN-PROZESS ZWISCHEN RECHT UND POLITIK (1995).

¹⁵ Records created by the GDR authorities are available in microfilm in the Archives of Foreign Ministry [*Politisches Archiv des Auswärtigen Amtes*], Berlin, file numbers: MfAA LS-A 381; MfAA A 16242; MfAA A 13.740; MfAA A 1444; MfAA A 2925. The records show the involvement of Hungary, Poland, Czechoslovakia, Romania and the Soviet Union. However, only the tip of the iceberg has become visible; a full review of archival sources in other former Communist countries would be needed. The available records reflect, among other subjects, the reactions to Israel’s request for documents as evidence against Eichmann. *Id.* An Austrian trial observer, involved in Nazi prosecutions, reported that journalists from Communist countries seemed to have been under instructions from their home countries for what time periods to attend the trial, Wiesinger to Austrian Embassy in Tel Aviv, Austrian State Archives [*Österreichisches Staatsarchiv*], Archives of the Republic [*Archiv der Republik*] file number BMI GZ 20.765-2A/62 (July 12, 1961).

¹⁶ Letter from Helmer, Foreign Ministry of GDR, to Vesper, GDR Ambassador to Hungary Archives of Foreign Ministry [*Politisches Archiv des Auswärtigen Amtes*], Berlin, file number: MfAA A 13.740 (Jan. 17, 1961) (noting that Hungarian Holocaust survivor Jenő Levai’s book: EICHMANN IN UNGARN (1961) had been commissioned for the Eichmann trial and was vetted by the Foreign Office of the GDR). Levai was a key figure. Bureau 06 contacted him during trial preparations. Joseph Kermish, *Yad Vashem Archives’ Contribution to Preparation of the Eichmann Trial*, in AFTER THE EICHMANN TRIAL: YAD VASHEM BULLETIN 43 (1962). Levai was in Jerusalem during the trial and Hausner tried to call him as a witness. 3 MINISTRY OF JUSTICE, STATE OF ISRAEL, THE TRIAL OF ADOLF EICHMANN 1362–64 (1992). In a publication targeting Globke, an affidavit by Levai from 1961 is printed; which I find to

political fallout of the trial. Apart from making information about Germany's efforts to bring Nazi perpetrators to justice publicly available, the Foreign Minister sent a diplomatic delegation to Jerusalem, and German Justice authorities sent Dietrich Zeug, a prosecutor specialized in Nazi crimes. His reports have only recently been declassified, and we will come back to them in the following.

The political aims sketched out above were completely different. Israel wanted to create a full narrative of the Holocaust, suitable to the interests of the state and to Zionism. The Communist countries wanted to delegitimize the West. The Federal Republic wanted to distance itself from the Nazi past. What they all had in common is the wish to create a politically usable image of the past.

III. THE EICHMANN TRIAL IN THE NAZI PROSECUTION FRAMEWORK OF 1961

The Eichmann trial was not the only trial in this period dealing with Nazi perpetrators. Apart from the Kasztner trial in the mid-fifties in Israel, several European countries dealt with Nazi crimes on an ongoing basis. The Soviet Union launched a new series of show trials in 1961 and 1962. The Federal Republic of Germany was particularly active with investigations.¹⁷ A 1958 trial concerning the Holocaust in the German-Lithuanian border region led to the realization that crimes committed in Eastern Europe had not been sufficiently investigated. This led, in turn, to the creation of the "Central Agency for the Investigation of Nazi Crimes" (*Zentrale Stelle der Landesjustizverwaltungen*) which was charged with systematic investigations of Nazi crimes before the statute of limitations set in.¹⁸ Its creation was, of course, highly contested, as a large part of the German population did not want a continuation of Nazi trials.¹⁹ Parts of the legal system shared this negative attitude. Those who chose to involve themselves in the prosecution of Nazi crimes did so out of moral conviction, not careerism.

In the following, we will situate the case against Adolf Eichmann in the contemporaneous framework and evaluate it using the level of infor-

be historically untrue. REINHARD M. STRECKER, DR. HANS GLOBKE: AKTENAUZÜGE, DOKUMENTE 270 (1961).

¹⁷ A good overview is provided by the lecture of Adalbert Rückerl, then head of Central Agency, in Israel to representatives of the Israel Police, Yad Vashem and Israeli media, Main State Archives [*Hauptstaatsarchiv*], Stuttgart, file number EA 4/106, Bü 90, (Sept. 8, 1969).

¹⁸ See generally ADALBERT RÜCKERL, DIE STRAFVERFOLGUNG VON NS- VERBRECHEN 1945–1978 (1979) (providing an overview of the work of the Central Agency). The German debate over the statute of limitations for murder cannot be dealt with in this article. Suffice it to say, that in the end Germany decided to abolish it.

¹⁹ See *id.*

mation about Nazi crimes and the Holocaust available at the time.²⁰ How to measure what was known? The reports by Dietrich Zeug, a specialist on Nazi prosecutions who was present at the Eichmann trial in Jerusalem for the full length of the hearing (apart from the sentencing), can serve as a conduit to help us measure what was known. From April to August 1961 he wrote twenty-nine reports to his superiors at the Central Agency and the prosecution office (*Staatsanwaltschaft*) in Frankfurt, Main.²¹ Zeug was also in contact with Fritz Bauer, the Attorney General (*Generalstaatsanwalt*) of the Province of Hessen in Frankfurt, a man very dedicated to the prosecution of Nazi crimes who had played a crucial role in the identification and capture of Eichmann in Argentina.²²

Zeug had joined the Central Agency in May of 1959, a few months after its foundation.²³ His responsibilities included investigations of crimes committed in the District of Lublin, located in the part of occupied Poland called "*Generalgouvernement*." The SS and Police Leader in Lublin had directed a major mass-murder operation, code-named "*Aktion Reinhardt*," during which between one and a half to two million Jewish victims were gassed in the Belzec, Sobibor and Treblinka death camps.²⁴ Zeug's case files reveal an active and determined prosecutor. After he had opened an investigation on Treblinka on July 9, 1959, the deputy commander of the camp was soon identified and then arrested on December 2, 1959.²⁵ Zeug

²⁰ Results of investigations or trials are not part of this analysis, only the information available in 1961. The Central Agency is in charge of preliminary investigations only. Afterwards, they hand cases over to the regional prosecution office, in whose district the main accused lives. These prosecutors investigate further and bring cases to court.

²¹ See generally DIETRICH ZEUG, REPORTS TO SUPERIORS [hereinafter ZEUG] (on file with the Main State Archives [*Hauptstaatsarchiv*], Stuttgart, file number EA 4/106, Bü 12).

²² See IRMTRUD WOJAK, EICHMANN'S MEMOIREN: EIN KRITISCHER ESSAY (2001). Bauer had received crucial information from a German Jewish emigrant in Argentina, he traveled twice to Israel to pass this on to the Israeli authorities and prod them into action. Several others have claimed to have "hunted" Eichmann, in particular Wiesenthal. *Id.* See also SEGEV, *supra* note 1, at 324–26; YABLONKA, *supra* note 1, at 15–16. See generally SIMON WIESENTHAL, ICH JAGTE EICHMANN: TATSACHENBERICHT (1961). A rival Nazi "Hunter," Tuviah Friedman, recounted that he had remonstrated with Wiesenthal, after the latter had told an audience in Montreal in 1962 that he had personally captured Eichmann. TUVIA FRIEDMAN, NAZI HUNTER: 60 YEARS LATER (1945–2005) 28ff (David C. Gross ed., trans. 2006).

²³ See PROSECUTION OFFICE [*Staatsanwaltschaft*], FRANKFURT TO ISRAEL MISSION, COLOGNE (Jan. 16, 1961) (on file with the German Federal Archives [*Bundesarchiv*], Koblenz branch, file number B 141/21887) (noting that Zeug was born in 1930. He joined the Central Agency at the relatively young age of 29).

²⁴ See ZEUG, *supra* note 21 (May 29, 1961); see also "AKTION REINHARDT": DER VÖLKERMORD AN DEN JUDEN IM GENERALGOUVERNEMENT 1941–1944 (Bogdan Musial ed., 2004) (providing a good overview of events).

was sent to Jerusalem because of his extensive knowledge of the subject matter of the trial.²⁶

A. *Zeug's Reports*

Zeug was commissioned to follow the Eichmann trial and collect as much information as possible that might be beneficial to German cases, not only for those of the Central Agency, but also of other attorneys' offices. In addition, he was to strengthen relations with a specialized Israeli Police unit and with Yad Vashem archives, with which the German authorities were cooperating closely.²⁷ He also planned to interrogate Eichmann following the trial. Zeug's first impressions were very positive, and he commented on how well he was received by the prosecution team.²⁸ Afterwards, his comments became critical. Zeug identified that not much information presented by the prosecution was unfamiliar to him. In fact, the Central Agency's knowledge regarding some core points of the indictment was superior.²⁹ On May 10, 1961, he suggested to his superiors to return early.³⁰ While he followed the trial to the end, his final report confirmed his overall critical view of the prosecution's presentation of evidence and manner of argumentation.³¹

Zeug had, of course, neither doubted that Eichmann was a major Nazi perpetrator nor subscribed to the defense's argument that Eichmann

²⁵ See DIETRICH ZEUG, MEMO TO FILE (July 9, 1959) (on file with the German Federal Archives [*Bundesarchiv*], Ludwigsburg branch, file number B 162/3817); see also ZEUG TO SCHÜLE (Dec. 2, 1959) (on file with the German Federal Archives [*Bundesarchiv*], Ludwigsburg branch, file number B 162/3819).

²⁶ See GRÜTZNER, FEDERAL MINISTRY OF JUSTICE, MEMO TO FILE (Mar. 20, 1961) (on file with the German Federal Archives [*Bundesarchiv*], Koblenz branch, file number B 141/21887).

²⁷ It is unclear why this specialized police unit had not been incorporated in Bureau 06, which was in charge of conducting the investigations and preparing the case against Eichmann. Zeug also visited other archives in Israel but found little material that would have assisted German investigations. See ZEUG, *supra* note 21 (May 2, 1961, May 7, 1961, May 17, 1961, June 12, 1961).

²⁸ See ZEUG, *supra* note 21 (Apr. 11, 1961). Zeug received mail from his office in Germany via Hausner. See PROSECUTION OFFICE [*Staatsanwaltschaft*] MUNCHEN I TO ZEUG VIA HAUSNER (July 10, 1961) (on file with the German Federal Archives [*Bundesarchiv*], Ludwigsburg branch, file number B 162/3622).

²⁹ See ZEUG, *supra* note 21 (Apr. 11, 1961). Archives in Communist countries, with which the Central Agency could not establish contact, were an exception. The Central Agency had also not been aware of some of the survivor witnesses and tried to call them for their own cases. See ZEUG, *supra* note 21 (June 21, 1961).

³⁰ See ZEUG, *supra* note 21 (May 10, 1961).

³¹ See ZEUG, *supra* note 21 (Aug. 17, 1961). The planned interview of Eichmann did not take place. The Israeli authorities gave Zeug permission to speak to Eichmann, but he refused to be interviewed. See ZEUG, *supra* note 21 (Aug. 25, 1961).

had just been a small cog in the Nazi state's mass-murder machinery.³² However, Zeug's level of knowledge allowed him to differentiate between founded and unfounded allegations. His criticism can be summarized as follows: First, the prosecution did not define Eichmann's responsibilities and actions correctly. Eichmann was not the "central figure" in the "final solution of the Jewish question," as he was portrayed.³³ Second, the prosecution had not prepared its case with the thoroughness required; it had not evaluated all available archives and sources of information.³⁴ This included a lack of outreach to the Central Agency, which would have been beneficial to the case.³⁵ Third, Hausner was not interested in the historical truth, in the real Eichmann. Whenever the evidence did not support his preconceived image, Hausner used rhetorical language to conceal the holes in his case.³⁶

IV. WAS ZEUG'S CRITICISM JUSTIFIED?

The trial record corroborates Zeug's criticism that the prosecution would have benefited from cooperation with the Central Agency. In January of 1961, Zeug had interrogated a major perpetrator formerly active in Lublin, Georg Michalsen. In his statement, Michalsen mentioned that Eichmann had been a spectator of deportations from the Warsaw ghetto in 1942. This damning piece of information was not known to Hausner. When he tried to introduce it as evidence, together with an affidavit by Zeug, the court refused to accept it at that late stage.³⁷

However, the view that German authorities could have helped the Israeli prosecution is at odds with commentary on the Eichmann trial. The tenor is that the Eichmann trial was decisive to prod the reluctant Germans into action, to make them finally move ahead with investigations and trials against Nazi criminals. This opinion was voiced already by Hannah Arendt³⁸ and has become accepted wisdom.³⁹ It was actively supported by the

³² See ZEUG, *supra* note 21 (June 21, 1961).

³³ See ZEUG, *supra* note 21 (May 29, 1961).

³⁴ See ZEUG, *supra* note 21 (Apr. 21, 1961, May 29, 1961, July 28, 1961).

³⁵ See ZEUG, *supra* note 21 (Apr. 21, 1961, Apr. 26, 1961, July 28, 1961). Zeug commented critically on mistakes and omissions by the German legal authorities as well. For instance, collaborators of Eichmann, who had been mentioned in the trial, had not been investigated with the required rigor. See ZEUG, *supra* note 21 (Apr. 27, 1961, May 17, 1961).

³⁶ See ZEUG, *supra* note 21 (July 15, 1961, July 28, 1961).

³⁷ 3 MINISTRY OF JUSTICE, *supra* note 16, at 1316, 1318–19; see also INTERROGATION OF GEORG MICHALSEN (Jan. 24–25, 1961) (on file with the German Federal Archives [*Bundesarchiv*], Ludwigsburg branch, file number B 162/2062). Eichmann denied the incident during cross-examination. 4 MINISTRY OF JUSTICE, STATE OF ISRAEL, THE TRIAL OF ADOLF EICHMANN 1714–15 (1992). Zeug does not refer to this incident in his reports.

³⁸ See ARENDT, *supra* note 8, at 11–16. Robinson contradicts this view. See ROBINSON, *supra* note 2, at 139–41. This is uncharacteristic, as Robinson usually supports the prosecu-

Israeli government⁴⁰ and by members of the prosecution team.⁴¹ The media reinforced it further. Every arrest that was made in 1961 was automatically connected to Eichmann.⁴² Specialized literature on Nazi trials, on the other hand, shows that these connections do not exist.⁴³

The activities and level of knowledge of the Central Agency in 1961 are reflected in their internal case list for the 1961 period.⁴⁴ Investigations on the major crimes of the Holocaust in Poland and the Soviet Union, such as deaths camps, concentration camps, ghettos and mobile killing

tion's viewpoint. However, it fits into the overall purpose of his book, which is to refute everything Arendt wrote. *See id.* at viii.

³⁹ *See Eichmann-Prozeß, in* 1 ENZYKLOPÄDIE DES HOLOCAUST (Israel Gutman ed., 1995) (exhibiting acceptance of this view in the Holocaust encyclopedia).

⁴⁰ The press office of the Israeli government released a statistical report, dated August 13, 1961. This survey—using data received through requests for legal assistance—contains a comparison between the measures taken throughout the world against Nazi war criminals in the two years before the apprehension of Adolf Eichmann and during the year afterwards. *See* CENTRAL AGENCY TO MINISTRY OF JUSTICE OF BADEN-WÜRTTEMBERG (Nov. 10, 1961) (on file with the Main State Archives [*Hauptstaatsarchiv*], Stuttgart, Germany, file number EA 4/106, Bü 7).

⁴¹ *See* GIDEON HAUSNER, JUSTICE IN JERUSALEM 451–52, 466–68 (1966). With his usual hyperbole, Hausner adds: “The trial, which brought the true facts to life, came as a shock just when the ‘research’ institutes had half-succeeded in clipping the devil’s nails, cropping his horns and camouflaging his tail. So it was from Jerusalem that the Germans were reminded” *Id.* at 467; *see also* Gabriel Bach, *Genocide (Holocaust) Trials in Israel*, in THE NUREMBERG TRIALS: INTERNATIONAL CRIMINAL LAW SINCE 1945, at 216, 221 (Herbert R. Reginbogin & Christoph J.M. Safferling eds., 2006).

⁴² An Austrian war crimes investigator complained that the Israeli media reports on this issue were very biased. *See* WIESINGER REPORT (Jan. 9, 1962) (on file with the Austrian State Archives [*Österreichisches Staatsarchiv*], Archives of the Republic [*Archiv der Republik*], file number BMI GZ 20.765-2A/62); *see also* ZENTRALE RECHTSSCHUTZSTELLE, FOREIGN MINISTRY, TO FEDERAL MINISTER OF JUSTICE (Apr. 29, 1961) (on file with the German Federal Archives [*Bundesarchiv*], Koblenz branch, file number B 305/960 Bd. 1); REPORT OF TRIAL OBSERVER [*BERICHT BEOBACHTER*] (May 23, 1961) (on file with the German Federal Archives [*Bundesarchiv*], Koblenz branch, file number B 83/435); DR. RAAB, MEMO TO FILE [*Aufzeichnung*] (Mar. 2, 1961) (on file with the German Federal Archives [*Bundesarchiv*], Koblenz branch, file number B 83/743).

⁴³ For example, the arrest of Richard Baer, the last commander of Auschwitz, was not linked to the Eichmann trial. *See* REBECCA WITTMAN, BEYOND JUSTICE: THE AUSCHWITZ TRIAL 93 (2005).

⁴⁴ *See* OVERVIEW OF CASES CONCERNING NAZI CRIMES [*ÜBERSICHT ÜBER VERFAHREN WEGEN NS-GEWALTVERBRECHEN*] (Dec. 1, 1961) (on file with the German Federal Archives [*Bundesarchiv*], Ludwigsburg branch, file number B162/82). The registration number of each case indicates the year it was started. Investigations commenced between 1958 and 1960 cannot have been caused by the Eichmann trial; *see also* CENTRAL AGENCY, CASE OVERVIEW [*ÜBERSICHT*] OF INVESTIGATIONS OF NAZI CRIMES, (on file with the Main State Archives [*Hauptstaatsarchiv*], Stuttgart, file number EA 4/106 Bü 10) (presenting an overview as of Dec. 1, 1960).

units, were commenced in 1958-1960.⁴⁵ In comparison, fewer investigations concerning deportations of the Jewish population from Western European countries to death camps in the East are listed.⁴⁶ The prosecution office in Frankfurt dealt with Eichmann and his unit.⁴⁷ Eichmann's office was part of the "Reichssicherheitshauptamt" (RSHA) in Berlin; several members of that institution had been under investigation since the fifties.⁴⁸

A review of the files shows no influence by the Eichmann trial.⁴⁹ Investigations followed their own dynamics, based on the discovery of new sources of information and previous investigations.⁵⁰ The following sequence of events can be considered typical: at the beginning of an investigation, for example those conducted by Zeug on "Aktion Reinhardt," the first pieces of information, mostly survivor accounts compiled in the immediate post-war period in Poland, were supplied by Yad Vashem archives in Israel. The German investigators used these accounts to search for perpetrator-specific documents in German archives, which would provide information on the chain of command and organizational structures. Other archives, in Germany or other countries, provided the historical context.

The investigators also searched for the perpetrators. When interviewed, perpetrators often openly admitted that they participated in mass murder, for instance by gassing in death camps. They only denied that they had committed individual acts of cruelty. For proving the latter, survivor witnesses were crucial. German investigators located survivors with the help of Jewish organizations and a special detachment of the Israeli Police.⁵¹ The Central Agency worked closely with the relevant institutions in Israel

⁴⁵ See OVERVIEW OF CASES CONCERNING NAZI CRIMES, *supra* note 44, at 2, 24-62.

⁴⁶ *Id.* at 64-69 (listing investigations related to Bulgaria, Greece, Croatia and Holland). Less work had been done on Belgium, France, Italy and Serbia. *Id.*

⁴⁷ *Id.* at 76-77.

⁴⁸ *Id.* at 108-09.

⁴⁹ This assessment is based on the review of the following investigation files, all on file with the German Federal Archives [*Bundesarchiv*], Ludwigsburg branch. They can be located via the following file numbers B 162/951-953, 958, 1695-1702, 2062, 2206, 2209-2210, 2324-2326, 2638, 2641-2656, 2660-2661, 2876-2882, 2958-2959, 3164-3171, 3177, 3243-3249, 3275-3276, 3301, 3373-3376, 3407-3420, 3422, 3622-3624, 3817-3822, 3819, 4425-4429, 4632, 4940, 4973-4976, 4632, 5018-5023, 5055, 5104, 5350-5252, 5610, 14193.

⁵⁰ According to the German system, investigations were conducted by the police under the direction of prosecutors. See generally Markus Dirk Dubber, *The Promise of German Criminal Law: A Science of Crime and Punishment*, 6 GER. L. J. 1049, 1049 (2005) (presenting an overview of the German criminal justice system).

⁵¹ On the reasons for setting up the unit see SCHÜLE, AT CENTRAL AGENCY, TO SHINNAR, AT ISRAEL MISSION (Jan. 21, 1960), SCHÜLE TO MINISTRY OF JUSTICE OF BADEN WÜRTTEMBERG (Jan. 29, 1960), and LIFF, ISRAEL POLICE, TO SCHÜLE (May 3, 1961) (on file with the Central Agency [*Zentrale Stelle*] General Files [*Generalakten*] file number III-32, Bd. 1).

and had had access to much of the information and many of the witnesses, later used in the Eichmann trial. However, the Central Agency drew on a wider range of sources of information than used by the Eichmann prosecution.⁵²

V. THE CRIMES EICHMANN COMMITTED AND THOSE HE DID NOT COMMIT

In his reports, Zeug identified the major problem of the Eichmann trial: the prosecution pursued two incompatible goals. On the one hand, the prosecution attempted to present a full picture of the Holocaust. On the other hand, it attempted to bring to justice Adolf Eichmann, who had had narrower responsibilities.⁵³ The political aim connected with the trial was clear: to create a politically usable image of past history. To achieve this aim in the context of a criminal trial, Hausner had to exaggerate the crimes of the real Eichmann to the point that they encompassed all the crimes of the Holocaust. For example, wanting to cover the whole sequence of events from 1933 to 1945, Hausner called witnesses to testify concerning events that had occurred in early 1933 at which time Eichmann had not even moved from Austria to Germany.⁵⁴ Hausner had to fill the mold of the “greatest war criminal” pre-set by Ben-Gurion.

Hausner’s opening address reveals the contours of the imagined Eichmann. “There was only one man who had been concerned almost entirely with the Jews, whose business had been their destruction. . . .” - Eichmann.⁵⁵ Hausner presented Eichmann as the “executive arm for the extermination of the Jewish people,”⁵⁶ whose word “put gas chambers into action.”⁵⁷

He lorded it over the ghettos and extermination centres; his position in the RSHA was unique. He could pass over the heads of his superiors and deal directly with Himmler . . .⁵⁸

The Accused, as head of the Gestapo Department for Jewish Affairs, as Special Commissioner for the extermination of the Jews, bears direct re-

⁵² See ZEUG, *supra* note 21 (Apr. 21, 1961, Apr. 26, 1961).

⁵³ See ZEUG, *supra* note 21 (May 29, 1961). “[D]ass der Prozess zwei nicht miteinander vereinbare Zwecke verfolgt, nämlich einmal die Aburteilung des Angeklagten Eichmann—der nur in einen Teil der Geschehnisse eingeschaltet war—und zum andern eine historische Darstellung aller Geschehnisse.” [That the trial had two incompatible aims, which are, to have the accused, Eichmann—who was involved in only some of the events—brought to justice, and, at the same time, give an historical overview of all events.]

⁵⁴ See 1 MINISTRY OF JUSTICE, *supra* note 6, at 210–32 (presenting the testimony of Benno Cohn, who testified about events in 1933).

⁵⁵ 1 MINISTRY OF JUSTICE, *supra* note 6, at 63.

⁵⁶ *Id.* at 62.

⁵⁷ *Id.*

⁵⁸ *Id.* at 73.

sponsibility as the initiator and implementer of this blood bath. We shall show proof of his initiative and his control over the ghettos, his responsibility and his role in the setting-up and the operation of the extermination camps, and the responsibility for the destruction of Polish Jewry.⁵⁹

Not content with having created this larger-than-life monster, Hausner added in his oral summary that Eichmann had been “more extreme even than that evil man Hitler himself.”⁶⁰ Though without the hyperbole, the indictment reflects the very broad charges.⁶¹

These allegations bear no resemblance to the position the real Eichmann held. Even Heinrich Himmler, Head of SS and German police, would not have fit into the image Hausner had created, as even he was not responsible for all components of the Holocaust. Eichmann had joined the SD, a branch of the Security Police in 1934. He headed organizations for the forced emigration of Jews and expropriation of their property set up in 1938 and 1939 in Vienna, Berlin and Prague. His section was in charge of deportations of various population groups, most importantly, the deportation of Jews, mainly from Western European countries, to death camps in the East. In 1944, he went with most of his staff to Hungary to organize the deportation of the last surviving Jewish community in Nazi occupied Europe. Eichmann was a major perpetrator. He held an important position. He was involved in many different crimes. He had shown zeal and initiative in his activities. But he was not the central figure in the Holocaust.⁶² In the chain of command his position was four levels below Himmler.⁶³ Zeug rightly pointed out that there had been 20 to 30 perpetrators of the same importance than Eichmann.⁶⁴ Eichmann had not committed a good part of the crimes Hausner alleged. We will look at three of the most egregious examples.

⁵⁹ *Id.* at 89.

⁶⁰ 5 MINISTRY OF JUSTICE, STATE OF ISRAEL, THE TRIAL OF ADOLF EICHMANN 2016 (1994).

⁶¹ See 1 MINISTRY OF JUSTICE, *supra* note 6, at 3–8 (reading of the indictment).

⁶² One reason Eichmann gained such prominence is that because of his activities in Hungary and in forced emigration, he was in personal contact with Jewish leaders. Many of them survived. Eichmann's superior, Heinrich Müller, the head of the Gestapo, was little known publicly.

⁶³ According to Himmler's official diary for 1941–42, he met Eichmann once, together with Eichmann's superior, Heinrich Müller, on August 11, 1941. HEINRICH HIMMLER, DER DIENSTKALENDER HEINRICH HIMMLERS 1941/42, 513 (Peter Witte et al. eds., 1999). This corroborates Eichmann's own statement to the police. 7 MINISTRY OF JUSTICE, STATE OF ISRAEL, THE TRIAL OF ADOLF EICHMANN 263(1995).

⁶⁴ ZEUG, *supra* note 21 (May 29, 1961). Zeug also expressed the opinion that Eichmann would have to be acquitted for one-third of the crimes of the Holocaust. See ZEUG, *supra* note 21 (June 30, 1961, Aug. 17, 1961). Historians now recognize that Eichmann's responsibility was not as Hausner had alleged. See DAVID CESARANI, EICHMANN: HIS LIFE AND CRIMES (2005) (discussing the various stages of Eichmann's career).

A. “*Aktion Reinhardt*”

Zeug had concentrated on the “*Aktion Reinhardt*” immediately after he joined the Central Agency.⁶⁵ The operation was run by the SS and Police Leader Lublin, Odilo Globocnik, who commanded three death camps in Belzec, Sobibor and Treblinka, and organized deportations from ghettos to camps and on-the-spot mass shootings throughout his district. Zeug and his investigators had managed to reconstruct the complex chain of command leading to “*Aktion Reinhardt*.” Globocnik had been commissioned directly by Himmler, and the staff of the death camps had been assigned by Hitler’s Chancellery (*Kanzlei des Führers*).⁶⁶ The link was the so-called “Euthanasia” program, the mass gassing of disabled people in Germany, which was run by the Chancellery and in which the personnel of the death camps had been previously active. As hardly any documentation on the top-secret “*Aktion Reinhardt*” has survived, the German investigators had to piece the responsibilities together by using promotion records and similar documents from SS-personnel files. Eichmann was not part of this chain of command (though he was responsible for deportations from Western Europe to “*Aktion Reinhardt*” camps).⁶⁷ He was, as mentioned by Zeug, not responsible for most of the crimes committed within the “*Generalgouvernement*.”⁶⁸

Count 1 of the indictment included the “*Aktion Reinhardt*” camps in the allegation that the accused, together with others, had “caused the death of millions of Jews” and “perpetrated the extermination of Jews” at death

⁶⁵ ZEUG, INVESTIGATION REPORT ON SSPF LUBLIN, German federal Archives [*Bundesarchiv*], Ludwigsburg branch, file number B 162/1695 (Mar. 12, 1960). See generally YITZHAK ARAD, BELZEC, SOBIBOR, TREBLINKA: THE OPERATION REINHARD DEATH CAMPS (1987).

⁶⁶ See Peter R. Black, *Rehearsal for “Reinhardt”? Odilo Globocnik and the Lublin Selbstschutz*, 25 CENT. EUR. HISTORY 204, 207 (1992) (stating that Globocnik had been commissioned directly by Himmler); HENRY FRIEDLÄNDER, THE ORIGINS OF NAZI GENOCIDE: FROM EUTHANASIA TO THE FINAL SOLUTION 284–302 (1995) (on the role of Hitler’s Chancellery).

⁶⁷ Not all deportations to death camps, however, were organized by Eichmann’s section, IVB4. Eichmann himself admitted already in his police interrogation that he had visited Lublin and liaised with Globocnik. 7 MINISTRY OF JUSTICE, *supra* note 63, at 170–73, 179–80, 229–31, 239–40. Recently discovered documents throw a light on the extent of these communications. See Stephen Tyas, *Der britische Nachrichtendienst. Entschlüsselte Funkmeldungen aus dem Generalgouvernement*, in “AKTION REINHARDT”: DER VÖLKERMORD AN DEN JUDEN IM GENERALGOUVERNEMENT 1941–1944 (Bogdan Musial ed., 2004); ZEUG, FINAL REPORT ON TREBLINKA (Nov. 26, 1959) (on file with the German Federal Archives [*Bundesarchiv*], Ludwigsburg branch, file number B162/3819); ZEUG, FINAL REPORT ON BELZEC, German Federal Archives [*Bundesarchiv*], Ludwigsburg branch, file number B162/3167 (Feb. 16, 1960); ZEUG, PRELIMINARY REPORT ON SOBIBOR (Apr. 11, 1960) (on file with the German Federal Archives [*Bundesarchiv*], Ludwigsburg branch, file number B162/4426).

⁶⁸ See ZEUG, *supra* note 21 (May 29, 1961, June 21, 1961).

camps in Auschwitz, Chelmno, Belzec, Sobibor, Treblinka, [and] Majdanek.”⁶⁹ In Count 7, “*Aktion Reinhardt*” is referred to under the heading “Plunder of Jewish property in Eastern Europe.”⁷⁰ Zeug, in his first report, mentioned that he found a mistake in Count 7: a non-existing Security Police entity was referred to as being in charge instead of the SS-Police Leader Lublin.⁷¹ In his opening address, a few days later, Hausner corrected the mistake.⁷² Hausner’s lack of understanding of the unusual chain of command⁷³ is apparent in his cross-examination of Eichmann. Hausner claimed that the “*Aktion Reinhardt*” camps had been under the RSHA, which, in Hausner’s simplified concept, would have meant that Eichmann was responsible.⁷⁴ Eichmann rejected these false assumptions, and Hausner did not get any admissions on this point from him.⁷⁵ Undeterred, Hausner concluded in his summing-up: “But all these are idle excuses. In actual fact, Eichmann dealt with the Jews of the Generalgouvernement in exactly the same way in which he dealt with the Jews of occupied Europe”⁷⁶

In response to pointed questions from the bench, however, Hausner had to admit that he had no direct proof. The following exchange took place:

⁶⁹ 1 MINISTRY OF JUSTICE, *supra* note 6, at 3. Auschwitz, Chelmno and Majdanek were under the administration of different Nazi organizations, but not under the RSHA. Eichmann’s unit was in charge of deportations to some of them, in particular to Auschwitz.

⁷⁰ *Id.* at 5–6. The reference to plunder is due to the fact that one of the few remaining documents is Globocnik’s report on the economical results of “*Aktion Reinhardt*,” that is, the plunder of the possessions of the murdered victims. This has been misleading scholars for quite some time.

⁷¹ See ZEUG, *supra* note 21 (Apr. 4, 1961).

⁷² 1 MINISTRY OF JUSTICE, *supra* note 6, at 90.

⁷³ Hausner’s knowledge was deficient in respect of witnesses as well. Because he was unaware of the whereabouts of the sole known survivor of Belzec, Hausner introduced the post-war report of an observer, a well-known, but problematic document. 3 MINISTRY OF JUSTICE, *supra* note 16, at 1221. Zeug had located the survivor in question and he had testified in Munich in 1960. ZEUG TO PROSECUTION OFFICE [*Staatsanwaltschaft*], MÜNCHEN I, (Mar. 7, 1960) (on file with the German Federal Archives [*Bundesarchiv*], Ludwigsburg branch, file number B 162/3167).

⁷⁴ Hausner assumed, erroneously, that, as the SS organization responsible for concentration camps (WVHA) was not in charge, this had to mean that it was the RSHA, 4 MINISTRY OF JUSTICE, *supra* note 37, at 1727; 5 MINISTRY OF JUSTICE, *supra* note 60, at 2009. As part of his evidence, Hausner submitted a Nuremberg affidavit by Oswald Pohl, head of the WVHA, 3 MINISTRY OF JUSTICE, *supra* note 16, at 1341–42. Pohl, who was sentenced to death in one of the Nuremberg successor trials, could hardly have been considered a trustworthy witness on the matter of responsibilities. Throughout the trial, Hausner argued that whenever the RSHA was involved, Eichmann was involved. Eichmann was, however, head of one subsection, albeit an important one in the context of the Holocaust.

⁷⁵ 4 MINISTRY OF JUSTICE, *supra* note 37, at 1635, 1727–29.

⁷⁶ 5 MINISTRY OF JUSTICE, *supra* note 60, at 1992.

Presiding Judge: Mr. Hausner, do we have any specific proof to the effect that he was involved in what was called the “*Aktion Reinhard*”?

Attorney General: Specific, Your Honour? That is to say, about Eichmann and the *Aktion Reinhard*?

Presiding Judge: Yes.

Attorney General: Direct proof—does Your Honour mean?

Presiding Judge: Yes.

Attorney General: No, there is none. But there is a construction which, in my opinion, stands the tests of logic and reality.⁷⁷

B. *Sonderkommando 1005*

Another particularly gruesome group of crimes described by survivor witnesses in heart-rending detail during the trial was the exhumation of corpses from mass graves and burning of the remains to destroy the evidence. The judgment referred to these events as “visions of hell which were amongst the most horrifying parts of all the evidence”⁷⁸ The unit in charge, commanded by Paul Blobel, had the code-name “*Sonderkommando 1005*.” Jewish prisoners were forced to do the work and routinely killed before the unit moved on. While one of the few survivors was on the stand, Eichmann’s defense lawyer raised objections, not to contest the facts, but because Eichmann had nothing to do with them. Hausner claimed otherwise: “With regard to the covering up of the traces, our point is that the Accused was the superior of Blobel”⁷⁹ In this view, Hausner was supported by a leading researcher from Yad Vashem.⁸⁰

Here, again, the findings of the Central Agency could have been of assistance to the prosecution. Already in 1960, during an investigation of a

⁷⁷ *Id.* In its judgment, the district court correctly referred to the fact that Eichmann’s unit sent victims to these camps. *See id.* at 2160. In addition, the court assumed, based on a rather complicated piece of evidence, that further links to Eichmann existed. *See id.* at 2160–62.

⁷⁸ *Id.* at 2164.

⁷⁹ 1 MINISTRY OF JUSTICE, *supra* note 6, at 366.

⁸⁰ According to Rachel Auerbach, head of the Collection of Testimony Department at Yad Vashem, these special commands “were led by one of Eichmann’s helpers, SS Standartenführer Blobel. I have been working for years on the documentation of unit No 1005” Rachel Auerbach, *Witnesses and Testimony in the Eichmann Trial*, 11 YAD VASHEM BULLETIN 48 (1962). As additional evidence Hausner used two post-war affidavits, one by the commander of Auschwitz, the other by a close collaborator of Eichmann. Both had reasons to blame Eichmann, both had been executed. On this point, again, Hausner’s reasoning was surprisingly simplistic. The Nazis wanted to destroy all Jews, the man in charge was Reinhard Heydrich, the head of the RSHA, who “for his part, appointed the Accused Consequently, the Prosecution maintains that everything that was done as a result of that decision and under that control for the extermination of the Jews is relevant. The Accused will be held responsible for all this” 1 MINISTRY OF JUSTICE, *supra* note 6, at 366. This type of reasoning would leave out a number of major perpetrators.

sub-unit of “*Sonderkommando 1005*,” the chain of command had been established. Blobel’s superior was the head of Section IV of the RSHA, Heinrich Müller. Locally, Security Police offices supplied manpower for the unit. (Eichmann admitted that Blobel’s unit was housed in the same building when in Berlin.) Several members of the subunit, called “*Teilkommando Cholm*,” had been interrogated and had made substantial admissions about their way of operating.⁸¹ One of Hausner’s witnesses, Joseph Reznik, had been forced to work in this subunit.⁸² Before the Eichmann trial, the Israel Police had located and questioned Reznik (as well as other survivors of the same unit) on behalf of the German authorities.⁸³ The unit’s commander, whom Reznik mentioned in his testimony, had been identified in March of 1960.⁸⁴

The district court displayed better judgment by rejecting Hausner’s allegation: “We find that the evidence is not sufficient to place the responsibility for the activities of Blobel’s unit on the Accused.”⁸⁵ In fact, as the court noted, Blobel had stated in Nuremberg that he was subordinate to Müller.

C. *Mobile Killing Units (Einsatzgruppen)*

Hausner contended that the *Einsatzgruppen* in the Soviet Union had “operated in collaboration with the Accused”⁸⁶ This was a grave allegation but also unfounded. Mobile killing units (*Einsatzgruppen* and at the lower level *Einsatzkommandos*) had moved into the Soviet Union on the

⁸¹ ZEUG, FINAL REPORT ON “TEILKOMMANDO CHOLM” (Apr. 2, 1960) (on file with the German Federal Archives [*Bundesarchiv*], Ludwigsburg branch, file number B 162/ 4973). Statements by former unit members taken in November 1960 are on file with the German Federal Archives [*Bundesarchiv*], Ludwigsburg branch, file number B 162/4975. Regarding the chain of command, see KDS LEMBERG TO HSSPF KRAKAU (May 28, 1944) (on file with the German Federal Archives [*Bundesarchiv*], Ludwigsburg branch, file number B 162/4973). Eichmann comments on his links to “*Sonderkommando 1005*,” which included organizing supplies in, 7 MINISTRY OF JUSTICE, *supra* note 63, at 263–65; 4 MINISTRY OF JUSTICE, *supra* note 37, at 1556–57.

⁸² See 3 MINISTRY OF JUSTICE, *supra* note 16, at 1159–62 (1992) (describing how Joseph Reznik was forced to exhume corpses from mass graves).

⁸³ The statements had been forwarded to Germany on July 27, 1960. LANDSBERG TO LIFF (Aug. 14, 1961) (on file with the German Federal Archives [*Bundesarchiv*], Ludwigsburg branch, file number B 162/4676).

⁸⁴ ZEUG TO CRIMINAL POLICE [*Landeskriminalamt*], NORDRHEIN-WESTFALEN (Mar. 16, 1960); ZEUG TO WEIDA (Mar. 18, 1960) (on file with the German Federal Archives [*Bundesarchiv*], Ludwigsburg branch, file number B 162/4873). The commander of the sub-unit, Rohlfing, was at this time still in active police service. *Id.*

⁸⁵ 5 MINISTRY OF JUSTICE, *supra* note 60, at 2164. Some historians nevertheless still assume closer links. See YAACOV LOZOWICK, HITLER’S BUREAUCRATS, THE NAZI SECURITY POLICE AND THE BANALITY OF EVIL 137 (Haim Watzman trans.) (2002).

⁸⁶ 1 MINISTRY OF JUSTICE, *supra* note 6, at 3 (count 1 of Eichmann’s indictment).

heels of the invading German armed forces and conducted large-scale shooting operations. Victims came from the civilian population, in particular the Jewish population.⁸⁷ Case 9 of the Nuremberg successor trials had dealt with the activities of the *Einsatzgruppen*. The reports of these units, in which a mounting death count was painstakingly listed, formed damning evidence against those accused in Case 9. A high number of death sentences were handed out.⁸⁸

The indictment against the leader of *Einsatzkommando 8*, by the Public Prosecution's Office in München, dated April 19, 1960, (before Eichmann was even kidnapped) described the setting up and chain of command correctly, from the head of the RSHA to the leaders of *Einsatzgruppen*, and then down to the commanders of various *Einsatzkommandos*. Eichmann's section, *Referat IVB4*, did not play a role.⁸⁹ As mentioned above, the Central Agency had opened investigations against all of these units, some of them as early as 1958, which were parceled out to individual prosecutors' offices.⁹⁰ From the Eichmann trial record it appears that Hausner erroneously assumed that every mobile killing unit was an *Einsatzkommando*, while the Central Agency's investigations had discovered that police units had a large share in the mass shootings in the Soviet Union. These police units were part of another branch of Police, called Order Police, and were not subordinate to the RSHA and therefore not even institutionally linked to Eichmann.⁹¹

Zeug, unsurprisingly, commented rather negatively on this part of the trial.⁹² Hausner based his case mainly on the testimony of one witness, Michael Musmanno, who had served as judge in Case 9 in Nuremberg. Against the objections of defense counsel Robert Servatius that Musmanno

⁸⁷ See generally HELMUT KRAUSNICK & HANS HANS-HEINRICH WILHELM, *DIE TRUPPE DES WELTANSCHAUUNGSKRIEGES: DIE EINSATZGRUPPEN DER SICHERHEITSPOLIZEI UND DES SD 1938–1942* (1981) (offering the best overview of the mobile killing units).

⁸⁸ See generally 4 TRIALS OF WAR CRIMINALS BEFORE THE NUREMBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10, NUREMBERG, OCT. 1946–APR. 1949 (1949); HILARY EARL, *THE NUREMBERG SS-EINSATZGRUPPEN TRIAL, 1945–1958: ATROCITY, LAW, AND HISTORY* (2009).

⁸⁹ Higher Regional Court, Prosecution Office [*Staatsanwaltschaft beim Landgericht*] München I, Indictment [*Anklage*] against Otto Bradfisch et al. (April 19, 1960) (on file with the German Federal Archives [*Bundesarchiv*], Ludwigsburg branch, file number B 162/3177). Bradfisch had been under arrest since 1958.

⁹⁰ CASE OVERVIEW OF INVESTIGATIONS OF NAZI CRIMES, *supra* note 44, at 24–49.

⁹¹ The role played by Order Police Battalions was discovered by prosecutors and investigators, not historians. The latter started to deal with the subject comparatively late. The influential book by Browning, for example, was only published in 1992. See CHRISTOPHER R. BROWNING, *ORDINARY MEN: RESERVE POLICE BATTALION 101 AND THE FINAL SOLUTION IN POLAND* (1992).

⁹² See ZEUG, *supra* note 21 (May 29, 1961).

could only present hearsay and that the record of Case 9 should be consulted and not the judge called to bear witness, Musmanno was allowed to testify.⁹³

This episode is among the most unedifying of the Eichmann trial. Hausner, eager to get Musmanno accepted as a witness, maintained that he did not know where the records of Case 9 could be found, while defense counsel provided the exact location.⁹⁴ Musmanno, while trying to support the prosecution, had to admit that Eichmann was not mentioned in his verdict. His testimony also revealed that he had been taken in by wild stories circulating in Nuremberg prison while interviewing people for a report, later a book, on the death of Hitler.⁹⁵ He recounted in all seriousness that high-ranking Nazis like Hermann Göring, Joachim von Ribbentrop and Ernst Kaltenbrunner had all told him that Eichmann had been “all powerful on the question of the extermination of the Jews,” that Eichmann “was the man who was to determine in what order, in what countries the Jews were to die,” and indeed “that Eichmann influenced Hitler.”⁹⁶ Kaltenbrunner, as head of the RSHA and therefore Eichmann’s superior three levels up, had every reason to put the blame on one of his subordinates. Of course, the same motives can be implied for the others.⁹⁷ When defense counsel pointed this out in cross-examination, Musmanno insisted that he nevertheless believed them. Musmanno had to admit, though, that he had not mentioned Eichmann in his book as well.⁹⁸

⁹³ See 2 MINISTRY OF JUSTICE, STATE OF ISRAEL, *THE TRIAL OF ADOLF EICHMANN* 704–29 (1992) (containing the attorney general’s request to call Musmanno as a witness and his testimony).

⁹⁴ See *id.* at 706–09, 715–17. Not only defense counsel and Zeug, but also the German diplomatic observer, knew in which archives these records were kept. See KRONECK TO FOREIGN MINISTRY (May 15, 1961) (on file with the Archives of Foreign Ministry [*Politisches Archiv des Auswärtigen Amtes*], Berlin, file number B 83/435).

⁹⁵ See generally Ruth Bettina Birn, *Criminals as Manipulative Witnesses: A Case Study of SS General von dem Bach-Zelewski*, 9 J. INT’L CRIM. JUST. 441 (2011) (on fabrication of evidence in Nuremberg jail).

⁹⁶ See 2 MINISTRY OF JUSTICE, *supra* note 93, at 710 (reference to Kaltenbrunner); *id.* at 720–21 (quoting Musmanno testimony).

⁹⁷ All three were sentenced to death at IMT and executed. In addition, Musmanno relied heavily on Walter Schellenberg, defendant in Case 11, a highly unreliable source. See 2 MINISTRY OF JUSTICE, *supra* note 93, at 726–27 (under cross-examination Musmanno stated that the judges in Case 11 rejected some of Schellenberg’s statements).

⁹⁸ See 2 MINISTRY OF JUSTICE, *supra* note 93, at 720–29. Earl quotes a passage from the transcript of Case 9, where Musmanno reprimanded a defendant because he complained that he was beaten during interrogations, adding that a few blows could not have done harm to such a “big, strapping fellow . . .” See EARL, *supra* note 88, at 245–46. Landsman mentions that Musmanno had already “acquired a reputation for inventing the statements he attributed to others” in the Sacco and Vanzetti case. STEPHAN LANDSMAN, *CRIMES OF THE HOLOCAUST: THE LAW CONFRONTS HARD CASES* 81 (Bert B. Lockwood ed., 2005). See generally MICHAEL

Despite these damaging admissions in cross-examination, Hausner repeated most of what Musmanno had said in his summing up.⁹⁹ Yet again, the judges of the district court, while seeing some links between Eichmann and the “Operations Units,” did not accept most of Musmanno’s testimony.¹⁰⁰

Observers saw this part of the trial differently. Zeug, the prosecutor, knew what the real facts were and that Musmanno could contribute only second-hand information.¹⁰¹ The historian Wolfgang Scheffler considered Musmanno’s testimony factually extremely weak.¹⁰² Quite different was the view of Haim Gouri, a trial observer, whose diary-style report *FACING THE GLASS BOOTH* became very popular in Israel. He saw the arguments of the defense against the admission of hearsay as a desperate attempt to fend off a crucial witness. Gouri left the hearing with the (incorrect) beliefs that, as maintained by Musmanno, the “staff of Einsatzgruppen was mostly appointed by Himmler according to Eichmann’s recommendations,” and “Eichmann’s friends commanded all these units.”¹⁰³

VI. CRITICISM AND APPLAUSE

A. *Legal Considerations*

Initial criticism of the Eichmann trial was aimed at legal problems. Eichmann had been brought to trial in Jerusalem by extra-legal means, that is, by kidnapping.¹⁰⁴ The 1950 Israeli law under which Eichmann was tried and sentenced was questioned because it was retroactive—the state of Israel had not existed when the crimes were committed—and because it violated the territoriality principle. While the law used concepts from the genocide convention and the Nuremberg charter, reference to “all humanity” as vic-

A. MUSMANNO, *TEN DAYS TO DIE* (1950) (presenting a sensationalist account typical for the fifties).

⁹⁹ Hausner quoted Schellenberg’s statement “that Eichmann was in control of the Einsatzgruppen in everything related to the extermination of the Jews” 5 *MINISTRY OF JUSTICE*, *supra* note 60, at 2003–04.

¹⁰⁰ *See id.* at 2146–48, 2160, 2173. The District Court accepted evidence that Eichmann had deported people to areas where *Einsatzgruppen* operated and that he had received their reports but did not accept Musmanno’s testimony of Schellenberg’s statements.

¹⁰¹ *See ZEUG*, *supra* note 21, (May 29, 1961).

¹⁰² SCHEFFLER TO RAAB, AT FOREIGN MINISTRY (June 5, 1961) (on file with the German Federal Archives [*Bundesarchiv*], Koblenz branch, file number B 305/965).

¹⁰³ *See* Haim Gouri, *Facing the Glass Booth: The Jerusalem Trial of Adolf Eichmann* 62–65 (Michael Swirsky trans., 2004).

¹⁰⁴ The problem was settled diplomatically between Israel and Argentina. *See* CESARANI, *supra* note 64, at 238–39 (stating that the abduction triggered issues with Argentina’s right to sovereignty and Israel’s violation of international law).

tims was replaced with “the Jewish people.”¹⁰⁵ Some critics, like Telford Taylor, proposed that Eichmann be tried by an international court.¹⁰⁶ One group of commentators defended both kidnapping and trial with reference to the “uniqueness” of the Holocaust.¹⁰⁷ Others saw this as a dangerous precedent, a concept that did not serve “the rule of law as a basic structure for minimum world order” and that could, ultimately, put Israel above the law.¹⁰⁸

Aside from these general debates, several critics considered it problematic that the influence of the Israeli state was so visible. Judges, both at the District Court and the Supreme Court level, had previously voiced strong, negative opinions of Eichmann during the Kasztner trial and appeal, but they had not recused themselves.¹⁰⁹ Communication lines used by defense and foreign observers may have been intercepted by the Israeli authorities.¹¹⁰ The defense did not enjoy equality of arms with the prosecution,

¹⁰⁵ See SEGEV, *supra* note 1, at 334–36 (stating that the wording of the law seemed to render crimes against the Jewish people a greater offense than crimes against humanity).

¹⁰⁶ See Telford Taylor, *Large Questions in the Eichmann Case*, N.Y. TIMES, Jan. 22, 1961, at SM11.

¹⁰⁷ Golda Meir had defended Eichmann’s kidnapping on the basis of “uniqueness.” See J.E.S. Fawcett, *The Eichmann Case*, 38 BRIT. Y.B. INT’L L. 181, 183–84, 187–92 (1962); see also PETER PAPADATOS, *THE EICHMANN TRIAL* 53–56 (1964); J. Lador-Lederer, *The Eichmann Case Revisited*, in 14 ISR. Y.B. ON HUM. RTS. 54, 77–78 (Yoram Dinsteine ed., 1984). See generally Anita Shapira, *The Eichmann Trial: Changing Perspective*, in AFTER EICHMANN: COLLECTIVE MEMORY AND THE HOLOCAUST SINCE 1961 (David Cesarani ed., 2005). Another argument used to defend the trial—ultimately by the Supreme Court—was that Israel was the “forum conveniens” because survivor witnesses and original documents were primarily housed in Israel. This is true for witnesses, but not for documents. As Zeug remarked, none of the original archival holdings were housed in Israel. See ZEUG, *supra* note 21 (Apr. 26, 1961).

¹⁰⁸ See Murray, *supra* note 6, at III-6, VI-9; see also ROBERT K. WOETZEL, *THE NUREMBERG TRIALS IN INTERNATIONAL LAW WITH A POSTLUDE ON THE EICHMANN CASE* 251, 258, 265–67 (2d ed. 1962); YOSAL ROGAT, *THE EICHMANN TRIAL AND THE RULE OF LAW* (1961).

¹⁰⁹ Judge Halevy referred to Eichmann as “the devil” in his decision on Kasztner. He remained on the bench of the District Court, though not as presiding judge. See SEGEV, *supra* note 1, at 283, 342–32; see also YABLONKA, *supra* note 1, at 130–33. The Supreme Court in the Kasztner appeal also referred to Eichmann. See LAHAV, *supra* note 13, at 133–41, 157–58.

¹¹⁰ The strongest indication comes from Hausner himself, who took the German diplomatic observer, von Preusschen, to task over criticism Preusschen voiced in one of his confidentially transmitted reports to the German Foreign Office. See ZENTRAL RECHTSSCHUTZSTELLE, NOTE TO FILE [Aufzeichnung] (July 2, 1962) (with undated report by Preusschen attached) (on file with Archives of Foreign Ministry [Politisches Archiv des Auswärtigen Amtes], Berlin, file number B 110/211); see also CHRISTINA GROBE, *DER EICHMANN-PROZESS ZWISCHEN RECHT UND POLITIK* 163–64 (1995); YABLONKA, *supra* note 1, at 129–30 (quoting Dieter Wechtenbruch, junior defense counsel, whom she interviewed); Christian Gerlach, *The Eichmann Interrogation in Holocaust Historiography*, 15 HOLOCAUST & GENOCIDE STUD.

both in respect to resources and local standing.¹¹¹ Hausner was both lead prosecutor and Attorney General. He used his political position to his advantage. The most disturbing manifestation was his preventing the defense from scrutinizing prosecution evidence.

Apart from documents and witnesses, Hausner relied heavily on affidavits produced in the post-war period, mainly in Nuremberg. Hausner's main selection criteria seem to have been that the affiant incriminated Eichmann. Questioning the veracity of the statements or the motives behind them does not seem to have been a consideration. For example, Hausner allocated "probative value of the highest order" to the affidavits of Dieter Wisliceny, who had been a high-ranking member of Eichmann's unit.¹¹² The fact that Wisliceny severely incriminated Eichmann, but at the same time exculpated himself, should have made his statements doubtful.¹¹³ This simple reliance on Nuremberg affidavits was also not consistent with the standards of 1961. German prosecutors had begun to realize how much concocting of statements had gone on in Nuremberg, and they had begun to reach out to a new pool of witnesses to penetrate established lines of defense.¹¹⁴

Wisliceny had been executed in Slovakia, but most other affiants were still alive.¹¹⁵ When Hausner submitted post-war affidavits of former

428, 433 (2001) (stating that Servatius was suspicious of Israeli authorities monitoring his communications with Eichmann).

¹¹¹ See LANDSMAN, *supra* note 98, at 60–61, 68–72, 107–09 (drawing an interesting comparison between ordinary legal practice in the U.S. and the Eichmann trial); 5 MINISTRY OF JUSTICE, *supra* note 60, at 2056 (stating that Servatius did not ask any questions to most survivor witnesses, because, as he himself expressed, "I had too much respect and reverence for their suffering to attack these witnesses by petty questioning.").

¹¹² See 1 MINISTRY OF JUSTICE, *supra* note 6, at 204–05. Co-prosecutor Gabriel Bach referred in the same way to the affidavits of Kurt Becher, an SS-officer and highly dubious figure, "[W]e shall ask the court to consider Becher's statement to be trustworthy," even while the prosecution considered him among the "criminal offenders against the Jewish People . . ." 2 MINISTRY OF JUSTICE, *supra* note 93, at 730–31.

¹¹³ One particularly strange statement by Wisliceny, as summarized by Hausner, was that when the "Commissars' Order was extended so as to apply to the destruction of all Jews, Eichmann saw in that a way of liquidating other Jewish groups." 5 MINISTRY OF JUSTICE, *supra* note 60, at 2003. This is contrary to everything known about the history and purpose of the "Commissar Order." In his police interrogations Eichmann commented on how outrageous he found Wisliceny's statements. See 8 MINISTRY OF JUSTICE, STATE OF ISRAEL, THE TRIAL OF ADOLF EICHMANN 2491–2561 (1995). See generally Dan Michman, *Täteraussagen und Geschichtswissenschaft. Der Fall Dieter Wisliceny und der Entscheidungsprozeß zur "Endlösung,"* in DEUTSCHE, JUDEN, VÖLKERMORD: DER HOLOCAUST ALS GESCHICHTE UND GEGENWART 205 (Jürgen Matthäus & Klaus-Michael Mallmann eds., 2006) (providing the only positive evaluation of Wisliceny statements).

¹¹⁴ See Birn, *supra* note 95, at 468 (on necessity to locate new witnesses).

¹¹⁵ Another affiant, often quoted by Hausner, Rudolf Höss, former commander of Auschwitz, had been executed in Poland. RUDOLF HÖSS, DEATH DEALER: THE MEMOIRS OF THE SS

Nazis as evidence, Eichmann's defense counsel objected and requested that the six affiants, who were alive, should be called, so that he could cross-examine them. Hausner switched to his role as Attorney General and declared that he would not grant safe passage to Nazi criminals to enter and leave the country.¹¹⁶ The debate between Hausner and Servatius became quite heated. The court, seemingly overtaxed by the situation, finally opted that evidence should be taken on commission in the witnesses' country of residence.¹¹⁷ Through this decision, Servatius lost any possibility to attack the witnesses' credibility because Germany and Austria do not have an equivalent to common-law cross-examination.¹¹⁸

It would also have been essential for the defense to attack the credibility of affiants and affidavits in front of the District Court.¹¹⁹ Servatius had been defense counsel in Nuremberg, he was well aware—as he pointed out repeatedly in Jerusalem—of the defense strategies cooked up in Nuremberg prison. Hausner denied free passage for the witnesses that defense wanted to call as well.

KOMMANDANT AT AUSCHWITZ 197 (Steven Paskuly ed., Andrew Pollinger trans., Da capo Press 1996) (1992).

¹¹⁶ 1 MINISTRY OF JUSTICE, *supra* note 6, at 247. Hausner's knowledge about the background of affiants on whose statements he was prepared to rely seems to have been quite sketchy. He made two exceptions, one concerned a major perpetrator. See 1 MINISTRY OF JUSTICE, *supra* note 6, at 245–49, 508. Zeug knew that Walter Huppenkothen had been “Commander of Security Police” in Lublin from 1940–41 and, therefore, heavily involved in the persecution of Jews in the Lublin district. He pointed this out to the prosecution, but it was too late. See ZEUG, *supra* note 21 (May 7, 1961). Hausner was also not familiar with all the facts concerning Eberhard von Thadden, an important collaborator of Eichmann in the Foreign Office. Servatius filled the gaps. See 1 MINISTRY OF JUSTICE, *supra* note 6, at 249–52.

¹¹⁷ See 1 MINISTRY OF JUSTICE, *supra* note 6, at 245–59, 501–02; 2 MINISTRY OF JUSTICE, *supra* note 93, at 644–46. Hausner introduced the affidavits of Höttl, Huppenkothen, Thadden, Jüttner, Becher, Grell. See 5 MINISTRY OF JUSTICE, *supra* note 60, at 1874–1922; see also HAUSNER, *supra* note 41, at 374–87 (providing Hausner's distorted version of the sequence of events).

¹¹⁸ See 5 MINISTRY OF JUSTICE, *supra* note 60, at 2222 (noting the irregularities in procedure between German and Austrian courts, which Servatius used as a ground for appeal).

¹¹⁹ See ZEUG, REPORT TO WOLF, PROSECUTION OFFICE [*Staatsanwaltschaft*] FRANKFURT (July 5, 1961) (on file with the Fritz-Bauer-Institut, Frankfurt am Main, Germany). As the judges taking the depositions were not familiar with the facts, they simply let the affiants give their statements. In one case, the court representative even provided the list of questions to the affiant ahead of the hearing. *Id.* Surprisingly, given that they were all under investigation, some of the affiants tried to disassociate themselves from their prior statements against Eichmann. See 5 MINISTRY OF JUSTICE, *supra* note 60, at 1895–1900, 1908–12. Gabriel Bach defended the use of affidavits in the following way: “[I]t has become possible to present the Court with a complete picture by means of these testimonies, which is more reliable and more weighty than is the evidence of witnesses who are able to come here and testify as to what occurred sixteen years ago.” 2 MINISTRY OF JUSTICE, *supra* note 93, at 732.

Hausner not only blocked the customary rights of the defense, but also legitimized the exculpatory stories of major perpetrators. The 1948 affidavit by Hans Jüttner serves as a good example.¹²⁰ Jüttner claimed that he had been on the road to Budapest in November of 1944 when he encountered foot-marches of Jews who had been driven out of Budapest under terrible conditions. Incensed by this cruelty and injustice—so Jüttner’s story continues—he immediately went to see the Higher SS and Police Leader in Budapest, Otto Winkelmann, to lodge a complaint. Winkelmann regretted that he was entirely powerless, as a certain Eichmann was in charge. A representative of Eichmann was summoned, but stated that Jüttner was in no position to give him any orders. To do justice to this story, one has to keep in mind that Winkelmann, an SS general, was as Higher SS and Police Leader superior to Eichmann and was in fact a major perpetrator of the Holocaust in Hungary. Jüttner, also a general, was head of an SS Main Office and had come to Hungary because of the SS takeover of a major armament concern through the means of blackmail of its Jewish owners. Two generals swore that they had been entirely powerless before a Lieutenant-Colonel—and, of course, were unaware of and appalled by the crimes committed against the Jews of Hungary.¹²¹ By 1960 the prosecutor’s office in Frankfurt had during its investigation of Eichmann’s unit in Hungary concluded that realities were different. Winkelmann was named a co-accused.¹²²

B. Empowerment of Victims?

Many commentators suggest the greatest achievement of the Eichmann trial was that it empowered Holocaust victims by giving them a voice.¹²³ To quote Lawrence Douglas: “By placing the Holocaust at the le-

¹²⁰ See 2 MINISTRY OF JUSTICE, *supra* note 93, at 731–33 (introducing the affidavit to the court); 9 MINISTRY OF JUSTICE, STATE OF ISRAEL, THE TRIAL OF ADOLF EICHMANN (1992) (affidavit of Hans Jüttner at Nuremberg, dated May 3, 1948, introduced in the Eichmann Trial as B 06-1287, exhibit T/692).

¹²¹ See Jan Erik Schulte, *Der Mann im Hintergrund der Waffen-SS*, in DIE SS: ELITE UNTER DEM TOTENKOPF 276 (Ronald Smelser & Enrico Syring eds., 2000) (describing Jüttner’s role in the SS); RUTH BETTINA BIRN, DIE HÖHEREN SS-UND POLIZEIFÜHRER: HIMMLERS VERTRETER IM REICH UND IN DEN BESETZTEN GEBIETEN 177–79, 297–304, 348 (1986). Despite his well-documented involvement in the Holocaust in Hungary, Winkelmann escaped prosecution by the Americans in Nuremberg, in Hungary and in Germany. One can only assume that this was due to the fact that the responsibilities of a Higher SS and Police Leader were difficult to understand and that Eichmann’s role in Hungary figured prominently. *Id.*

¹²² Decision by Regional Higher Court [*Oberlandesgericht*], Frankfurt am Main (Aug. 21, 1961) (on file with the German Federal Archives [*Bundesarchiv*], Ludwigsburg branch, file number B 162/5351).

¹²³ See, e.g., LAWRENCE DOUGLAS, THE MEMORY OF JUDGMENT: MAKING LAW AND HISTORY IN THE TRIALS OF THE HOLOCAUST 6 (2001) (“[The Eichmann trial] helped to remove an episode of unprecedented atrocity from the silences of shame”); Debórah Dwork, *Foreword* to HARRY MULISCH, CRIMINAL CASE 40/61, THE TRIAL OF ADOLF

gal fore of the trial, and by satisfying the testimonial need of survivor-witnesses, the Eichmann trial offered a far more comprehensive and, from the perspective of the survivors, more satisfying treatment of the traumatic history presented in incomplete fashion at Nuremberg.”¹²⁴ Indeed, Hausner’s case rested on over a hundred witnesses; some of whom could speak about Eichmann or had been the victims of his actions, but the majority of whom had no connection to Eichmann. This group provided a general depiction of the Holocaust created by Hausner according to his overall politically-inspired design. Rachel Auerbach, in charge of the collection of witness statements at Yad Vashem and herself a survivor of the Warsaw Ghetto, worked with the prosecution and recalled how everybody agreed to include not only “indirect” witnesses, but also “sufferings of the Jewish-people witnesses” as well.¹²⁵ The judges were not happy with the special dynamics created in the courtroom by the tales of terrible suffering by survivors—important in their own right, but often not shedding any light on the criminal responsibility of Eichmann.¹²⁶

One of the most dramatic and frequently mentioned testimonies was given by Rivka Yosselevska.¹²⁷ She described the destruction of her small

EICHMANN: AN EYEWITNESS ACCOUNT, at xxii (Robert Naborn trans., 2005) (“For the first time, survivors were prominent, present and publicly vocal. . . . The voices of the survivors and the suffering of the victims were acknowledged, honored and legitimized.”); Martti Koskeniemi, *Between Impunity and Show Trials*, 6 MAX PLANCK Y.B. FOR U.N. LAW, 1, 10 (2002); SHOSHANA FELMAN, *THE JURIDICAL UNCONSCIOUS: TRIALS AND TRAUMAS IN THE TWENTIETH CENTURY* 126 (2002). Felman’s endorsement is particularly fulsome:

It is this revolutionary transformation of the victim that makes the victim’s story *happen* for the first time and happen as a legal act of *authorship of history*. This historically unprecedented revolution in the victim that was operated in and by the Eichmann trial is, I would suggest, the trial’s major contribution not only to Jews but to history, to law, to culture—to humanity at large.

Id. at 300.

¹²⁴ Lawrence Douglas, *History and Memory in the Courtroom: Reflections on Perpetrator Trials*, in *THE NUREMBERG TRIALS: INTERNATIONAL CRIMINAL LAW SINCE 1945*, at 95, 100 (Herbert R. Reginbogin & Christoph J.M. Safferling eds., 2006).

¹²⁵ Auerbach, *supra* note 80, at 46.

¹²⁶ See, e.g., 3 MINISTRY OF JUSTICE, *supra* note 16, at 1122–27 (noting the exchange with the witness, Zvi Zimmermann); LANDSMAN, *supra* note 98, at 104; 5 MINISTRY OF DEFENSE, *supra* note 60, at 2082–83. The judges made references to this problem in the decision, noting that iconic figure like the Warsaw ghetto fighters were called, while Eichmann had nothing to do with the suppression of the Warsaw Ghetto uprising of 1943. *Id.*

¹²⁷ See Auerbach, *supra* note 80, at 49, 51; Lawrence Douglas, *Rivka Yoselevska on the Stand: The Structure of Legality and the Construction of Heroic Memory at the Eichmann Trial*, in 2 *LAW AND LITERATURE: CURRENT LEGAL ISSUES* 285, 297–300 (Michael Freeman & Andrew Lewis eds., 1999); DOV SCHMORAK, *SIEBEN SAGEN AUS: ZEUGEN IM EICHMANN-PROZESS* 192–208 (1962); SEGEV, *supra* note 1, at 351, 355–56; YABLONKA, *supra* note 1, at 3–4, 111–12 (describing Yoselevska’s testimony as “the most horrific of all testimonies at the trial,” and her story as “different, personal and completely lacking in generalization”).

community, Pohost Zagorodski in Belarus, by two mass-murder actions. In the second action in 1942, her whole family was killed, including her child in her arms. She was wounded and fell into the mass grave, but she managed to crawl out during the night. Testifying in court seems to have come at a price for her: on the scheduled day she could not appear because of a heart attack.¹²⁸ Hausner relates that she almost fainted when the police came to interview her and that her family asked that she be excused. Hausner, however, wanted the testimony in because of its dramatic potential.¹²⁹ He interpreted Rivka Yosselevka's escape from the grave as a symbol of the Jewish people emerging from the grave and finding new life in the state of Israel. "Rivka Yoselewska embodies in her person all that was perpetrated, all that happened to the Jewish people . . . Rivka Yoselewska symbolizes the entire Jewish people."¹³⁰

While even recent literature states that Yosselevska was shot by "Eichmann's men,"¹³¹ it was well-established in 1961 that Eichmann had nothing to do with it (nor did the *Einsatzgruppen*, associated by Hausner with Eichmann). The person responsible, Alfred Renndorfer, had been identified in 1959. He was the head of the Security Police Post in Hansewitsche, and Pohost Zagorodski belonged to his district. Investigations by the Central Agency (and other state attorneys' offices) from 1959 on had established that the local Security Police apparatus was responsible for the murder of the Jewish population in Belarus in 1942.¹³² The first action in 1941 described by Yosselevska also had nothing to do with Eichmann. It was perpetrated by the *SS-Kavallerieregiment 2*, which was subordinate to Himmler's Special Command Staff (*Kommandostab Reichsführer-SS*). The commander of the unit, Franz Magill, was under investigation since 1960.¹³³ Presumably because of Zeug's reports, the attorney's office in charge of the Renndorfer case in 1961 sent a request to the Israel Police that Yosselevska should be

¹²⁸ See 1 MINISTRY OF JUSTICE, *supra* note 6, at 499, 514–18.

¹²⁹ HAUSNER, *supra* note 41, at 73–74 ("Her story shattered the courtroom. . . . [L]oud sobbing was heard from the audience, and tears flowed freely from many eyes."); see also *id.* at 453.

¹³⁰ 5 MINISTRY OF JUSTICE, *supra* note 60, at 2004.

¹³¹ YABLONKA, *supra* note 1, at 3 (describing how "Eichmann's men" shot at and killed Rivka Yoselewska's family members and village).

¹³² Case Against Alfred Renndorfer and Wilhelm Daditschek, Central Agency file number 202 AR-Z 95/59 (on file with the German Federal Archives [*Bundesarchiv*], Ludwigsburg branch, file numbers B 162/3407–3418, 3422). Eichmann's section, IVB4, was not part of the chain of command. The Superior Commander of the Security Police [*Befehlshaber der Sicherheitspolizei*] in charge of Belarus held a higher rank than Eichmann. *Id.*

¹³³ Case Against Franz Magill, Central Agency file number AR-Z 296/60 (on file with the German Federal Archives [*Bundesarchiv*], Ludwigsburg branch, file numbers B 162/2324–2326). The mass-shooting in Pohost-Zagorodski was part of the allegations against Magill. *Id.*

asked to give a statement. She did not.¹³⁴ While no reason is indicated, it is possible that she did not want to go through the ordeal of testifying in court a second time. What remains is that she testified against Eichmann, but not against the murderer of her family.

Yosselevska's case raises questions about the claim that victims were empowered in the Eichmann trial.¹³⁵ Inevitably, the scope for a witness's account is limited in a criminal court setting, as fairness and due process impose certain limitations. Beyond these requirements, Hausner utilized victim statements selectively, using only snippets that fit into his rhetorical edifice, without much consideration for either the probative value for the case against Eichmann or the broader experiences of the witnesses themselves. Yosselevska had given a statement about her experiences to a Yad Vashem researcher in 1960, which included a lot more than the poignant scene of the mass shooting.¹³⁶ Telford Taylor suggested separating trial from witness testimony, having the latter heard in form of an inquest.¹³⁷ As we know from the example of Truth Commissions, such a format can give greater self-determination to victims.¹³⁸

¹³⁴ PROSECUTION OFFICE (*Staatsanwaltschaft*) MÜNCHEN I TO CENTRAL AGENCY (Nov. 24, 1961) (on file with the German Federal Archives [*Bundesarchiv*], Ludwigsburg branch, file number B 162/3419). A statement by Yosselevska could not be found in the files of the Central Agency, or the Prosecution Office or the Criminal Police [*Landeskriminalamt*] in München. She is not listed as a witness in the indictment, Indictment against Alfred Renndorfer and Wilhelm Daditschek (Apr. 2, 1964) (on file with the German Federal Archives [*Bundesarchiv*], Ludwigsburg branch, file number B 162/3416). Renndorfer was, among other crimes, sentenced for the killing of the Jewish population of Pohost Zagorodski. He received the very low sentence of five years, Judgment against Alfred Renndorfer and Wilhelm Daditschek (Nov. 22, 1966) (on file with the German Federal Archives [*Bundesarchiv*], Ludwigsburg branch, file number B 162/3416).

¹³⁵ See YABLONKA, *supra* note 1, at 3–4 (mentioning an interview with Yosselevska, in which her feelings in respect of her testimony at the Eichmann trial were not discussed); E-mail from Hanna Yablonka to Ruth Bettina Birn (Nov. 11, 2010) (on file with author). There are some discrepancies between Yablonka's account and Hausner's account. *Id.* at 97, 108, 111–12; HAUSNER, *supra* note 41, at 73–74. See generally Judith Stern, *The Eichmann Trial and Its Influence on Psychiatry and Psychology*, 1 THEORETICAL INQUIRIES L. 393, 419–22 (2000) (it seems no interviews with survivor witnesses about their experiences at the trial were conducted).

¹³⁶ Deposition of Rivka Yosselevska, taken by the Oral History Division of Yad Vashem (Jan. 10, 1961) (recorded Dec. 10, 1960) (on file with the Yad Vashem Archives, Jerusalem, file reference No 0.3/2054)

¹³⁷ See Taylor, *supra* note 106, at 25 (“There is no reason why . . . the Israeli Government could not conduct a proceeding in the nature of an inquest . . . which . . . precedes and furnishes the basis for an accusation.”).

¹³⁸ Not all Truth Commissions achieved this aim, however. The literature on this subject is extensive. See, e.g., PRISCILLA B. HAYNER, UNSPEAKABLE TRUTHS: FACING THE CHALLENGE OF TRUTH COMMISSIONS (2002) (exploring twenty major truth commissions around the world).

Hausner's lack of consideration for the complete story of victims is demonstrated by another witness prominently discussed in the literature.¹³⁹ Ada Lichtman was asked to testify about the persecution of the Jewish population in her home town in Poland in the early period of the German occupation. Hausner's promptings—"Can you remember the old Jew who was carrying his paralyzed grandson? Tell us what happened to that Jew."¹⁴⁰—show that he had preselected the components of Lichtman's story he wanted to use.¹⁴¹ In his summing-up Hausner generalized the acts of cruelty described by Lichtman as "the mode of operation in the Generalgouvernement" and suggested similarities between East and West,¹⁴² but Eichmann was, again, not responsible for the crimes Lichtman described. However, at a later time Lichtman was deported to Sobibor. Zeug, in the course of his investigation on Sobibor, had had her questioned by the Israel Police on March 30, 1960. Eichmann's office was instrumental for deportations from Western Europe to Sobibor and Lichtman could have legitimately spoken in Jerusalem, as she did at other occasions, about her ordeal in this death camp.¹⁴³

C. *On Show Trials and Narratives*

Some recent commentators on the Eichmann trial advocate diversions from strict legality in favour of didactic purposes.¹⁴⁴ According to Douglas, the trial was an "extraordinary success, creating a site of remembrance and commemoration that served to confer iconic significance upon

¹³⁹ See Douglas, *supra* note 124, at 97–122. It is striking that Douglas shows no interest in the witnesses beyond their appearance in the courtroom, treating them as figures in a theatre performance. *Id.* Douglas uses theatre-related expressions like "dramaturgy of prosecution." Douglas, *supra* note 127, at 300. Similarly, he uses the expression "greatest moments of melodrama." DOUGLAS, *supra* note 123, at 170. The characterization of witnesses as figures in a theatre performance is also evident in the works of Shoshana Felman. See FELMAN, *supra* note 123.

¹⁴⁰ 1 MINISTRY OF JUSTICE, *supra* note 6, at 326.

¹⁴¹ See *id.* at 323–26. Hausner was aware that Lichtman could testify about Sobibor but did not call her on that. *Id.*

¹⁴² 5 MINISTRY OF JUSTICE, *supra* note 60, at 2000.

¹⁴³ ZEUG TO KERMISZ AT YAD VASHEM (Dec. 1, 1960) (on file with the German Federal Archives [*Bundesarchiv*], Ludwigsburg branch, file number B 162/4425); STATEMENT OF ADA LICHTMAN (Apr. 23, 1963) (on file with the German Federal Archives [*Bundesarchiv*], Ludwigsburg branch, file number B 162/4431). Lichtman's husband also had been in Sobibor, where his first wife and children were murdered. See Barbara Distel, *Vernichtungslager Sobibór*, in 8 DER ORT DES TERRORS: GESCHICHTE DER NATIONALSOZIALISTISCHEN KONZENTRATIONSLAGER 375–404 (Angelika Königseder ed., 2008).

¹⁴⁴ See, e.g., Douglas, *supra* note 124; FELMAN, *supra* note 123; BILSKY, *supra* note 13; Shapira, *supra* note 107.

the Holocaust.”¹⁴⁵ Earlier commentators like Hannah Arendt (and, by implication, the Jerusalem District Court) are criticized for promoting the “unnecessarily restrictive vision” that “the *sole* purpose of a trial is to render justice.”¹⁴⁶ Hausner, on the other hand, is applauded for his “capacious view of the trial,” which made the prosecution the “defender of narrative and memory against the court’s rigid dedication to traditional trial form.”¹⁴⁷ What really matters, it is argued, is the grand narrative created, the courtroom drama. Following Mark Osiel: “To maximize their pedagogic impact, such trials should be unabashedly designed as monumental spectacles.”¹⁴⁸ As a safeguard against abuse, Douglas stipulates that such historical trials should be conducted “responsibly.”¹⁴⁹ Osiel, in his “defense of liberal show trials” considers the intentions decisive: “Whether show trials are defensible depends on what the state intends to show and how it will show it.”¹⁵⁰ What this commentary omits are the role of the law in creating a sphere outside of the influence of government and the function of procedural rules in ensuring fairness and equality before the law, as well as considerations of the content of narratives. To what extent does a narrative have to reflect the facts, in a case like the Eichmann trial, reflect the historical record? Is it also permissi-

¹⁴⁵ DOUGLAS, *supra* note 123, at 260.

¹⁴⁶ Douglas, *supra* note 124, at 97. Compare *id.* (adding that “it is unrealistic to expect and silly to demand that the trial be conducted as an ordinary exercise of the criminal law”), with FELMAN, *supra* note 123, at 305–06 (“[T]he function of the trial was not to create a legal precedent but to create a legal narrative, a legal language and a legal culture that were not yet in existence but that became essential for the articulation of the unprecedented nature of the genocidal crime.”).

¹⁴⁷ DOUGLAS, *supra* note 123, at 144, 150. Douglas uses the expression “capacious” repeatedly throughout the book. See *id.* The expression signals justified disregard of procedural rules, but, because the term is so ill-defined, there is no indication when and under which circumstances breaking the rules is permissible.

¹⁴⁸ Mark J. Osiel, *In Defense of Liberal Show Trials—Nuremberg and Beyond*, in PERSPECTIVES ON THE NUREMBERG TRIAL 704, 705 (Guenael Mettraux ed., 2008). Osiel bases his analysis on JUDITH N. SHKLAR, LEGALISM: LAW, MORALS, AND POLITICAL TRIALS (1986) (originally published in 1964) (arguing that procedural fairness, as a liberal value, is required).

¹⁴⁹ Douglas, *supra* note 124, at 97 (considering a procedurally fair trial a basic requirement, but not addressing the inherent tension between procedural requirements and didactic intentions).

¹⁵⁰ Osiel, *supra* note 148, at 706. Other authors echo this requirement. See, e.g., Gary J. Bass, *The Adolf Eichmann Case: Universal and National Jurisdiction*, in UNIVERSAL JURISDICTION: NATIONAL COURTS AND THE PROSECUTION OF SERIOUS CRIMES UNDER INTERNATIONAL LAW 77, 88 (Stephen Macedo ed., 2004). Some authors hold the more conventional view that a trial automatically vindicating the prosecutor’s position is a show trial. See, e.g., Koskenniemi, *supra* note 123, at 404. Shapira sees courtroom drama and the avoidance of boredom as valid considerations. Shapira, *supra* note 107, at 23 (“It is true that the documents were more incriminating; yet whenever the prosecution presented such documents, the bored journalists headed straight for the snack bar.”).

ble to disregard the narrow confines of “legalism” to create a politically inspired, distorted depiction of history?¹⁵¹

This brings us back to the major problem in the Eichmann trial, the discrepancy between Eichmann’s real role and the exaggerated image created by Hausner. As pointed out earlier in this article, the District Court—in particular the Presiding Judge Moshe Landau—tried its best to keep the focus on evidence concerning the accused rather than the Holocaust in general. In its judgment, the court stated explicitly that it saw the function of the trial in deciding on the culpability of Eichmann, not in a comprehensive depiction of a period in history.¹⁵² But, although the fact-oriented judgment of the District Court came closer to documenting Eichmann’s role in the Holocaust, the Hausner narrative re-emerged in the judgment of the Supreme Court.¹⁵³ The discrepancy between history and image became partic-

¹⁵¹ A particularly troubling example is the attempt to construct a close link between Eichmann and the former Mufti of Jerusalem, as requested by Golda Meir. According to Hanna Yablonka, Bureau 06 was opposed to this. YABLONKA, *supra* note 1, at 84–86. Hausner was more obliging. Here, again, he utilized the affidavits of Wisliceny. 1 MINISTRY OF JUSTICE, *supra* note 6, at 243–44; 2 MINISTRY OF JUSTICE, *supra* note 93, at 914–15; 3 MINISTRY OF JUSTICE, *supra* note 16, at 1138–44; 5 MINISTRY OF JUSTICE, *supra* note 60, at 2028–29. The judgment followed, to a large extent, Hausner’s view. *See id.* at 2169. In his book, Hausner claimed that close links existed. HAUSNER, *supra* note 42, at 345–46. According to Eichmann, he had met the Mufti once at a reception, and some Arab officers were sent to his office for an informational visit. 4 MINISTRY OF JUSTICE, *supra* note 37, at 1451–52; 7 MINISTRY OF JUSTICE, *supra* note 63, at 357–59, 551–70. The Mufti resided in Berlin during the war. While he was sympathetic to the Nazi cause, his political influence was quite limited. A whole genre of books is devoted to exaggerating his role. *See, e.g.,* SIMON WIESENTHAL, GROSSMUFTI: GROSSAGENT DER ACHSE (1947).

¹⁵² 5 MINISTRY OF JUSTICE, *supra* note 60, at 2082.

In this maze of insistent questions, the path of the Court was and remains clear. It cannot allow itself to be enticed into provinces which are outside its sphere

It is the purpose of every criminal trial to clarify whether the charges in the prosecution’s indictment against the accused who is on trial are true Everything which requires clarification in order that these purposes may be achieved, must be determined at trial, and everything else which is foreign to these purposes must be entirely eliminated from the court procedure.

Id.

¹⁵³ *See* 5 MINISTRY OF JUSTICE, *supra* note 60, at 2368.

As a matter of fact the Appellant did not receive any orders ‘from above’ at all; it was he who was supreme, he who was the commander in all that pertains to Jewish Affairs Yet that idea might not have assumed so satanic and infernal an expression—in the bodies of millions of tortured and martyred Jews—but for the thorough planning, the zeal, the fanatical enthusiasm, and the insatiable blood-thirstiness of the Appellant and those who did his bidding.

Id.; *see also id.* at 2369 (“Even as there is no word in human speech to describe acts such as the acts of the Appellant, so there is no punishment in human laws sufficiently grave to match the guilt of the Appellant.”). According to Pnina Lahav, the Supreme Court judge who wrote this part was suffering from the loss of relatives during the Holocaust. LAHAV, *supra*

ularly visible in Hausner's cross-examination of Eichmann. Zeug was not the only observer to comment negatively on this part of the trial.¹⁵⁴ Hausner, due to his lack of in-depth knowledge, made unfounded allegations that Eichmann easily refuted.¹⁵⁵ Hausner was also not able to see and seize upon admissions Eichmann made. Hausner relied on an aggressive and bullying tone, causing interventions by the Presiding Judge. The scene deteriorated into what some media commentators called a "show trial."¹⁵⁶ The trial record has several examples of Eichmann denying a (false) fact put to him by Hausner, which created unrest in the audience.¹⁵⁷

Many of Hausner's false claims have a continuing impact to this day.¹⁵⁸ The trial's influence on memory is also ambiguous. While the trial was instrumental in creating space for suppressed memory, false memory appeared as well. Some survivors, presumably due to the highly publicized event, did not differentiate between recollection and imagination.¹⁵⁹ Perpe-

note 13, at 157–58 ("Silberg was an open wound."). Even sympathetic viewers commented on Hausner's demonization of Eichmann. See BERND NELLESEN, *DER PROZESS VON JERUSALEM. EIN DOKUMENT* 12 (1964).

¹⁵⁴ See ZEUG, *supra* note 21 (July 15, 1961); MULISCH, *supra* note 123; ZENTRALE RECHTSSCHUTZSTELLE TO ALL EMBASSIES [*alle Vertretungen*] (Sept. 30, 1961) (on file with the Archives of Foreign Ministry [*Politisches Archiv des Auswärtigen Amts*], Berlin, file number B 80/466).

¹⁵⁵ See ZEUG, *supra* note 21 (July 15, 1961, July 28, 1961).

¹⁵⁶ See *id.* In response to a question from Judge Halevi, Eichmann admitted to having drawn up time tables for resettlements from the East to KL Lublin. This was new. According to Zeug, Hausner became more careful after negative comments in the media. *Id.*

¹⁵⁷ Eichmann denied, correctly, knowing of the final solution in the sense of extermination in early 1941. 4 MINISTRY OF JUSTICE, *supra* note 37, at 1618–19. He answered, equally correctly, to the question: "Were you not Heydrich's Specialist Officer?" with "No, I was not Heydrich's Specialist Officer for the Final Solution of the Jewish Question. I was a Specialist Officer on Jewish Affairs under Müller." *Id.* at 1621. He also correctly asserted that he received his orders in Hungary from the HSSPF and the Commander of the Security Police, not directly from Berlin. *Id.* at 1773–74. The trial record indicates, that the Presiding Judge had to quell unrest in court. There are other examples for unfounded allegations made in cross-examination.

¹⁵⁸ Gabriel Bach, former member of the prosecution team and an influential commentator during the fifty years anniversary, repeated in 2006, that Eichmann "was in charge of all the steps taken to implement the demonic plan for the so-called 'Final Solution of the Jewish Problem,'" as well as the other allegations Hausner had made. Bach, *supra* note 41, at 216. After the trial, 48.3% of Israeli youth were under the impression that Eichmann was one of the top leaders. See AKIVA W. DEUTSCH, *THE EICHMANN TRIAL IN THE EYES OF ISRAELI YOUNGSTERS* 48 (1974); see also MULISCH, *supra* note 123, 50–51; *Eichmann-Prozeß*, *supra* note 39.

¹⁵⁹ One example from the trial for false recollections is the testimony of the witness Bahir. See 3 MINISTRY OF JUSTICE, *supra* note 16, at 1178–82, 1188, 1219–20, 1341. Another example found in Holocaust literature are the memoirs of a survivor, who in 1961, incorporated an Eichmann incident in his recollections. See JACOB FRANK & MARK LEWIS, *HIMMLER'S JEWISH TAILOR: THE STORY OF HOLOCAUST SURVIVOR JACOB FRANK* 119–23 (2000).

trators used the highly charged atmosphere of the trial for their own ends. A Security Police leader responsible for mass shootings in the Pinsk district, close to the area where Yosselevska had lived, invented as a defense an order by Eichmann.¹⁶⁰

As this article demonstrates, in 1961 it would have been possible to conduct a trial reflecting Eichmann's crimes more accurately.¹⁶¹ The public impact need not have been affected, due to television coverage and the presence of hundreds of journalists. There were enough survivors linked to Eichmann's crimes to make the suffering of victims visible. What would have been needed was, as Zeug stated, outreach to other agencies and more time and hard work. Zeug, based on his observations, saw the reason why this did not happen in a mix between ignorance and nationalistic tendencies—the wish to do it alone. He also saw no sign that Hausner was much inclined to overcome the weaknesses of his case.¹⁶² And, as we know, what stood against a trial of the “real” Eichmann was the Israeli government's intention to use the trial as a stage on which to display a politically usable past.

¹⁶⁰ Interrogation of Wilhelm Rasp (Dec. 18, 1961) (on file with the German Federal Archives [*Bundesarchiv*], Ludwigsburg branch, file number B 162/5801). The interrogation of Rasp's deputy shows that the story was invented. Interrogation of Heinrich Geigenscheder (Dec. 20, 1961) (on file with the German Federal Archives [*Bundesarchiv*], Ludwigsburg branch, file number B 162/5801). That the story was a fabrication is also supported by the fact that Eichmann's office was not part of the chain of command leading from Berlin to the Security Police sub-unit in Pinsk, headed by Rasp. *Id.*

¹⁶¹ In 1961, prosecutors had more detailed knowledge about the history of the Holocaust than historians.

¹⁶² See ZEUG, *supra* note 21 (May 29, 1961, July 15, 1961, July 28, 1961, Aug. 17, 1961). How “capacious” Hausner's views were is illustrated by the following sequence: When the prosecution wanted to call a witness on the flight of Jews to the partisans, which had nothing to do with Eichmann, Hausner responded,

I know that it is not the Court's wish that we attempt to depict the Holocaust fully, for the Court desires—and, with all due respect, rightly so—to confine the matters brought before it only to the indictment against the Accused. But, in our view, this also relates to the Accused. They fled from these hardships which the Accused brought upon them—they were forced to hide, and everything they underwent came from the Accused, if not directly, at least indirectly.

3 MINISTRY OF JUSTICE, *supra* note 16, at 1341.