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Matthew Lippman
University of Illinois at Chicago

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GENOCIDE: THE TRIAL OF ADOLF EICHMANN AND THE QUEST FOR GLOBAL JUSTICE

*Matthew Lippman**

INTRODUCTION

This essay revisits the Israeli prosecution of Adolf Eichmann, a central architect of Nazi Germany's Final Solution of the Jewish question. The *Eichmann* trial stands as a seminal step in the development of international human rights and humanitarian law and presents the profound jurisprudential issue as to whether legal standards and procedures may be compromised in an effort to achieve a desired and deserved criminal conviction.¹

Professor Lon L. Fuller composed the hypothetical, *The Problem Of The Grudge Informer*, to highlight the central issues raised in *Eichmann* and in other post-World War II war crimes prosecutions.² Fuller described the election of "Headman" as President of a mythical Republic and the securing of a parliamentary majority by "Headman's" Purple Shirt Party. This electoral success was based on a campaign of false promises, misrepresentation and physical intimidation. The new government retained the country's constitution, political structure, statutory provisions and continued to conduct elections. Judges, however, were pressured into perverted interpretations of the criminal code, secret and retroactive statutes were adopted, opposition parties were abolished and dissidents were intimidated and jailed. An amnesty resulted in the release of incarcerated Purple Shirts. Property was forcefully appropriated by members of the Purple Shirts and these seizures later were ratified by retroactive statutes.³

A number of "grudge informers" reported acts declared criminal by Purple Shirt authorities, including criticizing the government, listening to foreign radio broadcasts, associating with dissidents and hoarding dried eggs and failing to report lost identification papers. Conviction could result in an administrative or judicial sentence of death. Following the overthrow

* Matthew Lippman (Ph.D. Northwestern; J.D. American; LL.M. Harvard); Professor, University of Illinois at Chicago

¹ See H.L.A. Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593 (1958). See also Lon L. Fuller, *Positivism and Fidelity to Law—A Reply to Professor Hart*, 71 HARV. L. REV. 630 (1958). See generally Lon L. Fuller, *The Case of the Speluncean Explorers*, 62 HARV. L. REV. 616 (1949).

² Lon L. Fuller, *The Problem of the Grudge Informer*, in LON L. FULLER, *THE MORALITY OF LAW* 245 (rev. ed. 1964).

³ *Id.* at 245-247.

of the Purple Shirts, the public demanded the punishment of the "grudge informers."⁴

Fuller presents the diverse views of five fictitious governmental advisers as to whether the new regime should retroactively prosecute the "grudge informants." One queried whether this would replicate the arbitrary lawlessness of the Purple Shirts.⁵ Another of Fuller's fictional advisers argued that the Purple Shirt regime existed in a distinct and different era which should be viewed as immune from legal scrutiny and judgment.⁶ Legal intervention also risked the eruption of antiquated animosities and grievances.⁷ Another adviser counseled against countenancing the acts of the "grudge informers" and advocated the adoption of a retroactive criminal statute.⁸ The final member of Fuller's board of governmental advisers assumed a neutral stance and favored the toleration of extra-legal retributive acts.⁹

Some of these same choices confronted Israel. Should Eichmann be subjected to trial under a retroactive law adopted following the commission of his crimes? Was it proper to judge acts undertaken in a distinct, different and largely lawless era? This dilemma was exacerbated by the fact that Eichmann's alleged offenses had been committed against citizens of European States prior to the establishment of Israel. On what basis could the fledgling Jewish State assert jurisdiction? Was Israel the proper forum for such a trial? Would any prosecution and punishment inevitably become influenced and infused by politics and degenerate into a "show trial?" Is the prosecution of international crimes beyond the capacity of a single nation-state? Should the defense of superior orders or adherence to law be recognized? May legal procedures be compromised in order to achieve substantive justice, particularly in light of the scope and severity of Eichmann's crimes. Might it be preferable to assassinate Eichmann and to deprive him of the procedural justice that he denied his victims?¹⁰

This essay begins with a brief review of Adolf Eichmann's role in the Nazi regime and describes Eichmann's abduction from Argentina and the subsequent United Nations Security Council debate. The testimony at the Eichmann trial, which provides a unique insight into the Final Solution is then discussed, followed by an outline of the verdict and sentencing. In

⁴ *Id.* at 247.

⁵ *See id.* at 247-249.

⁶ *See id.* at 250.

⁷ *See id.*

⁸ *See id.* at 251-252.

⁹ *See id.* at 252-253.

¹⁰ *See generally* PETER PAPADATOS, *THE EICHMANN TRIAL* (1964).

conclusion, the international legal issues involved in the trial are reviewed and some summary observations are sketched.

I. EICHMANN AND THE FINAL SOLUTION

Despite Adolf Eichmann's central role in the Nazi conspiratorial campaign to exterminate the Jews, he remains a shadowy and skeletal figure in the historiography of the Third Reich.¹¹ Eichmann spent most of his childhood in Linz, Austria, and completed two years at a post-secondary vocational school.¹² He seemingly mindlessly migrated to membership in the National Socialist Party and in October 1934, following Hitler's ascendancy to power, volunteered for service in the Head Office of the Security Service (S.D.) in Berlin.¹³ After spending several months in the Department

¹¹ For instance, German historian Joachim C. Fest makes devotes little attention to Eichmann in his profile of the major figures of the Third Reich. *See* JOACHIM C. FEST, *THE FACE OF THE THIRD REICH PORTRAITS OF THE NAZI LEADERSHIP* (Michael Bullock trans., 1999) (1964).

¹² *Attorney-General of the Government Of Israel v. Adolf Eichmann* 36 I.L.R. 18 (Dist. Ct., Dec. 12, 1961)(1968) [hereinafter Dist. Ct. Judgment] *aff'd* 36 I.L.R. 277 (Sup. Ct., May 29, 1962)(1968) [hereinafter Sup. Ct. Judgment]. Adolf Eichmann was born in 1906 in Solingen in the Rhineland Germany. His family moved to Austria in 1914. Eichmann's father, a devout Evangelical Christian, worked as a bookkeeper in a local company. He later lost money in various business ventures, including a mining company in which the young Eichmann was employed. Adolf Eichmann was forced in young adulthood to seek an independent career, but was fired from his position with the Socony Vacuum Company in 1933. He joined the Austrian National-Socialist Party in 1933 and, following Hitler's ascendancy to power, Eichmann migrated to Germany. In November 1933, he enlisted for military service in the Austrian S.S. unit in exile and received military training. After reaching the rank of sergeant, he volunteered for service at the Head Office of the Security Service in Berlin. *See* Dist. Ct. Judgment, *supra* at 84-85.

¹³ Dist. Ct. Judgement, *supra* note 12, at 85. The National Socialist bureaucratic structure was complex with overlapping State and Party authority over the same areas. The S.D. (Security Service of the Reichsfuhrer S.S.) was the intelligence service of the Nazi Party Secret Service, S.S., and, later, of the entire National Socialist Party. The Head of the S.D., Reinhard Heydrich, in 1936, also was appointed to direct the State Security Police which was comprised of the State Secret Police (Gestapo) and the Criminal Police. Heydrich's superior was Minister of Interior, Heinrich Himmler, who in this capacity headed the German Police. Himmler also was leader of the S.S. The unification of the S.D. with the Security Police was completed by Himmler's order of September 27, 1939 creating the Head Office for Reich Security (RSHA). RSHA was comprised of six (later seven) offices. The Gestapo was merged into this new structure as Bureau IV, headed by Heinrich

for Research into Freemasonry, he shifted to Section II 112, "Jews."¹⁴ In March 1938, Eichmann was appointed Referent (section head) for Zionist Affairs which was concerned with intelligence and worked in close co-operation with the Jewish Department in the Gestapo (II4B).¹⁵ Eichmann's superiors were impressed with his knowledge of Jewry and he went so far as to study Hebrew and Yiddish.¹⁶ Eichmann also traveled to Palestine, established an important diplomatic alliance with the virulently anti-semitic Mufti of Jerusalem, Haj Amin el Husseini, and regularly lectured the S.S. and army commanders on the structure and aims of World Zionism.¹⁷

Eichmann, following the annexation of Austria in 1938, was sent to Vienna to administer the newly-established Center for Emigration of Austrian Jews.¹⁸ He displayed administrative acumen in coordinating the various governmental authorities involved in Jewish emigration.¹⁹ Eichmann described the process as resembling an automated factory in which a Jew was processed and emerged at "the other end without any money, without any rights, and only a passport in which it says: 'You must leave the country within a fortnight: otherwise—you will go to a concentration camp.'"²⁰ In a letter to a friend, Eichmann boasted that the Jews "are entirely in my hands, they do not dare to take a single step without asking me first."²¹ In the end, he succeeded in pressuring a substantial percentage of Austria's 150,000 Jews to emigrate.²² The Reich financed the evacuation of Jews without means through the confiscation of Jewish property, the extraction

Mueller. The mission of Bureau IV was "combating opponents." The Criminal Police was transformed into Bureau V and the intelligence duties of the S.D. were transferred to Bureaus II, III and VI of the RSHA. *Id.* at 85. RSHA, in turn, was one of the twelve main offices of the S.S. In November 1939, the officials of the Gestapo and Criminal Police received ranks in the S.S. *See id.* at 86. Heydrich served as head of the RSHA until his assassination in June 1942. In December 1942, he was replaced by Ernst Kaltenbrunner, an Austrian acquaintance of Eichmann. *id.*

¹⁴ *Id.*

¹⁵ *See id.* The Gestapo possessed executive as well as intelligence powers. Eichmann's performance merited a promotion to the officer rank (*Untersturmführer*). *See id.*

¹⁶ *See id.* at 86-87.

¹⁷ *See id.* at 87.

¹⁸ *See id.* at 88.

¹⁹ *See id.*

²⁰ *Id.* at 89.

²¹ *Id.* at 90.

²² *See id.* at 91.

of funds from abroad, and unfavorable rates of exchange on the currency permitted emigrating Jews.²³ Eichmann was next sent to Prague, where he devoted himself to organizing and financing the evacuation of the Jews within the newly-established German Protectorate of Bohemia and Moravia.²⁴

Eichmann returned to Berlin following the invasion of Poland, in September 1939, where he organized the evacuation of Jews from Germany to Poland.²⁵ In February 1940, 1,300 Jews were deported from the Old Reich to Lublin Poland; 230 expired in transit.²⁶ The invasion of Poland by Germany and Russia resulted in two million additional Jews falling under the command and control of the Reich.²⁷ An ambitious plan was initiated which involved deporting Jews and Poles resident within the newly-created and annexed Warthe District in the East (incorporated Poland) to the so-called Government General (unincorporated Poland).²⁸ Eichmann supervised the sealing of Jews into railroad cars with little regard for heat, hygiene or provisions.²⁹

In 1940, Eichmann sought to alleviate the overcrowding in Polish Jewish ghettos through the creation of a Jewish State in the inhospitable locale of Nisko on the River San in the Government General.³⁰ The Jews were unceremoniously left to fend for themselves in withering winter weather without food, water or shelter.³¹ The plan faltered and was abandoned; only three hundred of the initial group of one thousand returned to Austria.³² Eichmann pursued an even more adventurous project in 1942, when he devised detailed preparations for the settlement of four million Jews on the island of Madagascar.³³

²³ *See id.*

²⁴ *See id.* at 92. Eichmann's efforts resulted in his promotion to captain in the S.S. *Id.*

²⁵ *See id.*

²⁶ *See id.* at 98-99. In October 1940, all the 7,450 Jews of the district of Baden and the Saar Palatinate were expelled to the unoccupied territory of France. *See id.* at 101.

²⁷ *See id.* at 93.

²⁸ *See id.* at 97. Eichmann was in charge of this effort which was placed under the newly created Bureau IVD4, charged with emigration and evacuation. *Id.*

²⁹ *See id.* at 98.

³⁰ *See id.* at 95.

³¹ *See id.* at 95-96.

³² *See id.* at 96.

³³ *See id.* at 100-101.

As Hitler contemplated the invasion of the Soviet Union in June of 1941, Eichmann was promoted to Lieutenant Colonel and appointed to head Bureau IVB4, Jewish Affairs.³⁴ He later was formally vested with authority over the confiscation of Jewish property and the revocation of German nationality.³⁵ In October 1941, a meeting was held between Reinhard Heydrich, Chief of the Head Office for Reich Security (RSHA), Eichmann and others, at which plans were promulgated for the comprehensive expulsion of Jews from the Old Reich and the Protectorate of Bohemia and Moravia.³⁶ Eichmann then organized, attended, and transcribed the minutes of the Wannsee Conference of January 1942, which established the foundation for the Final Solution of the Jewish question throughout Europe.³⁷ Wannsee formally replaced the policy of emigration abroad with evacuation to the East for purposes of forced labor and "appropriate treatment."³⁸

Eichmann was recognized at the conference as the principal person within RSHA for all matters connected with the Final Solution of the "Jewish problem."³⁹ His activities now encompassed the entire European continent; he coordinated arrangements for the arrest, selection, transport and reception of Jews and the seizure and sequestration of Jewish property, insuring that the entire process was recorded and financed.⁴⁰ This extended to numerous countries ranging from France, where 52,000 Jews were evacuated;⁴¹ Norway, in which only thirteen of the 750 Jews deported survived;⁴² Slovakia which suffered the extermination of 70,000 of the country's 90,000 Jews;⁴³ Croatia which witnessed the survival of only 1,500 of

³⁴ See *id.* at 102.

³⁵ See *id.* at 103. In 1944, Eichmann's section was provided with a new designation, IVA4. *Id.*

³⁶ See *id.* at 106-109.

³⁷ See *id.* at 108-110. In July 1941, Himmler charged Heydrich with making all necessary preparations for the "general solution of the Jewish problem within the German sphere of influence in Europe." *Id.* at 104-105. Heydrich also was assigned to plan to implement the "desired final solution of the Jewish problem." *Id.* The Reich Nationality Law of 1941 provided that a Jew resident abroad forfeited his or her German citizenship. The property of these Jews was subject to confiscation. This resulted in deported Jews losing both citizenship and property rights. *Id.* at 109.

³⁸ *Id.* at 109-112.

³⁹ *Id.* at 113.

⁴⁰ See *id.* at 115-121.

⁴¹ See *id.* at 121, 123.

⁴² See *id.* at 125-126.

⁴³ See *id.* at 127-128.

30,000 Jews;⁴⁴ Serbia, where only 5,000 of a population of 47,000 Jews survived;⁴⁵ Greece, in which only 10,00 of 77,000 Jews were left alive;⁴⁶ and Italy, in which only 600 of the 7,500 Jews who were evacuated survived.⁴⁷ Eichmann's commitment to cleansing the Jews from Europe is illustrated by a 1942 memorandum, that recorded the cancellation of a train from Bordeaux in France due to the fact that local authorities only managed to arrest 150 stateless Jews.⁴⁸ Eichmann reportedly reacted by characterizing this as a "disgraceful" event which undermined the "prestige" of his office.⁴⁹ He later did not hesitate to order the deportation of 4,000 French Jewish children separated from their parents to Auschwitz.⁵⁰ In September 1941, the German Foreign Ministry in Serbia sought guidance on the disposition of 8,000 Jews; the file recorded that "Eichmann proposes killing by shooting."⁵¹ Eichmann consistently opposed the emigration of Jews to Palestine, on one occasion exerting diplomatic pressure on Turkey and Bulgaria to refuse to issue transit visas to thousands of Jewish children.⁵²

The near completion of the cleansing of European Jewry freed Eichmann to turn his attention to the remaining concentration of stateless and domestic Jews in Hungary, which had been occupied by Germany in March 1944.⁵³ Despite countless barriers and challenges, Eichmann succeeded in evacuating roughly two-thirds of Hungary's 800,000 Jews.⁵⁴ Between April 16, 1944 and July 9, 1944 alone, 434,351 Jews were transported in 147 freight cars to Auschwitz.⁵⁵ As the Allied Powers landed in Normandy, in June 1944, Hungarian Regent Miklos Horthy was persuaded by international pressure to halt the deportations.⁵⁶ This frustrated Eichmann's aspiration to evacuate the entire Jewish population of Budapest and, when Horthy halted a train at the border carrying 1,500 Jews, Eichmann responded by defiantly deporting the Jews.⁵⁷ In August, as the victory

⁴⁴ See *id.* at 128-129.

⁴⁵ See *id.* at 129, 131.

⁴⁶ See *id.* at 132-133.

⁴⁷ See *id.* at 133-134.

⁴⁸ See *id.* at 122.

⁴⁹ *Id.*

⁵⁰ See *id.* at 123.

⁵¹ *Id.* at 130.

⁵² See *id.* at 195-196.

⁵³ See *id.* at 137.

⁵⁴ See *id.* at 138.

⁵⁵ See *id.* at 139.

⁵⁶ See *id.*

⁵⁷ See *id.* at 140.

of the Allied Powers became increasingly apparent, Himmler announced the termination of Hungarian transports.⁵⁸ Eichmann, however, was emboldened by the installation of a sympathetic fascist regime in Hungary and, unwilling to be stymied by the Allied bombing of railroad lines, force-marched over 25,000 Jews on a murderous eight-day trek to the Austrian border.⁵⁹

Eichmann's ability to deport a steady stream of Jews was dependent on the expeditious extermination of those interned in the concentration camps.⁶⁰ The mass execution of Jews by killing squads in Poland and Russia proved ineffective, inefficient and threatened to undermine morale.⁶¹ Eichmann agreed to the asphyxiation of victims by exhaust fumes pumped into the passenger compartments of vans.⁶² He visited the camp at Chelmno and witnessed the crowding of Jews into trucks, the removal of the corpses, and the extraction of gold from their teeth.⁶³ Eichmann also was consulted on an even more sophisticated scheme of slaughter; the utilization of Zyklon-B gas to fuel the killing chambers in concentration camps.⁶⁴ On one occasion, he participated in the selection of individuals from the Theresienstadt ghetto for extermination in Auschwitz.⁶⁵ Eichmann conceded that he visited Auschwitz on at least five occasions and viewed the mass burnings of bodies.⁶⁶ He also was involved in the transfer of eighty inmates from Auschwitz to Natzweiler, where they were exterminated in order to complete a skeleton collection at the Institute for Racial Research at the University of Strasbourg.⁶⁷

In 1944, the Reich bestowed three prestigious awards on Eichmann, including the Distinguished War Service Cross, First Class, with Swords.⁶⁸ Dieter Wislicency, one of Eichmann's chief assistants, testified at Nuremberg that Eichmann proclaimed that he would "leap laughing into the

⁵⁸ See *id.* at 141.

⁵⁹ See *id.* at 141-142.

⁶⁰ See *id.* at 153.

⁶¹ See *id.* at 154, 177-179.

⁶² See *id.* at 154, 210-212. See also Sup. Ct. Judgment, *supra* note 12, at 338.

⁶³ See Dist. Ct. Judgment, *supra* note 12, at 154-155.

⁶⁴ See *id.* at 183-84, 212-16. See also Sup. Ct. Judgment, *supra* note 12, at 338-339.

⁶⁵ See Sup. Ct. Judgment, *supra* note 12, at 339.

⁶⁶ See Dist. Ct. Judgment, *supra* note 12, at 183.

⁶⁷ See *id.* at 202-203.

⁶⁸ See *id.* at 226.

grave” with “extraordinary satisfaction” over having been responsible for the extermination of five million Jews.⁶⁹

II. POST-WAR YEARS

As the Allied Powers advanced into the Reich, Adolf Eichmann, abandoned by his superiors and disillusioned by their lack of resolve to resist, fled to Austria.⁷⁰ He was arrested in 1945 by an American patrol, escaped, was re-arrested, and again fled in anticipation that he would be identified as a seminal figure in the Final Solution and prosecuted at Nuremberg.⁷¹ Eichmann worked as a lumberjack in Lower Saxony for three years under the name Otto Heninger and was subsequently spirited by a shadowy underground organization of former members of the S.S. and a sympathetic Catholic cleric to Argentina, a post-war haven for Nazi notables.⁷² By 1960, Eichmann achieved a sense of stability, working as a foreman at a Mercedes-Benz plant in Buenos Aires and constructing a non-descript house in which he lived with his wife and children.⁷³ Eichmann and his wife made no sustained effort to conceal their identity and Eichmann went so far as to dictate his memoirs to a sympathetic Argentinian newspaper editor, Willen Sassen.⁷⁴

Israeli intelligence continued to receive reports that Eichmann was residing in various Arab States.⁷⁵ The fledgling Jewish State, however, was preoccupied with self-defense and with the immigration of Jews from the Arab States.⁷⁶ In 1957, the Israelis received credible information that Eichmann was residing in Buenos Aires.⁷⁷ This provided the catalyst for a complex and convoluted chase over the next three years which culminated in Eichmann’s capture on May 11, 1960.⁷⁸ He was interrogated for over a

⁶⁹ MOSHE PEARLMAN, *THE CAPTURE AND TRIAL OF ADOLF EICHMANN* 11 (1983).

⁷⁰ See ZVI AHARONI & WILHELM DIETL, *OPERATION EICHMANN PURSUIT AND CAPTURE* 44 (1997).

⁷¹ See AHARONI & DIETL, *supra* note 70, at 45-46. See also PEARLMAN, *supra* note 69, at 29-30;

⁷² See AHARONI & DIETL, *supra* note 70, at 51-55.

⁷³ See *id.* at 100-01. See also PEARLMAN, *supra* note 69, at 33-36.

⁷⁴ See AHARONI & DIETL, *supra* note 70, at 72-73.

⁷⁵ See GIDEON HAUSNER, *JUSTICE IN JERUSALEM* 273 (1968).

⁷⁶ AHARONI & DIETL, *supra* note 70, at 148.

⁷⁷ See *id.* at 78-79.

⁷⁸ See *id.* at 79-138. See also HAUSNER, *supra* note 75, at 273-275. The Israeli authorities were pressured by various influential individuals who were pursuing Eichmann. This included Fritz Bauer, State Attorney General of Hesse and famed Nazi hunter Simon Wiesenthal. See AHARONI & DIETL, *supra* note 70, at 84-87.

week and flown to Israel.⁷⁹ Prior to leaving Argentina, Eichmann drafted and signed a statement, dated May 1960, stating that he was "willing to go to Israel and face proceedings" and that this declaration was an expression of his "own free will."⁸⁰

III. THE DIPLOMATIC DEBATE

On May 23, 1961, Israeli Prime Minister David Ben Gurion announced the apprehension of Adolf Eichman, "one of the greatest of Nazi war criminals," who together with other German leaders, was responsible for the "final solution of the Jewish question."⁸¹ Ben Gurion informed the Knesset that Eichmann was under arrest in Israel and would shortly be placed on trial.⁸²

⁷⁹ See AHARONI & DIETL, *supra* note 70, at 139-160.

⁸⁰ Reprinted in U.N. SCOR, 15th Sess., Supp., Apr.-June 1960, at 31-32, U.N. Doc. S/4342 (1960)(*Note verbale* Dated 3 June 1960 From The Embassy Of Israel In Buenos Aires To The Ministry For Foreign Affairs And Religion Of The Argentine Republic). Eichmann wrote that he desired to provide a "straightforward account of the facts" of his service in Germany in the interests of "future generations." In a revealing comment he noted that it was "futile to attempt to go on evading justice" and that "I wish at last to achieve inner peace." *Id.* at 32. Hannah Arendt notes that the Israelis may have had good grounds for believing that there were few meaningful alternatives to kidnapping Eichmann. Argentina and Israel had not entered into an extradition treaty. Argentina thus was not legally compelled to hand Eichmann over for trial. In addition, the Argentinians had a history of refusing to cooperate in the trial of Nazi war criminals. The West German government, for example, unsuccessfully sought the extradition of Josef Mengele, infamous for having conducted medical experiments at Auschwitz. Argentina also established a fifteen year statute of limitations on offenses associated with World War II. This expired on May 7, 1960. See HANNAH ARENDT, EICHMANN IN JERUSALEM A REPORT ON THE BANALITY OF EVIL 264 (rev. ed. 1992)(1963). Following Eichmann's arrest the Jewish community in Argentina and in other South American countries was targeted for vandalism, bombings and beatings. A young women who assisted the Israelis was murdered and the daughter of the owner of home where Eichmann was detained was sexually abused, tortured and a swastika was burned into her breast with cigarettes. See ALAN LEVY, THE WIESENTHAL FILE 134 (1993).

⁸¹ PEARLMAN, *supra* note 69, at 60, 64. Israel subsequently claimed that the operation had been carried out by volunteers. Zvi Aharoni, a central character in the kidnapping of Adolf Eichmann, characterized this as "pure fiction." AHARONI & DIETL, *supra* note 70, at 169.

⁸² PEARLMAN, *supra* note 69, at 60.

On June 1, Argentine Foreign Minister Diogenes Taboado called Israeli Ambassador Arveh Levavi and requested "a concrete and official declaration on reports that Eichmann had been captured in Argentina."⁸³ Taboado added that in the event that "it is proved that an act violating international law was committed within Argentine territory my government will adopt measures in accordance with the nature of the case."⁸⁴

Israel responded to the Argentinian inquiry with a *note verbale*.⁸⁵ The Israelis contended that they had been unaware prior to the receipt of the Argentinian inquiry that Eichmann had been apprehended in Argentina.⁸⁶ They explained that Eichmann had been seized by volunteers who had been searching for the infamous mass murderer of the Jews for the past fifteen years.⁸⁷ These private individuals traced Eichmann to Argentina where he had been living under an assumed name and he voluntarily accompanied his captors to Israel.⁸⁸ The Israelis stressed that Eichmann penned a letter while in Argentina in which he expressed his willingness to stand trial in Israel.⁸⁹ He wrote that he desired "to give a straightforward account of the facts of his last years of service in Germany so that a true picture of the facts may be passed to future generations" and that he might achieve "inner peace."⁹⁰

The Israeli note expressed regret in the event that the volunteers violated Argentine law or sovereignty.⁹¹ The Jewish State importuned the Argentinians to consider the special significance of bringing to trial the individual responsible for the murder of millions, and requested that due weight be accorded to the fact that the volunteers were themselves Holocaust survivors.⁹²

In order to deter further diplomatic disagreement, Israeli Prime Minister David Ben-Gurion sent a letter to President Arturo Frondizi of

⁸³ *Id.* at 64.

⁸⁴ *Id.* Argentina's assertive response, in part, was motivated by a desire to detract attention from the fact that Eichmann entered the country illegally. This incident also might draw attention to the fact that other Nazi war criminals entered and were living in Argentina. *Id.* at 63-64.

⁸⁵ U.N. SCOR, 15th Sess., Supp., Apr.-June 1960, at 31, U.N. Doc. S/4342 (*Note verbale* dated 3 June 1960 from the Embassy of Israel in Buenos Aires to the Ministry for Foreign Affairs and Religion of the Argentine Republic).

⁸⁶ *See id.*

⁸⁷ *See id.*

⁸⁸ *See id.*

⁸⁹ *See id.*

⁹⁰ *Id.* at 32.

⁹¹ *See id.*

⁹² *See id.*

Argentina, dated June 7, 1960.⁹³ Ben-Gurion reiterated that he did not underestimate the seriousness of the "formal violation" of Argentinian law.⁹⁴ He nevertheless requested Argentina to understand that the aim of the volunteers was to prosecute before an Israeli court, Adolf Eichmann, the individual responsible for the "unparalleled crimes" of the Holocaust.⁹⁵ There could be no doubt concerning the "lofty motives," the "imperative moral force" and the "depth of feeling" which motivated the individuals who apprehended Adolf Eichmann.⁹⁶ Ben Gurion expressed confidence that the Argentinians would view this as an act of "historical justice" and that the friendly relations between Israel and the Argentine Republic would "suffer no harm."⁹⁷

As this note was in transit, Argentina submitted a letter to the Israeli regime dated June 8, 1960.⁹⁸ Argentina condemned the cataclysmic crimes committed by Hitler and his henchmen which cost the lives of millions.⁹⁹ The Argentinians noted that Israel had not clarified whether the volunteers were acting on behalf of the Jewish State.¹⁰⁰ Argentina nevertheless claimed that Israel's express approval of the acts of the volunteers and intent to place Eichmann on trial resulted in the imputation of legal responsibility to the Jewish State.¹⁰¹ The Argentinians also reiterated their disappointment that, although the volunteers disregarded established international procedures, Israel had failed to offer appropriate reparations for the violation of Argentine sovereignty.¹⁰²

Argentina suggested that Israel's focus on the historical grievances of the Jewish people had resulted in the Israelis overlooking the signifi-

⁹³ See Letter Dated 7 June 1960 from Mr. Ben-Gurion, Prime Minister of Israel, to Mr. Frondizi, President of Argentina, *reprinted in* U.N. SCOR, 15th Sess., Supp., Apr.-June 1960, at 32, U.N. Doc. S/4342.

⁹⁴ See *id.* at 33.

⁹⁵ See *id.*

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ See U.N. SCOR, 15th Sess., Supp., Apr.-June 1960, at 24, U.N. Doc. S/4334 (Note from the Ministry of Foreign Affairs of the Argentine Republic addressed to the Embassy of Israel at Buenos Aires on 8 June 1960). On the same day that Taboada replied, the Argentinian Ambassador to Israel was instructed to return to Buenos Aires. See PEARLMAN, *supra* note 69, at 68.

⁹⁹ See U.N. SCOR, 15th Sess., Supp., Apr.-June 1960, at 24, U.N. Doc. S/4334 (1960).

¹⁰⁰ See *id.* at 25.

¹⁰¹ See *id.*

¹⁰² See *id.*

cance of the sovereignty and equality of States embodied in the United Nations Charter.¹⁰³ Argentina expressed the hope that Israel would make the only appropriate reparation; the return of Eichmann and the punishment of those responsible for violating Argentinian law.¹⁰⁴ Once Eichmann was returned, Israel would be free to request his return in accordance with the procedures prescribed under international law.¹⁰⁵ The Argentinians admonished that a failure to follow this course would result in the invocation of United Nations procedures to remedy Israel's breach of the obligation to respect the sovereign equality of States.¹⁰⁶

Argentina expressed doubt whether Israel was authorized to prosecute Eichmann for genocide.¹⁰⁷ Article VI of the 1948 Convention on the Prevention and Punishment of Genocide provided for territorial jurisdiction; trial by a competent tribunal of the State in whose territory the act was committed.¹⁰⁸

On June 13, 1960, Argentina requested an "urgent meeting" of the United Nations Security Council to consider the violation of its sovereign rights.¹⁰⁹ Argentina contended that in view of the failure of diplomatic exchanges between the two countries that the conflict was appropriately submitted to the United Nations Security Council under Article 34 of the United Nations Charter on the grounds that Eichmann's abduction had cre-

¹⁰³ *See id.* at 26.

¹⁰⁴ *See id.*

¹⁰⁵ *See id.*

¹⁰⁶ *See id.*

¹⁰⁷ *See id.*

¹⁰⁸ *See id.* *See also* Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 78 U.N.T.S. 277, art. VI [hereinafter Genocide Convention] *discussed in id.* Article VI also provided for jurisdiction by such international tribunal as may be created in the future. *Id.* Unsuccessful efforts were made to orchestrate a Ben Gurion-Frondizi meeting. Additional initiatives were undertaken in New York, where Israel's Foreign Minister Mrs. Golda Meir was on a visit. On June 14, 1960, the Uruguayan Ambassador to the U.N. Professor Enrique Rodriguez Fabregat, invited to his home Dr. Mario Amadeo, the Argentinian Ambassador to the U.N., Mrs. Golda Meir and Michael Comay, Israel's Ambassador to the U.N. The matter was not resolved during this two hour meeting. The next day, Argentina called for the convening of the United Nations Security Council. *See* PEARLMAN, *supra* note 1, at 70.

¹⁰⁹ *See* U.N. SCOR, 15th Sess., Supp., Apr.-June 1960, at 27, U.N. Doc. S/4336 (Letter dated 15 June 1960 from the representatives of Argentina to the President of the Security Council).

ated an atmosphere of insecurity and mistrust which was incompatible with the preservation of international peace.¹¹⁰

Argentina reiterated that the illicit and clandestine transfer of Eichmann to Israel constituted a violation of Argentine sovereignty and required reparations.¹¹¹ This right, according to Argentina, was not qualified by any consideration, including Eichmann's catastrophic crimes.¹¹² A contrary conclusion would pave the path for States to take the law into their own hands and posed a dire danger to the preservation of global peace.¹¹³

The next day, President Frondizi's reply to Ben Gurion's letter of June 7, arrived in Israel.¹¹⁴ This note, which was dated June 13, 1960, reiterated that while Argentina had demonstrated its opposition to genocide, that the "very principles of international coexistence are likely to be impaired if the relations between States are not conducted according to juridical norms which are universally accepted."¹¹⁵ President Frondizi expressed hope that their two peoples would resume "friendly relations."¹¹⁶

On June 21, Israel requested an invitation to participate in any Security Council debates.¹¹⁷ It also challenged whether Article 34 provided a basis for jurisdiction.¹¹⁸ According to Israel, this Article authorized the Security Council to investigate any dispute or situation whose continuance may endanger international peace and security.¹¹⁹ Argentina, however, somewhat ambiguously claimed that Israel's actions constituted a political question which constituted a precedent dangerous to international peace and

¹¹⁰ *See id.* Article 34 provides that the Security Council may "investigate" any dispute which might lead to international friction or give rise to a dispute in order to determine whether the continuance of the dispute or situation is likely to endanger international peace and security. Charter of the United Nations, June 26, 1945, 59 Stat. 1031, T.S. No. 993. Any Member of the United Nations may bring any situation of the nature referred to in Article 34 to the attention of the Security Council or General Assembly. *See id.* art. 35(1).

¹¹¹ *See* U.N. SCOR, 15th Sess., Supp., Apr.-June 1960, at 27, U.N. Doc. S/4336 (1960).

¹¹² *See id.* at 28.

¹¹³ *See id.*

¹¹⁴ *See id.* at 71.

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ *See* U.N. SCOR, 15th Sess., Supp., Apr.-June 1960, at 29, U.N. Doc. S/4341 (Letter dated 21 June 1960 from the representative of Israel to the President of the Security Council).

¹¹⁸ *See id.*

¹¹⁹ *See id.*

security and created an atmosphere of insecurity and mistrust incompatible with the preservation of international peace.¹²⁰ Israel stressed that these allegations were not sufficient to bring this complaint within the jurisdiction of the Security Council and that the matter should be resolved through direct negotiations between the parties.¹²¹

IV. THE SECURITY COUNCIL DEBATE

The Security Council debate was a reprise of the on-going disagreement between Argentina and Israel.¹²² The Council, torn between the Scylla of State sovereignty and the Chabrydis of bringing Eichmann to justice, attempted to construct a compromise.¹²³

The Argentinian representative to the United Nations, Dr. Mario Amadeo, argued that Israel's apology constituted an admission of the Jewish State's responsibility for Eichmann's abduction.¹²⁴ He noted that Israel ratified and had become an accessory to Eichmann's illegal abduction.¹²⁵ The clandestine circumstances certainly cast doubt on the contention that he voluntarily consented to stand trial in Israel.¹²⁶ At any rate, Eichmann lacked the legal standing to waive Argentinian sovereignty.¹²⁷ His immigration status was an internal Argentinian affair and could not be invoked as a defense by Israel.¹²⁸

Dr. Amadeo stressed that this was not a mere violation of sovereignty; it was an assertion of Israeli jurisdiction over an individual resident in the territory of another State.¹²⁹ Acquiescence in such acts would result in the rule of international law being replaced by the code of the jungle.¹³⁰ The Argentinian representative stressed that his country was acting in defense of international human rights;¹³¹ "in defending our rights, we are defending the

¹²⁰ *See id.*

¹²¹ *See id.*

¹²² *See generally* U.N. SCOR, 15th Sess., 865th mtg., at 1, U.N. Doc. S/P.V. 865 (1960) U.N. SCOR, 15th Sess., 868 mtg., at 1, U.N. Doc. S/P.V. 868 (1960).

¹²³ *See* U.N. SCOR, 15th Sess., 866th mtg., at 14-15, U.N. Doc. S/P.V. 866 (1960) (Mr. Lodge, United States).

¹²⁴ *See* U.N. SCOR, 15th Sess., 865th mtg., at 5, U.N. Doc. S/P.V. 865 (1960).

¹²⁵ *See id.*

¹²⁶ *See id.* at 5-6.

¹²⁷ *See id.*

¹²⁸ *See id.* at 6.

¹²⁹ *See id.* at 7.

¹³⁰ *See id.*

¹³¹ *See id.*

security of the millions of men and women who seek refuge from persecution in their native lands and make new homes abroad."¹³² Dr. Amadeo reiterated that Israel was obligated to punish its nationals and to make reparations for the violation of Argentinian sovereignty irrespective of whether Eichmann's abduction had been carried out by public officials or by private volunteers.¹³³

Dr. Amadeo clarified that Argentina would accept a settlement scheme that both redressed Argentina's injured rights and recognized the imperative to bring Eichmann to the bar of justice.¹³⁴ However, Argentina could not accept that accused was being brought to trial as a direct result of the violation of international law.¹³⁵ Dr. Amadeo stressed that although his country was outraged by Eichmann's crimes that it would be "putting these bitter memories to a bad use to invoke them in an attempt to palliate a violation of the law."¹³⁶

The two operative paragraphs of the Argentinian draft amendment declared that acts such as those at issue "affect the sovereignty of a Member State and therefore cause international friction" and "may, if repeated, endanger international peace and security."¹³⁷ Moreover, this amendment re-

¹³² *Id.* at 8.

¹³³ *See id.* at 5.

¹³⁴ *See id.*

¹³⁵ *See id.*

¹³⁶ *Id.* at 9.

¹³⁷ U.N. Doc. S/4345 reprinted in U.N. SCOR, 15th Sess., 865th mtg., at 10, U.N. Doc. S/P.V. 866 (1960). The prefatory paragraphs declared that the violation of sovereignty of a Member State is incompatible with the United Nations Charter; that respect for sovereign rights are essential to the harmonious coexistence of States; that a repetition of acts such as those under discussion would create an atmosphere of distrust and insecurity which are incompatible with international peace; and that the resolution should not be interpreted as condoning the "odious [sic] crimes of which Eichmann is accused." *Id.* Dr. Amadeo dismissed questions concerning the jurisdiction of the Security Council. He contended that a situation likely to endanger the maintenance of international peace or security was not limited to an imminent danger of a generalized military conflict. *See id.* at 6. International peace and security were endangered in the event that a situation of hostility may arise between two States which is likely to seriously affect the relations between them, even when the two are widely separated geographically and are only modest military powers. *See id.* at 6-7. Argentina took the position that it was not obligated to provide an interpretation of the phrase "appropriate reparations" and that this would be a matter to be negotiated between the parties concerned in accordance with international law. U.N. SCOR, 15th Sess., Supp., 868th mtg., at 9, U.N. S/P.V. 868 (1960).

quested that Israel make “appropriate reparations in accordance with the Charter of the United Nations and the rules of international law.”¹³⁸

Mr. Claude Corea of Ceylon, in support of Argentina, argued that the violation of a fundamental rule of international law could not be countenanced on the basis of vague claims such as “historical justice” and “irresistible inner force.”¹³⁹ This was a slippery slope which inevitably would result in States offering other equally ambiguous justifications for intervention, including threats to their vital interests or internal security.¹⁴⁰ Mr. Corea stressed that the sanctity of sovereignty was particularly important to small nations, such as Ceylon and Israel, which found that this provided the “surest shield” and “strongest sword” to safeguard their territorial integrity.¹⁴¹

In rebuttal, the Israeli United National delegate, Mrs. Golda Meier, noted that Israel’s “isolated” act must be viewed as “exceptional” and “unique.”¹⁴² Those involved were motivated by a desire to bring to trial one of the central cogs in the unprecedented annihilation of six million Jews, three million of whom were children, and six million Slavs, mostly Poles and Russians.¹⁴³ Mrs. Meier stressed that the survivors of the Holocaust were concentrated within Israel and that these individuals existed within a “nightmare of recollection” of those led to the crematorium, of “babies thrown into the air” and employed as “targets for Nazi bullets,” and of mothers utilized as a human laboratory for “scientific experiments.”¹⁴⁴ Eichmann’s activities resulted in the destruction of the future foundation of the Jewish State, depriving the country of essential intellect, inspiration and ingenuity.¹⁴⁵

Eichmann was a major motor in the monstrous and malevolent machine that fueled the sadistic solution of the so-called Jewish question in Germany and throughout the subjugated States of Europe.¹⁴⁶ Mrs. Meier noted that Eichmann exercised freedom for fifteen years following the de-

¹³⁸ U.N. SCOR, 15th Sess., 865th mtg., at 10, U.N. Doc. S/P.V. 865 (1960).

¹³⁹ U.N. SCOR, 15th Sess., 868th mtg., at 5, U.N. Doc. S/P.V. 868 (1960).

¹⁴⁰ *See id.*

¹⁴¹ *See id.*

¹⁴² U.N. SCOR, 15th Sess., 866th mtg., at 4, U.N. Doc. S/P.V. 866 (1960). Mrs. Meier challenged the jurisdiction of the Security Council in light of the fact that Argentina refused to meet with representatives of Israel and that Israel issued an apology. *See id.* at 1.

¹⁴³ *See id.* at 4-5.

¹⁴⁴ U.N. SCOR, 15th Sess., 866th mtg., at 6, U.N. Doc. S/P.V. 866 (1960).

¹⁴⁵ *See id.*

¹⁴⁶ *See id.* at 7.

feat of Nazi Germany.¹⁴⁷ She queried whether this was not “a violation of the sovereignty of the spirit of man and of humanity’s conception of justice?”¹⁴⁸

Despite the fact that Argentinian sovereignty had been violated by private individuals, the Israelis had twice expressed their regret.¹⁴⁹ While individuals may have violated legal standards, they did so in pursuit of Adolf Eichmann, an individual who would not have been admitted into Argentina or granted asylum had his true identity been revealed.¹⁵⁰ According to Mrs. Meier, this abduction did not constitute a precedent since “modern history knows of no such monster as Adolf Eichmann.”¹⁵¹ Nor was this the rule of the mob; Eichmann was seized and was to be subjected to due process procedures.¹⁵² Weighing the equities, Mrs. Meier insisted that Israel’s expressions of regret constituted appropriate reparation.¹⁵³

The Israeli representative questioned whether Eichmann’s alleged abduction fell within the Security Council’s jurisdiction over threats to the peace.¹⁵⁴ Was peace threatened by Eichmann apprehension and trial by the very people to whose total physical annihilation he had dedicated all his energies?¹⁵⁵ In fact, did not, “the [true] threat to peace lie in Eichmann at large, Eichmann unpunished, Eichmann free to spread the poison of his twisted soul to a new generation?”¹⁵⁶ The Union of Soviet Socialist Republics pointed out that the Allied Powers, during World War II, as well as the United Nations, called for Nazi war criminals to be brought to the bar of justice.¹⁵⁷ Argentina’s failure to arrest and extradite Eichmann clearly breached international policy, agreements and United Nations resolutions.¹⁵⁸

Henry Cabot Lodge, the American representative, recognized that Eichmann had compiled a record of savagery that was unequaled in the

¹⁴⁷ *See id.* at 8.

¹⁴⁸ *Id.*

¹⁴⁹ *See id.* at 9.

¹⁵⁰ *See id.*

¹⁵¹ *Id.*

¹⁵² *See id.* at 9-10.

¹⁵³ *See id.* at 10.

¹⁵⁴ *See id.*

¹⁵⁵ *See id.*

¹⁵⁶ *Id.*

¹⁵⁷ *See id.* at 11-12.

¹⁵⁸ *See id.* at 12. The debate became enmeshed in the Cold War with the Soviet Union alleging that the West German government was dominated by former Nazi officials. *See id.* at 12-13.

twentieth century.¹⁵⁹ At the same time, the United States was rightfully concerned with preserving and protecting State sovereignty.¹⁶⁰ Mr. Lodge proffered two amendments which were intended to insure that the Argentinian resolution recognized and balanced the interests of the Parties and reflected a conciliatory tone.¹⁶¹ A preambular paragraph noted that Member States were mindful of the universal condemnation of the Nazi's persecution of the Jews and that the peoples of the world were concerned that Eichmann should be brought to "appropriate justice for the crimes of which he is accused."¹⁶² A new operative paragraph expressed the hope that the "traditionally friendly relations" between Israel and Argentina would be "advanced."¹⁶³ These modifications were accepted by Argentina without reservation.¹⁶⁴ The United States expressed the view that appropriate reparations had been made by the Security Council's passage of the resolution together with the statement of the Israeli Prime Minister apologizing on behalf of the Israeli government.¹⁶⁵

V. THE POST-SECURITY COUNCIL NEGOTIATION

On June 28, Argentina requested that Israel respond to the note of June 8 in light of the Security Council debate and resolution.¹⁶⁶ Israel, on July 4, reiterated its apology and noted that its previous expressions of regret constituted adequate reparation.¹⁶⁷ The Israelis pointed out that the

¹⁵⁹ See *id.* at 14.

¹⁶⁰ See *id.*

¹⁶¹ See *id.*

¹⁶² *Id.* at 15.

¹⁶³ *Id.*

¹⁶⁴ See U.N. SCOR, 15th Sess., 868th mtg., at 9, S/P.V. 868 (1960).

¹⁶⁵ See U.N. SCOR, 15th Sess., 867th mtg., at 1-2, S/P.V. 867 (1960). The resolution provided in the three operative paragraphs that the Security Council:

1. *Declares* that acts such as that under consideration, which affect the sovereignty of a Member State and therefore cause international friction, may, if repeated, endanger international peace and security.
2. *Requests* the Government of Israel to make appropriate reparation in accordance with the Charter of the United Nations and the rules of international law.
3. *Expresses the hope* that the traditionally friendly relations between Argentina and Israel will be advanced.

See 15 S.C.R. S/4349 (June 24, 1960) (Supp April-June, 1960) at 35, S/4349.

¹⁶⁶ See PEARLMAN, *supra* note 69, at 76.

¹⁶⁷ See *id.* at 77.

American, British and French representatives to the Security Council voted for the Security Council resolution on the understanding that text constituted adequate compensation.¹⁶⁸

The Argentinian Foreign Minister transmitted a note to the Israeli Ambassador to Argentina, on July 20, declaring that Argentina viewed Israel's expressions of regret as inadequate reparations.¹⁶⁹ The Minister added that his government reserved the right to take whatever action was appropriate.¹⁷⁰ Two days later, Argentina expelled Israeli Ambassador Aryeh Levavi; a decision which was softened by affirming a continuance of diplomatic relations and welcoming the visit of Shabtai Rosenne, the Legal Advisor to the Israeli Foreign Ministry.¹⁷¹ On August 3, a joint communique was simultaneously issued in Buenos Aires and in Jerusalem, following a series of meetings.¹⁷² This declared that the two governments agreed to regard as "closed the incident that arose out of the action taken by the Israel nations which infringed fundamental rights of the State of Argentina" and expressed the hope that the "traditionally friendly relations between the two countries will be advanced."¹⁷³ Two months later Israel named a new Ambassador to Argentina.¹⁷⁴

VI. THE POLITICS OF PROSECUTION

The Holocaust had remained of secondary significance in a fledgling Israeli State preoccupied with nation-building and with combating the surrounding Arab States.¹⁷⁵ The prosecution of Adolf Eichmann provided an opportunity to restore this tear in the fabric of Jewish history and to firmly imprint on the minds of young Israelis that millions of their brethren had been killed in Europe because they were Jews.¹⁷⁶ It was hoped that young Israeli Sabras (individuals born in Israel) would develop an apprecia-

¹⁶⁸ *See id.*

¹⁶⁹ *See id.* at 78.

¹⁷⁰ *See id.*

¹⁷¹ *See id.*

¹⁷² *See id.* at 79.

¹⁷³ *Id.*

¹⁷⁴ *See id.*

¹⁷⁵ *See* IDITH ZERTAL, FROM CATASTROPHE TO POWER HOLOCAUST SURVIVORS AND THE EMERGENCE OF ISRAEL 216-222 (1998). *See also* TIM COLE, SELLING THE HOLOCAUST FROM AUSCHWITZ TO SCHINDLER: HOW HISTORY IS BOUGHT, PACKAGED, AND SOLD 63, 67 (1999); SHABTAI TEVETH, BEN-GURION AND THE HOLOCAUST (1996).

¹⁷⁶ *See* ARENDT, *supra* note 80, at 9.

tion and respect for their Ashkenazi (Eastern European) elders.¹⁷⁷ The Allied Powers at Nuremberg focused on the wars of aggression waged by the Hitlerite regime¹⁷⁸ and Israel seized the opportunity to insure that history recorded the horrors visited upon the Jewish people.¹⁷⁹ There also was a wider audience; the peoples of the globe would learn the consequences of their silence in the midst of the murder of millions.¹⁸⁰ The lesson should be learned that acceptance or accommodation to totalitarianism, racism or anti-semitism could lead to the gas chamber.¹⁸¹

The abduction and trial of Eichmann thus presented opportunity to assert Israeli strength and status on the world stage.¹⁸² This would serve as a testimony to the essential role of the Jewish State in safeguarding and shielding semites against a hostile world.¹⁸³ Jews would never again be led meekly to massacre; this was a strong message to Israel's Arab adversaries, some of who had supported the Nazi cause.¹⁸⁴ The Israelis also utilized the

¹⁷⁷ See ARENDT, *supra* note 80, at 10. Prime Minister Ben-Gurion utilized the prosecution to communicate that, despite negotiations with Germany over reparations and arms sales, his political party, the Mapai, remained sensitive to the suffering of the Holocaust. There also was a desire to find an issue to unite the Sephardic immigrants of Asia and Africa and the Western European, Ashkenazic, establishment who were the main backers of Mapai. See TOM SEGEV, *THE SEVEN MILLION: THE ISRAELIS AND THE HOLOCAUST* 328 (1993). Ben-Gurion also was eager to divert attention from the potentially embarrassing revelation that Israel Kastner, press spokesperson for the Ministry of Commerce and Industry, in his capacity as head of a Rescue Committee for Hungarian Jewry had collaborated with the Nazi occupiers in Hungary. See *id.* at 257. A libel suit resulted in a court finding that Kastner collaborated with the Germans and facilitated the deportation of Hungarian Jews. In return, members of his family, inhabitants of his village and community notables were permitted to emigrate. The judgment also determined that Kastner persuaded two Israeli paratroopers secreted into Budapest to surrender to the Germans in order to safeguard the Jewish community against possible retaliation. Kastner was exonerated of the allegation that he shared in the division of Jewish valuables. See *id.* at 282-283. The Israeli Supreme Court reversed the verdict, finding that Kastner worked in good faith to rescue Hungarian Jews. See *id.* at 305-308. The judgment was issued too late for Kastner; he had been assassinated several months earlier. See *id.* at 308.

¹⁷⁸ See COLE, *supra* note 175, at 66.

¹⁷⁹ See SEGEV, *supra* note 177, at 329.

¹⁸⁰ See ARENDT, *supra* note 80, at 9-10.

¹⁸¹ See *id.* at 10.

¹⁸² See *id.* at 11.

¹⁸³ See SEGEV, *supra* note 177, at 328-329.

¹⁸⁴ See ARENDT, *supra* note 80, at 13.

Eichmann trial to claim a new singular status, claiming jurisdiction by virtue of her self-proclaimed status as the Jewish national home; a safe-haven in which the Jewish victims of the Nazi Holocaust likely would have sought refuge.¹⁸⁵

The Eichmann trial had a profound impact on West Germany, which initiated the first serious steps to bring those implicated in the Nazi mass murder to trial.¹⁸⁶ However, this only skimmed the surface. For instance, it was estimated that 5,000 of the 11,500 judges in the West German Republic had been active in the judiciary under the Hitler regime.¹⁸⁷ Dr. Hans Globke, one of Chancellor Conrad Adenauer's closest advisers, was revealed to be co-author of an interpretative commentary on the radically racist Nuremberg Laws and was found to have been responsible for requiring German Jews to adopt "Israel" or "Sarah" as a middle name.¹⁸⁸ Fritz Bauer, the Jewish Attorney General of Hesse, unsuccessfully applied to the federal government in Bonn to initiate extradition proceedings against Eichmann.¹⁸⁹ Bonn rationalized that there was no extant extradition treaty between Israel and Germany and that Germany was unable to mete out the proper punishment absent a provision for capital punishment.¹⁹⁰

The prosecution of Eichmann extended beyond his individual guilt. This was nothing less than a primer on the pernicious plague of anti-semitism in Nazi Germany and throughout history.¹⁹¹

¹⁸⁵ See SEGEV, *supra* note 177, at 330.

¹⁸⁶ See ARENDT, *supra* note 80, at 14. Four months prior to the Eichmann trial Richard Baer, successor to Rudolf Hoss as Commandant of Auschwitz, was arrested. *Id.* A number of Eichmann's underlings, including his representatives in Rumania and Amsterdam, soon also were detained. *Id.* Other former high-ranking Nazis also were arrested including Wilhelm Koppe, the director of a chocolate factory, who formerly was charged with cleansing Poland of Jews. *See id.* at 15. Martin Fellenz, the former Higher S.S. and Police Leader, a prominent member of the Free Democratic Party in Konrad Adenauer's democratized Germany, was arrested in June 1960 and charged with participation in and partial responsibility for the murder of forty thousand Jews in Poland. The prosecutor demanded a life sentence at hard labor; the court sentenced Fellenz to four years, two and half years of which he had already served while waiting in jail to be tried. This skimmed the surface of former Nazi war criminals residing in West Germany. *See id.* at 16.

¹⁸⁷ *See id.*

¹⁸⁸ *Id.* at 18-19.

¹⁸⁹ *See id.* at 17.

¹⁹⁰ *See id.* The absence of an extradition treaty merely meant that Israel or Germany would not have been legally obligated to extradite Eichmann for trial. *Id.*

¹⁹¹ *See id.* at 19. Historian Peter Novick argues that the Eichmann trial was the first coherent rendition of the Nazi barbarities presented to the American public and,

VII. THE INDICTMENT

A. *Statutory Scheme*

Eichmann was prosecuted under the Nazis and Nazi Collaborators (Punishment) Act, 1950.¹⁹² In its 1953 decision in *Honigman v. Attorney General*, the Israeli Supreme Court observed that the Act was intended to provide a fair trial for alleged Nazi war criminals and their collaborators charged with the brutalization and extermination of the Jewish people.¹⁹³ The Supreme Court noted that the law was fundamentally different from other statutes in that it was retroactive, extraterritorial and authorized the deviation from the laws of evidence and the imposition of capital punishment and provided that prosecutions were not barred by the fact that the accused had been previously tried abroad.¹⁹⁴ The Supreme Court noted that the circumstances under which the Nazi crimes were committed were extraordinary¹⁹⁵ and that the enforcement of the rule of law under these conditions required a statutory scheme which itself was "extraordinary."¹⁹⁵

Article One of the Act provided that an individual may be liable for the death penalty who was convicted of a crime against the Jewish people,¹⁹⁶ crime against humanity¹⁹⁷ or war crime.¹⁹⁸ These delicts were punishable when committed "during the period of the Nazi regime, in any enemy

that as a result of the trial that the term Holocaust became identified with the murder of European Jewry. See PETER NOVICK, *THE HOLOCAUST IN AMERICAN LIFE* 133 (1999).

¹⁹² See Nazis And Nazi Collaborators (Punishment) Act, 1950, *Reshumot, Sefer ha Hukkim* No. 57 (Aug. 9, 1950) at 251 reprinted in 1950 U.N.Y.B. HUM. RTS. 163 (1952) [hereinafter Nazi Collaborators Act].

¹⁹³ See *Honigan v. Attorney-General* (Sup. Ct. Israel 1953) quoted in Sir Hersch Lauterpacht ed., *Enforcement of the Laws of War*, 18 I.L.R. 538, 543 (1957).

¹⁹⁴ See *id.*

¹⁹⁵ *Id.* The Supreme Court noted that the purpose of the act was to permit the just and equitable prosecution of Nazi and Nazi collaborators involved in the extermination of Jews. The Act was not a rehabilitative measure. See *id.*

¹⁹⁶ See Nazi Collaborators Act, *supra* note 192, art. 1(a)(1). A crime against the Jewish people required the commission of various enumerated acts with the intent to destroy the Jewish people in whole or in part. This included killing Jews; causing serious bodily or mental harm to Jews; placing Jews in living conditions calculated to bring about their physical destruction; imposing measures intended to prevent births among Jews; forcibly transferring Jewish children to another national or religious group; destroying or desecrating Jewish religious or cultural assets of value; inciting to hatred against Jews. Other than the destruction of cultural assets, this definition is based on the 1948 Genocide Convention. *Id.* art. 1(b). See Genocide Convention *supra* note 108, art. 2.

country.”¹⁹⁹ The Statute also provided for jurisdiction over various criminal acts committed against a ”persecuted person.”²⁰⁰

¹⁹⁷ See Nazi Collaborators Act, *supra* note 192, art. 1(a)(2). Crimes against humanity are defined as murder, extermination, enslavement, starvation or deportation and other inhumane acts committed against any civilian population and other inhumane acts committed against any civilian population, and persecution on national, racial, religious or political groups. *Id.* art. 1(b). This differs from the Nuremberg standard, which required that a crime against humanity be committed in execution or in connection with any crime within the jurisdiction of the Tribunal. See Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis Powers and Charter of the International Military Tribunal, art. 6(c), 59 Stat. 1544, 82 U.N.T.S. 279 (1950) [hereinafter Nuremberg Charter].

¹⁹⁸ See Nazi Collaborators Act, *supra* note 192, art. 1(b). War crimes are defined as murder, ill-treatment or deportation to slave labor or for any other purpose, of civilian population of or in occupied territory; murder or ill-treatment of prisoners of war or persons on the high seas; killing of hostages; plunder of public or private property; wanton destruction of cities, towns or villages; and devastation not justified by military necessity. *Id.* art. 1(b). The Nuremberg standard appears slightly broader reciting that war crimes encompasses violations of the laws or customs of war and that such violations shall include, but shall not be limited to the various enumerated acts. See Nuremberg Charter, *supra* note 197, art. 6(b).

¹⁹⁹ Nazi Collaborators Act, *supra* note 192, art. 1(a)(1). A persecuted person means a person belonging to a national, racial, religious or political group which was persecuted by an enemy administration. *Id.* art. 16. The period of the Nazi regime encompassed January 30, 1933 to May 8, 1945. *Id.* The latter was distinguished from the Nuremberg standard which limited the jurisdiction of the International Military Tribunal to crimes against peace and acts associated with aggressive wars. This effectively restricted the jurisdiction of the Tribunal over crimes against humanity and war crimes to the period following the initiation of an aggressive war against Poland in 1939. See *United States v. Joseph Goering et. al. XII Trial of the Major War Criminals Before the International Military Tribunal* 411, 498 (1948) [hereinafter Nuremberg Judgment]. The Nuremberg judgment did not directly address the issue of genocide. See also Matthew Lippman, *The Convention on the Prevention and Punishment of the Crime of Genocide: Fifty Years Later*, 15 ARIZ. J. INT’L & COMP. L. 415, 425-430 (1998).

²⁰⁰ Nazi Collaborators Act, *supra* note 192, art. 2. Enemy administration is defined as the administration that existed in an enemy country. *Id.* art. 16. Enemy country means Germany during the period of the Nazi regime as well as any other Axis State during the period of the war or any territory under the effective control of Germany or another Axis State. *Id.* Article Two punished an individual who committed an enumerated criminal act against a persecuted person, “as a persecuted person,” in an enemy country; the perpetrator shall be liable to the same punishment as that which he would have been subject had he committed the act in Israeli

Article Eight abrogated the traditional criminal defenses of constraint, necessity, justification and the exercise of judicial function in the case of prosecutions under the Nazis and Nazi Collaborators (Punishment) Act.²⁰¹ These considerations might be taken into account in mitigation of punishment.²⁰²

Article Nine provided that an individual who committed an offense under the Act may be prosecuted in Israel despite that the fact that he or she had been tried for the same offense abroad, whether before a domestic or

territory. Article Two arguably extended pre-existing provisions of Israeli law based on a claim of jurisdiction over the victim. The application of existing legal standards seemed designed to rebut claims of retroactive application of the law. *See id.* art. 2. Article 4 utilized a similar scheme to impose liability on individuals who committed a criminal act against a persecuted person while exercising some function in a place of confinement on behalf of an enemy administration. *Id.* art. 4. Article 3 imposed liability for knowing membership in an organization declared criminal pursuant to Article 9 of the Nuremberg Charter. *See id.* art. 3. Article Five punished by ten years a person who during the Nazi regime was instrumental in turning a persecuted person over to the enemy administration. *Id.* art. 5. Article Six imposed imprisonment not exceeding seven years on an individual who demanded or received a benefit from a persecuted person under threat of delivering him or her or another persecuted person to any enemy administration, *Id.* art. 6(a); or demanded or received a benefit from a person who had provided shelter to a persecuted person under threat of delivering him or her or the sheltered persecuted person to an enemy administration. *Id.* art. 6(b).

²⁰¹ *See* Nazi Collaborators Act, *supra* note 192, art.8. These defenses were set forth in sections 16-19 of the Israeli Criminal Code. *Id.* Article Ten provided that a persecuted person may invoke the defense that he or she committed a criminal act to avert immediate death and did his or her best to avert the consequences of the act or omission. *Id.* art. 10(a). A persecuted person also may invoke the defense that he or she committed or omitted to perform the act with the intent to avert consequences more serious than those which resulted from the act or omission, and actually averted the harm. *Id.* art. 10(a). These defenses were not available in the case of crimes against the Jewish people, crimes against humanity, war crimes and murder. *Id.* art. 10.

²⁰² *See id.* art. 11. The grounds for mitigation included that a crime was committed under conditions which would otherwise exempt the accused from liability or constituted a reason for pardon and that the accused took steps to reduce the gravity of the consequences of the offense. *Id.* art. 11(a). The offense also might be mitigated when committed with the intent to avert more severe consequences than resulted from the offense. *Id.* art. 11(b). In the case of a crime against the Jewish people, crime against humanity and war crime, a defendant's sentence may not be mitigated to a term of imprisonment for less than ten years. *Id.* art. 11.

international court.²⁰³ An Israeli court, in affixing punishment, was to consider any sentence served abroad.²⁰⁴ Article Twelve established a twenty year statute of limitations for all offenses other than crimes against the Jewish people, crimes against humanity, war crimes and murder.²⁰⁵ A court was authorized to deviate from the rules of evidence in any prosecution in the event that the tribunal was satisfied that this would “promote the ascertainment of the truth and the just handling of the case.”²⁰⁶

B. *Indictment*

Adolf Eichmann was indicted on fifteen counts under the Nazis and Nazi Collaborators (Punishment) Act.²⁰⁷ Counts One through Four charged Eichmann with crimes against the Jewish people.²⁰⁸ Count One detailed Eichmann’s involvement in the “killing of millions of Jews” through his coordination of the ghettoization, deportation and extermination of the Jews of Germany, the other Axis and occupied countries.²⁰⁹ This included Jews deported to concentration camps as well as Jews deported to Minsk and Riga, where they were systematically slaughtered by killing squads.²¹⁰ Count Two charged the creation of physical conditions calculated to bring about the physical destruction of Jews, including forced labor, ghettoization and mass deportation under inhumane conditions.²¹¹ Count Three accused Eichmann of causing serious harm through the enslavement, starvation, deportation, persecution and detention of Jews in conditions designed to cause their degradation and the deprivation of their rights and inhumane suffering and torture.²¹² Eichmann was charged in Count Four with the prevention of childbearing among the Jews of Germany and countries occupied by the

²⁰³ See *id.* art. 9(a).

²⁰⁴ See *id.* art. 9(b).

²⁰⁵ See *id.* art. 12(b). Amnesties are not available for offenses under the act. *Id.* art. 13.

²⁰⁶ *Id.* art. 15(a). The court shall place on the record the reasons for deviating from the rules of evidence. *Id.* art. 15(b). A prosecution may be instituted only by the Attorney-General. *Id.* art. 14.

²⁰⁷ See *Attorney-General v. Adolf Eichmann (Indictment)* reprinted in PAPANATOS, *supra* note 10, at 111.

²⁰⁸ See *id.* at 111-117.

²⁰⁹ *Id.* at 111.

²¹⁰ See *id.* at 112-115 and accompanying texts.

²¹¹ See *id.* at 115.

²¹² See *id.* at 115-116.

Reich.²¹³ This included providing the offspring of mixed marriages the alternative of sterilization or deportation.²¹⁴

Counts Five through Seven charged Eichmann with crimes against humanity directed against Jews.²¹⁵ Count Seven introduced the charge of spoliation of the property of millions of Jews resident in Germany and occupied countries by means of the inhumane measures of compulsion, theft, terrorism and torture.²¹⁶ Counts Nine through Twelve charged Eichmann with crimes against humanity directed against Poles, Yugoslavs, Gypsies and Czechoslovaks.²¹⁷ Count Twelve was particularly poignant, alleging that, in 1942, Eichmann was involved in the deportation and execution of approximately one hundred children from the village of Lidice in Czechoslovakia.²¹⁸ Counts Thirteen through Fifteen charged Eichmann with membership in hostile, criminal organizations,²¹⁹ including service as Director of the Department for Jewish Affairs in the Gestapo.²²⁰

C. *Eichmann's Preliminary Defense: In His Own Words*

Eichmann responded to the indictment by repeating fifteen times the incantation invoked by the defendants at Nuremberg: "In the sense of the indictment—not guilty."²²¹

In 1960, *Life Magazine* published the transcript of an interview between journalist Willen Sassen and Adolf Eichmann.²²² Eichmann anticipated the defense he was to later offer at trial, contending that he was "merely a little cog in the machinery that carried out the directives of the

²¹³ See *id.* at 116.

²¹⁴ See *id.* at 117.

²¹⁵ See *id.* at 117-120.

²¹⁶ See *id.* at 118. This included compulsory payment to finance deportations, the seizure of property and the removal of personal effects and gold teeth, hair and other body parts from victims. *Id.* at 119-120. Count Seven recorded that personal effects and valuables seized from internees at Auschwitz were stored in thirty-five warehouses. *Id.* at 120.

²¹⁷ See *id.* at 121-122.

²¹⁸ See *id.* at 122. This was undertaken in retribution for the assassination of Reinhard Heydrich in Prague. *Id.*

²¹⁹ See *id.* at 123-124.

²²⁰ See *id.* at 123-124 (Count Fifteen).

²²¹ HAUSNER, *supra* note 75, at 323.

²²² *Eichmann Tells His Own Damning Story*, LIFE, Nov. 28, 1960, at 19, at <http://www2.ca.nizkor.org/~kewis/trials/profiles/introducton.html>.

German Reich.”²²³ Eichmann conceded that the Jews would not have died had he not transported them to the camps.²²⁴ At the same time, Eichmann avowed that “[i]t would be as pointless to blame me for the whole Final Solution of the Jewish Problem as to blame the official in charge of the railroads over which the Jewish transports traveled.”²²⁵ An order issued by the Hitlerite regime was to be obeyed; a failure to follow orders would have implicated Eichmann not only as a “scoundrel but a despicable pig.”²²⁶

Still, Eichmann pointed out that the majority of Jews were not exterminated and were deployed in factories and in munitions plants.²²⁷ In fact, he noted that there are “thousands of Jews happily alive today” who were interned in the camps.²²⁸ The notion that Jews were systematically cleansed from Europe was mistaken: it was “child’s play for a Jew to reach relative safety” and thousands remained resident in ghettos at the conclusion of the conflict or managed to avoid apprehension.²²⁹ Eichmann contended that the Final Solution was not a battle fought with implements of death and destruction.²³⁰ He claimed that the Nazis primarily relied on “spiritual methods” and condemned physical liquidation as a “vulgar, coarse action.”²³¹ Eichmann insisted that he did not dislike or despise Jews and respected and endorsed their aspirations.²³² In fact, had he been a Jew he claimed that he would have been “the most ardent Zionist imaginable.”²³³

Following his apprehension in 1961, Eichmann was subjected to interrogation by Israeli police captain Avner Less.²³⁴ During these sessions, he reiterated the theme that he was a mere transportation expert who disin-

²²³ *I Transported Them . . . To The Butcher*, LIFE, Nov. 28, 1960, at 21, at <http://www.2.ca.nizkor.org/~kewis/trials/profiles/eichmannintro.html>.

²²⁴ *See id.*

²²⁵ *Id.*

²²⁶ *Id.*

²²⁷ *See id.* at 109-110, at <http://www2.ca.nizkor.org/~kewis/trials/profiles/shipments.html>

²²⁸ *Id.*

²²⁹ *Id.*

²³⁰ *See id.*

²³¹ *Id.*

²³² *See id.* at 21-22, at <http://www2.ca.nizkor.org/~kewis/trials/profiles/annihilation.html>.

²³³ *Id.*

²³⁴ *See* EICHMANN INTERROGATED TRANSCRIPTS FROM THE ARCHIVES OF THE ISRAELI POLICE (Jochen von Lang in collaboration with Claus Sibyll trans., Ralph Manheim trans.)[hereinafter EICHMANN INTERROGATED]. Portions of Eichmann’s

terestedly obeyed orders.²³⁵ Eichmann claimed ignorance; he alleged that he had neither read Hitler's seminal statement, *Mein Kampf* in its entirety,²³⁶ nor other Nazi tracts,²³⁷ could not recall the party program,²³⁸ and knew nothing about Zyklon B gas²³⁹ or the liquidation of Jews by killing squads.²⁴⁰ Furthermore, he stated that he saw the chimneys of the crematorium at Auschwitz, but "didn't watch the gassing."²⁴¹ He said, "I couldn't. I'd have probably keeled over."²⁴² The burning of corpses was "as much as I could stand. I wasn't up to it."²⁴³ Eichmann continued to insist that he was a transport expert²⁴⁴ and that he was neither involved in drawing up lists of evacuees²⁴⁵ nor in planning or directing the killing of Jews²⁴⁶ and was not kept informed of the fate of the Jews in the camps.²⁴⁷ He insisted that "pure transportation" has "nothing to do with killing" and that this constituted a "big distinction."²⁴⁸ Eichmann reiterated that "I never killed a Jew. . . .I've never killed anybody. And I never ordered anybody to kill a Jew, or ordered anybody to kill a non-Jew. No, never."²⁴⁹ Queried about the extermination of Jewish children, Eichmann stressed that "I don't know. I've told you repeatedly, that wasn't in my jurisdiction."²⁵⁰

Eichmann reiterated that he was "neither a Jew-hater nor an anti-Semite" and "never had any trouble with the Jewish functionaries."²⁵¹ He merely followed orders and stated that he would have adhered to commands to kill his own father without hesitation.²⁵² Eichmann was not positioned to

statement were played in court and the transcript was introduced into evidence. *See* HAUSNER, *supra* note 75, at 325.

²³⁵ *See* EICHMANN INTERROGATED, *supra* note 234, at 131.

²³⁶ *See id.* at 36.

²³⁷ *See id.* at 37.

²³⁸ *See id.*

²³⁹ *See id.* at 85.

²⁴⁰ *See id.* at 81.

²⁴¹ *Id.* at 83-84.

²⁴² *Id.*

²⁴³ *Id.* at 85.

²⁴⁴ *See id.* at 104, 131.

²⁴⁵ *See id.* at 108-109.

²⁴⁶ *See id.* at 104.

²⁴⁷ *See id.* at 109-111.

²⁴⁸ *Id.* at 131.

²⁴⁹ *Id.* at 101.

²⁵⁰ *Id.* at 277.

²⁵¹ *Id.* at 149.

²⁵² *See id.* at 157.

adjudge the legality of orders. After all, “[w]ho is a little man like me to trouble his head about it? I get orders from my superior and I look neither right nor left. That’s not my job. My job is to obey and comply.”²⁵³ During wartime, “[y]ou click your heels and say ‘Yes sir.’ That’s all there was to it.”²⁵⁴

In summary, Eichmann carefully constructed himself as a faithful functionary, refused to accept responsibility and did not defend or rationalize Nazi policies. The accused’s rather passionless portrayal seemed to fit the gray countenance of the balding, be-speckled defendant in the glass enclosed booth. This was the ultimate denigration, since Jews had been exterminated for no reason other than that Eichmann believed that he was obligated to obey superior orders. He indifferently viewed the Jews as building blocks in the edifice of his career. Eichmann refused to accept responsibility for his actions and denied that his deportation of Jews implicated him in mass murder.²⁵⁵

VIII. THE EICHMANN TRIAL

A. *The Prosecutor’s Opening Argument*

Prosecutor Gideon Hausner’s opening address set the stage for the trial.²⁵⁶ He invoked the prophetic call of the “judges of Israel” and proclaimed that he represented “six million accusers” who were unable to “rise to their feet to point an accusing finger toward the glass booth and cry out at the man sitting there, ‘I accuse.’”²⁵⁷ Hausner stressed that the Holocaust was a significant chapter in the history of Jewish suffering.²⁵⁸ The Pharaoh in Egypt, “tortured and oppressed them [the Jews] and threw their sons into

²⁵³ *Id.* at 158.

²⁵⁴ *Id.* at 271.

²⁵⁵ See SEGEV, *supra* note 177, at 345. Segev recorded that prosecutor Gideon Hausner wrote that Eichmann possessed “hands like talons.” Segev observed that the glass booth “contained only a bland and balding man in a suit and eyeglasses, with a nervous tic at the corner of his mouth, leafing endlessly through the stacks of documents in front of him.” *Id.*

²⁵⁶ See *id.* at 346-347. Hausner’s speech was reviewed by Israeli Prime Minister David Ben-Gurion who suggested modifications designed to protect West Germany’s image and to avoid the contention that the German people were collectively responsible. Ben-Gurion urged Hausner to attribute primary responsibility to Adolf Hitler. The Prime Minister also suggested omitting the argument that Nazism was inevitable in anticipation that this would spark a debate over German character and history. The opening address lasted eight hours. *Id.*

²⁵⁷ *Id.* at 347.

²⁵⁸ See *id.*

the river.”²⁵⁹ Haman [in Persia] ordered them “destroyed, murdered, and obliterated.”²⁶⁰ Chmielnicki [Ukraine] “slaughtered them in masses;” Petlura [Poland] “launched pogroms against them.”²⁶¹ But, none of these individuals had matched the Nazis in so efficiently and effectively setting their sites on the extermination of the Jewish people;²⁶² this was an unprecedented tale of total technological murder.²⁶³ The killing field was centered in Europe, “the heart of the [Jewish] nation, the source of its vitality” and progenitor of modern Jewish secular and religious thought and the home of the founders of the State of Israel.²⁶⁴ Hausner bolstered the Israeli’s jurisdictional claim by noting that those who died had been deprived of their dream to emigrate to a Zionist State.²⁶⁵

Hausner noted that the *Eichmann* trial was not the first to adjudicate the guilt of Nazi war criminals, but that this prosecution was unique in placing the fate of the Jewish people at the center of concern.²⁶⁶ Eichmann was the official who had been entirely concerned and consumed with the destruction of the Jews.²⁶⁷ He viewed the “destruction of the Jews” as his “destiny and calling.”²⁶⁸ The accused was complicit in these crimes and his guilt was equal to those who sealed the Jews in the gas chambers.²⁶⁹

In *Eichmann*, the people of the planet “encounter a new kind of killer, the kind that exercises his bloody craft behind a desk, and only occasionally does the deed with his own hands.”²⁷⁰ He exercised authority over

²⁵⁹ *Id.*

²⁶⁰ *Id.*

²⁶¹ *Id.*

²⁶² *See id.* “Even the most bloodcurdling and grisly male factions of Nero, Attila, and Genghis Khan—archetypes of barbarity and blood lust, watchwords of evil and infamy—pale beside the atrocities and terrors of the destruction that will be described in this court.” *Id.*

²⁶³ *See* PEARLMAN, *supra* note 69, at 150.

²⁶⁴ *See* SEGEV, *supra* note 177, at 349.

²⁶⁵ *See id.*

²⁶⁶ *See* PEARLMAN, *supra* note 69, at 150.

²⁶⁷ *See id.*

²⁶⁸ *Id.* Hausner expressed doubt whether the trial would succeed in revealing the roots of evil and left this task to the academic and professional experts on human behavior. *See id.* at 150-151.

²⁶⁹ *See id.* at 149. The guilt of Germany was shared by other European States. *See id.* at 154-155.

²⁷⁰ *Id.*

the fate of the Jews and his signature “sealed the doom of tens of thousands.”²⁷¹

Hausner described Eichmann’s central role in the three phases of Final Solution: the evacuation, territorial concentration, and extermination of the Jews.²⁷² He had been designated by Reinhard Heydrich to orchestrate the Final Solution²⁷³ and had been responsible for “combing Europe” to detain and to deport Jews; he “held the Jewish people in his grip like an octopus strangling its prey.”²⁷⁴ The story and scope of the Final Solution could be catalogued through Eichmann’s activities: organizing and tracking deportations and delivering deportees; consulting on mechanisms of extermination; negotiating with the heads of satellite governments; inspecting ghettos and concentration camps, observing mass executions, and dismissing entreaties to save individual Jews.²⁷⁵

Gideon Hausner concluded by proclaiming that the history of the Final Solution now will be written by the “kinsmen of the corpses” in the courtroom of Jerusalem with Adolf Eichmann “in the dock.”²⁷⁶ In this process, Hausner observed that Eichmann would be accorded a trial, a privilege that he was unwilling to accord to his victims.²⁷⁷

B. *The Evidence At Trial*

The prosecution challenged the contention that Eichmann was a dispassionate bureaucrat and transportation expert.²⁷⁸ The declaration of

²⁷¹ *Id.* Eichmann was emblematic of the intelligentsia and professionals who were complicit in the Nazi crimes. *Id.* Hausner noted that strong figures had sought power in many countries. But it was only in Germany that the seed of Nazism had found a fertile soil in Germany. *Id.* at 151.

²⁷² *See id.* at 166.

²⁷³ *See id.* at 176-177.

²⁷⁴ *Id.* at 177-178.

²⁷⁵ *See id.* at 178-179.

²⁷⁶ *Id.* at 185.

²⁷⁷ *See* HAUSNER, *supra* note 75, at 325.

²⁷⁸ *See* The Attorney-General Of The Government Of Israel, Crim. Case. No. 40/61 (Dist. Ct., 1961) [hereinafter Transcript]. The evidence presented by the prosecution involved oral and documentary evidence attesting to Eichmann’s involvement in the Final Solution in Germany and in each country occupied by the Third Reich. PEARLMAN, *supra* note 69, at 227. Eichmann was on the stand from June 20 to July 24, for a total of thirty-three and a half sessions. Sixty-two sessions, out of a total of one hundred and twenty-one, were spent recording the testimony of one hundred prosecution witnesses. The presentation of this testimony lasted from April 24 to June 12. ARENDT, *supra* note 80, at 223.

Rudolf Hoss, the Commandant of the Auschwitz concentration camp, who had been convicted and sentenced to death by a Polish court, characterized Eichmann as an active, energetic and largely independent administrator.²⁷⁹ Hoss first encountered Eichmann when the accused arrived at Auschwitz to discuss the extermination of Jewry.²⁸⁰ According to Hoss, Eichmann was "wholly and compulsively obsessed with the Jewish Question and with the "Final Solution."²⁸¹ The defendant was absolutely convinced that the eradication of the "biological foundation of the Jews in the East" would deal a death blow to the future of world Jewry.²⁸² Hoss wrote that Eichmann viewed the deployment of Jews in work brigades as unnecessarily impeding the extermination of Jewry, a goal which seemed increasingly unlikely to be achieved as Germany's hopes of total victory faded.²⁸³ Still, Eichmann refused to concede that the aspirations of the Nazi super-State would not be accomplished, and invoked his superior orders as a justification for accelerating the pace of deportations.²⁸⁴ According to Hoss, Eichmann refused to countenance delay and frequently sent transports to Auschwitz that exceeded the agreed upon quota.²⁸⁵ Hoss concluded that his distinct impression was that the "Final Solution" was Eichmann's "life mission."²⁸⁶

The prosecution's initial witness, Professor Solo Baron of Columbia University, documented the destruction of the Jewish communities of Europe, which resulted from Eichmann's devout devotion and discipline.²⁸⁷ Poland's Jewish community of 3,300,000 was reduced to 73,955.²⁸⁸ In Ger-

The District Court Tribunal was comprised of Moshe Landau, a member of the Supreme Court, and two regular district court judges, Benjamin Halevi and Dr. Yitzhak Raveh. All three judges emigrated to Palestine in 1933 when it was under British Mandate. PEARLMAN, *supra* note 69, at 95-96. Eichmann chose Dr. Robert Servatius of the Cologne Bar as his attorney, who had considerable experience defending accused Nazi war criminals. The Knesset passed a special law permitting Servatius to practice before Israel courts and the Israeli government paid him 300,000 to represent Eichmann. The prosecuting attorney was Gideon Hausner, Israeli Attorney General. HAUSNER, *supra* note 75, at 302-303.

²⁷⁹ See Transcript, *supra* note 278, at 241 (Sess. 16, Apr. 26, 1961).

²⁸⁰ See *id.* at 242.

²⁸¹ *Id.* at 241.

²⁸² See *id.* at 242.

²⁸³ See *id.*

²⁸⁴ See *id.*

²⁸⁵ See *id.*

²⁸⁶ *Id.*

²⁸⁷ See *id.* at 183 (Sess. 13, Apr. 24, 1961).

²⁸⁸ See *id.*

many, 15-20,000 remained out of a thriving population of one half million.²⁸⁹ Czechoslovakia's population numbered 117,551 Jews in 1930 and now totaled 14,489; only 1,179 were children fifteen or younger.²⁹⁰ In Poland, prior to World War II there were vital Jewish communities in 2,000 cities.²⁹¹ However, in 1945, Jews remained in only 224 communities.²⁹²

The result was that the extermination of one-third of the world-wide Jewish population and the corrosion of the center of Jewish culture, theology, social and scientific thought.²⁹³ In 1939, there were 16,500,000 Jews in the world; in 1961 there were 12,000,000.²⁹⁴ Absent the Holocaust, Baron testified that the natural population increase would have resulted in a population of 20,000,000.²⁹⁵ There was no precedent in Jewish history for such widespread and all-embracing devastation which spanned global geography.²⁹⁶ Eichmann's shadow loomed over the prosecution's documentary evidence, which was powerfully supplemented by the personal accounts of Holocaust survivors.²⁹⁷ The callous and cruel character of these crimes challenged Eichmann's distant and disinterested demeanor; the message was that only a severe and sadistic figure could have presided over this contemptible campaign.²⁹⁸

A brief glimpse of Eichmann's determined demeanor was provided in the testimony of Benno Cohen, a German lawyer and World War I veteran, who headed the Zionist organization in Berlin.²⁹⁹ At a meeting in Berlin in late 1938 or early 1939, Cohen testified that Eichmann accused Jewish leaders of contacting their Viennese brethren in contravention of his commands and warned that "[i]f such a thing occurs once more, you will go to a *Konzer-Lager* (concentration camp)!"³⁰⁰ Eichmann responded to the defiant statement of one Jewish leader by threatening, "you miserable ras-

²⁸⁹ See *id.*

²⁹⁰ See *id.*

²⁹¹ See *id.*

²⁹² See *id.*

²⁹³ See *id.*

²⁹⁴ See *id.* at 184.

²⁹⁵ See *id.*

²⁹⁶ See *id.* at 183.

²⁹⁷ See ARENDT, *supra* note 80, at 220-224.

²⁹⁸ See *infra* notes 318-367 and accompanying texts.

²⁹⁹ See Transcript, *supra* note 278, at 210-211 (Sess. 15, Apr. 25, 1961).

³⁰⁰ *Id.* at 228. This is a vulgar term for *Konzentrationslager* or concentration camp. *Id.*

cal, you old shit-bag. . . . it seems it is a long time since you have been to a camp. What do you think you are doing? How dare you complain?"³⁰¹

Eichmann later announced the establishment of a Berlin Emigration Center similar to one he designed in Vienna, sketched the procedure to Jewish leaders and informed them that they would be expected to satisfy emigration quotas.³⁰² The accused stressed that these evacuations would proceed in an expeditious fashion: the "Jew goes in through the front door, and goes out the back with all the papers in his hand."³⁰³

Aharon Lindenstrauss, in charge of the Aliyah (emigration to Israel) Department of the Palestine Office in Berlin, later accompanied several Jewish leaders to a meeting with Eichmann in Austria.³⁰⁴ Eichmann insisted that emigration from the Germany had to be accelerated, and shifted into "high gear."³⁰⁵ He demanded a "thousand passports everyday, that is the minimum."³⁰⁶ Eichmann refused to discuss the details and informed the Jewish leaders that it was their problem as to how this was to be accomplished.³⁰⁷ He also noted that an emigration tax would be imposed, but dismissed the notion that these funds would be made available to the Jewish community to finance the departure of Jews from Germany: "This is out of the question! . . . How should we pay for keeping your old bags alive?"³⁰⁸

Absent Eichmann's trial, the tales of those swept up in the deportations, ghettoization and concentration camps likely would have gone unreported. Those who testified invariably survived through serendipity and the folly of fortune. Leon Wells who, at the time of the trial was an engineer in the United States, was the only survivor of a family of seventy-six from Lvov, Poland.³⁰⁹ In explaining the source of his inner-strength to persevere, Wells testified that "somebody had to remain to tell the world that it was the idea of the Nazis to kill all the Jews—so we had a responsibility somehow to withstand this idea and to be alive."³¹⁰ Ya'akov Biskowitz was interned in Sobibor.³¹¹ Two Jewish inmates escaped and in retaliation an

³⁰¹ *Id.*

³⁰² *See id.* at 229.

³⁰³ *Id.*

³⁰⁴ *See id.* at 233-234 (Sess. 15, Apr. 25, 1961).

³⁰⁵ *Id.* at 234.

³⁰⁶ *Id.*

³⁰⁷ *See id.* at 235.

³⁰⁸ *Id.*

³⁰⁹ *See id.* at 360 (Sess. 22 May 1, 1961).

³¹⁰ *Id.* at 369 (Sess. 23, May 2, 1961).

³¹¹ *See id.* at 1183 (Sess. 65, June 5, 1961).

entire block of male inmates were marked for execution.³¹² They selected every third individual, passed by Biskowitz, killing twenty.³¹³ Alfred Oppenheimer arrived at Auschwitz and immediately handed his watch over to a Jewish Kapo who, in appreciation, told Oppenheimer to claim that he was an experienced craftsman, five years younger than his actual age and that he was in perfect health; he was selected for work while a companion who was a ski champion identified himself as a lawyer and was sent to his death.³¹⁴ Oppenheimer later volunteered to work as a mechanic at the Gleiwitz labor camp. Along with a companion, he stole and was caught with potatoes. The other inmate, who had stolen six or seven potatoes, had a rope placed on his neck and was forcefully pulled up to the ceiling. As the rope was placed on Oppenheimer's neck, the commander of the camp intervened and ordered that a single potato only merited hanging him by the hands.³¹⁵ Aharaon Beilin was found with an unauthorized piece of bread and only avoided a fatal shot of petrol in the heart when a syringe was unable to be found.³¹⁶ Rivka Yoselewska witnessed the killing of her father, mother, and eighty year old grandmother, along with her two sisters, as well as other members of her family.³¹⁷ A German soldier then seized and shot her child. Next, he shot Rivka in the head, causing her to fall underneath an avalanche of dying and desperate humanity.³¹⁸ Miraculously, she survived, extracted herself from the trench, hid from the Germans, joined Jews in the forest and was rescued by the Soviets in 1944.³¹⁹

The Jews throughout Europe were initially concentrated in centralized and self-contained ghettos.³²⁰ Witness Doctor Mark Dworjecki described the conditions in Vilna.³²¹ The population lived on a subsistence diet of 170 or 200 calories per day while being subjected to intense involuntary physical labor.³²² The witness testified that, absent the food smuggled into the ghetto, this diet would have resulted in the death through starvation of the entire population within one or two months.³²³ Under these condi-

³¹² *See id.* at 1185.

³¹³ *See id.*

³¹⁴ *See id.* at 1865 (Sess. 68, June 7, 1961).

³¹⁵ *Id.* at 1867.

³¹⁶ *See id.* at 1266 (Sess. 69, June 7, 1961).

³¹⁷ *See id.* at 516-517 (Sess. 20, May 8, 1961).

³¹⁸ *See id.* at 517-518.

³¹⁹ *See id.*

³²⁰ *See id.* at 450 (Sess. 27, May 4, 1961).

³²¹ *See id.* at 450-451.

³²² *See id.* 452.

³²³ *See id.*

tions, a number of Jews were reduced to so-called “musselmen,” who were individuals existing in catatonic conditions, slowly and deliberately moving about while wrapped in blankets and sheets.³²⁴ Moreover, the population suffered from skin disease, tuberculosis, swollen limbs, the collapse of veins and arteries, typhoid, internal organ damage and night-blindness.³²⁵ Additionally, witnesses recounted inexplicable acts of sadism. Shmuel Horowitz testified that a deputy commander of the criminal police entered a hospital, threw two children out a window, shot patients immobilized in bed and ordered the remaining patients to lie face down on the floor and killed them.³²⁶ As the population swelled in the Vilna ghetto, thousands were periodically removed and exterminated.³²⁷ Five thousand volunteered to be transported from the Vilna to the Kovno ghetto and then were summarily executed.³²⁸

Several witnesses noted that the Nazis targeted children in the ghetto.³²⁹ Witness Aharon Peretz recounted the so-called “children’s action” in the Kovno ghetto, in which children were swept off the street.³³⁰ He recounted an incident in which three children were taken from their mother. She demanded the return of her children and the soldier responded, “[y]ou can take one.”³³¹ The children stretched out their arms and the mother, unwilling to make a choice, retreated from the car.³³² Another mother hung to the car and only released her grip after being assaulted by an attack dog.³³³ A third demanded the return of one of her two children; a soldier grasped one of the young girls by the shoulders and threw her to the ground.³³⁴

These descriptions of senseless and sadistic violence were implicitly contrasted with the due process procedures afforded to Adolf Eichmann. Germany’s actions against the Jews, whatever the alleged justification, could only be viewed as malevolent murder. Of course, a more stringent court and active defense attorney might find that these personal and largely uncorroborated accounts based on distant memory were irrele-

³²⁴ *Id.* at 453. This word was introduced by the Germans and seems to derive from the Moslem practice of wrapping themselves in shawls while praying. *Id.*

³²⁵ *See id.*

³²⁶ *See id.* at 512 (Sess. 30, May 8, 1961).

³²⁷ *See id.* at 451 (Sess. 27, May 4, 1961) (witness Mark Dworzecki).

³²⁸ *See id.*

³²⁹ *See id.* at 470 (Sess. 28, May 4, 1961) (witness Avraham Karasik).

³³⁰ *Id.* at 479.

³³¹ *Id.*

³³² *See id.*

³³³ *See id.*

³³⁴ *See id.*

vant to the case against the accused. There was the related issue as to how to guard against prejudice in a prosecution that was based on such an inherently inflammatory and cruel factual foundation.³³⁵

The same evidentiary pattern was nevertheless followed as the prosecution moved to the deportations to the concentration camps. In September 1942, 120,000 Jews were assembled in the Warsaw Ghetto and over the course of the next week 60,000 were evacuated to the Treblinka death camp.³³⁶ A member of the Gestapo sat at a desk and sent the children, the weak and the aged to their death.³³⁷ This action culminated on Yom Kippur, the Jewish Day of Atonement, in 1942.³³⁸ Adolf Avrahm Berman, a psychologist, described an earlier action in which the Nazis invaded schools, orphanages and hospitals and sent the children and their teachers along with nurses, psychologists and social workers to Treblinka.³³⁹ Berman visited Treblinka following the war and found a vast area of skulls, bones and piles of children's shoes.³⁴⁰ He announced at the trial that he had a pair of shoes with him: "I brought it as a very precious thing, because I knew that over a million of such little shoes, scattered over all the fields of death, could very easily be found."³⁴¹ Dr. Martin Foeldi, a lawyer, was deported with his family from Czechoslovakia to Auschwitz.³⁴² Men and boys arriving at the camp were directed to the right; women and younger children to the left, and ultimate death.³⁴³ Foeldi was approached by a German soldier who instructed Foeldi's twelve year old son to join his mother and sister. Foeldi testified that his daughter wore a red coat and "the red spot was the sign that my wife was near there. The red spot was getting smaller and smaller. I walked to the right and never saw them again."³⁴⁴ The women selected for work were instructed to hand their children over to a grandmother or older women who then were diverted to the left and death.³⁴⁵ In their first few days in the camp, inmates were provided with a pencil and paper and or-

³³⁵ See generally ARENDT, *supra* note 80, at 8-10.

³³⁶ See Transcript *supra* note 278, at 405-06 (Sess., 25, May 3, 1961) (witness Zivia Lubetkin-Zuckerman).

³³⁷ See *id.* at 406.

³³⁸ See *id.*

³³⁹ See *id.* at 426-427 (Sess. 26, May 3, 1961).

³⁴⁰ See *id.* at 427.

³⁴¹ *Id.*

³⁴² See *id.* at 967-968 (Sess. 53, May 26, 1961).

³⁴³ See *id.*

³⁴⁴ *Id.*

³⁴⁵ See *id.*

dered to write their relatives, ensuring them that they were working and doing well in Austria.³⁴⁶

Individuals selected for extermination were led to the gas chambers that were labeled, constructed and equipped to resemble showers.³⁴⁷ The inmates dutifully placed their clothes on numbered hangars and were admonished to act swiftly so that the percolating coffee would not become cold.³⁴⁸ Inside the chambers were what appeared to be water valves.³⁴⁹ The Zyklon-B gas was then inserted into the chamber and within thirty-five or forty minutes the occupants were dead.³⁵⁰ The chamber was ventilated, the bodies cleared, gold teeth and other valuables were extracted, and then the bodies were burned.³⁵¹ Witness Eliahu Rosenberg worked clearing corpses from the ovens at Treblinka and testified that on one occasion all three ovens were ignited and ten thousand people were exterminated within forty-five minutes.³⁵² He also noted that the children often hugged the floor and managed to survive; they were then shot to death by the guards.³⁵³

Life inside the camps for individuals yoked to the wheel of labor was nasty and harsh. Esther Goldstein testified that at Auschwitz one thousand women were assigned to a bloc; twelve to a shelf in the barracks.³⁵⁴ Food was served to all twelve in a single dish; there were no spoons or forks and the inmates counted each sip of gruel in order to insure that the rations were equally shared.³⁵⁵ Witness Dr. Joseph Melkman testified concerning conditions in Bergen-Belsen and recounted an incident in which a German soldier beat several women who were fighting over scraps of food at the bottom of a barrel.³⁵⁶ He noted that one inmate documented fourteen incidents of cannibalism.³⁵⁷ Internees were disciplined through severe beatings; neglect or absence from work resulted in death by hanging.³⁵⁸ Confronted with these conditions, Ya'akov Friedman testified that inmates would run into the electrified fence surrounding the camp in order to com-

³⁴⁶ *See id.*

³⁴⁷ *See id.* at 1250 (Sess. 68, June 7, 1961) (witness of Yehuda Bakon).

³⁴⁸ *See id.*

³⁴⁹ *See id.*

³⁵⁰ *See id.* at 1251.

³⁵¹ *See id.*

³⁵² *See id.* at 1215 (Sess. 66, June 6, 1961).

³⁵³ *See id.* at 1214.

³⁵⁴ *See id.* at 1283 (Sess. 70, June 8, 1961).

³⁵⁵ *See id.*

³⁵⁶ *See id.* at 618 (Sess. 34, May 5, 1961).

³⁵⁷ *See id.*

³⁵⁸ *See id.* at 1163 (Sess. 64, June 6, 1961) (witness Ya'akov Friedman).

mit suicide.³⁵⁹ He would then have to remove the bodies in the morning.³⁶⁰ In addition, the so-called Goebbels' calendar dictated that the sick, infirm and mentally disoriented prisoners were to be exterminated on Saturdays and Jewish holidays.³⁶¹

Witnesses recounted stories of both petty and profound cruelty. Dov Frieberg testified that inmates were forced to imitate animals; one prisoner was required to wander around on all fours barking and snapping like a dog.³⁶² Others were compelled to sing and dance to anti-semitic songs.³⁶³ The guards invented various games and indignities such as compelling inmates to attempt to scale a building in an effort to close an umbrella perched on the roof. As these "parachutists" fell, they were beaten, set upon by a dogs and shot.³⁶⁴ Doctor Zalman Kleinman testified that Doctor Josef Mengele, the infamous impresario of the medical experiments at Auschwitz, ordered 2,000 children to assemble on the parade grounds. Mengele became furious over the attitude of one of the boys and ordered that a board should be attached to a soccer goal post. The boys were ordered to walk under the goal; those who were able to walk under the board without bending were designated for extermination.³⁶⁵ Physician Aharon Beilin testified that he was approached by a young man in the camp who insisted that Beilin document that the inmate had been castrated: "I want you to see what they are doing to us."³⁶⁶

As the Allied Powers advanced, the inmates were marched through the winter cold to camps within safe and secure German territory.³⁶⁷ Those who faltered were summarily shot; the death toll during these treks was overwhelming.³⁶⁸ Yehuda Bakon testified that the children on the march from Auschwitz to Mauthausen expressed gratitude that their parents died in the gas chambers and avoided the travails and torture of the trek.³⁶⁹ Aharon Beilin testified that during the forced march from Auschwitz that 5000 people were sealed in a uranium mine without sufficient ventilation.

³⁵⁹ *See id.*

³⁶⁰ *See id.*

³⁶¹ *See id.* at 1262 (Sess. 69, June 6, 1961) (witness Aharon Beilin).

³⁶² *See id.* at 1172 (Sess. 64, June 5, 1961).

³⁶³ *See id.* at 1170-1171.

³⁶⁴ *Id.* at 1171-1172.

³⁶⁵ *See id.* at 1240-1241 (Sess. 68, June 7, 1961).

³⁶⁶ *Id.* at 1263 (Sess. 69, June 7, 1961).

³⁶⁷ *See id.* at 1249 (Sess. 68, June 7, 1961) (witness Yehuda Bakon).

³⁶⁸ *See id.*

³⁶⁹ *See id.*

The prisoners pled for air and a thousand suffocated; they were discovered dead, their mouths to the floor, gasping for the remaining air pockets.³⁷⁰

Substantial testimony was devoted to Jewish resistance. The evidence implicitly rebutted the allegation that the Jews had been complicit in their own extermination.³⁷¹ A number of witnesses recounted the revolt of the Sonderkommando, the unit of Jews charged with immolating the corpses of the dead.³⁷² The unit managed to blow up a crematorium and throw two Germans into the flames, but were captured while attempting to escape.³⁷³ Among the countless acts of resistance documented at trial was a plan to set fire to the Auschwitz camp,³⁷⁴ a revolt at Sobibor in which thirteen German and several Ukrainian guards were killed,³⁷⁵ the setting fire to a fuel tank and escape from Treblinka³⁷⁶ and the igniting of a conflagration and attempted escape of one thousand children from Auschwitz-Birkenau.³⁷⁷ In one instance, the Germans learned of an escape plan involving Dutch inmates at Sobibor.³⁷⁸ The guards tortured a prisoner in an unsuccessful effort to elicit information and, in frustration, beheaded seventy Dutch prisoners.³⁷⁹ Mala Zimitbaum, a major figure in the hagiography of the Holocaust, escaped from Auschwitz in a German uniform with a male companion.³⁸⁰ She was caught, tortured and paraded before a gathering of prisoners.³⁸¹ Mala removed a hidden razor blade, sliced her hand and while bleeding profusely proclaimed that she would die a heroine and prophesized retribution against the Germans. She was taken away and executed.³⁸²

³⁷⁰ See *id.* at 1265 (Sess. 69, June 7, 1961).

³⁷¹ See *id.* at 468-469 (Sess. 28, May 4, 1961) (discussing the armed resistance of the Bialystok ghetto). *Id.* But see *id.* at 468 (Sess. 28, May 4, 1961). Witness Avraham Karsik testified that the Jewish Council in the Bialystok ghetto assisted in handing an individual over the Germans in order to prevent the liquidation of the ghetto. This is the type of difficult choice presented to the Jewish Councils. *Id.*

³⁷² See *id.* at 1249 (Sess. 68, June 7, 1961) (witness Yehuda Bakon).

³⁷³ See *id.*

³⁷⁴ See *id.* at 1247.

³⁷⁵ See *id.* at 1186 (Sess. 65, June 5, 1961) (witness Ya'akov Biskowitz).

³⁷⁶ See *id.* at 1210-1211 (Sess. 66, June 6, 1961) (witness Kalman Teigman).

³⁷⁷ See *id.* at 1292 (Sess. 71, June 6, 1961) (witness of Nahum Hoch).

³⁷⁸ See *id.* at 1174 (Sess. 64, June 5, 1961) (witness of Dov Freiberg).

³⁷⁹ See *id.*

³⁸⁰ See *id.* at 1275 (Sess. 70, June 8, 1961) (testimony of Raya Kagan).

³⁸¹ See *id.*

³⁸² See *id.*

Eichmann periodically appeared in the prosecution's narrative. Various witnesses testified that Eichmann visited Auschwitz,³⁸³ a Hungarian Jewish ghetto³⁸⁴ and Maidanek.³⁸⁵ Walking past the Jewish prisoners at Maidanek, Eichmann instructed the guards to "get rid of the whole pile."³⁸⁶ He responded to a letter written to Hitler by a German woman married to a Jew, in which she pled for her children to be released from the Litzmannstadt ghetto by writing, "for reasons of principle I am unable to comply with the application of Maria Schwartz for the return of her children from the Ghetto of Litzmannstadt."³⁸⁷ In responding to another petition, Eichmann expressed irritation over the efforts of the Italian Counsel in Danzig to obtain the release of a Jewish woman married to an Italian officer.³⁸⁸ He alleged that the incident was being exploited for "atrocious propaganda"³⁸⁹ and concluded that the "fate of the Jewish woman Cozzi is sealed;" I have "issued instructions for the Jewess Cozzi to be accommodated in the Riga concentration camp."³⁹⁰ Eichmann also rejected a request to refrain from deporting a Jew, Donati, to Bergen-Belsen who invented a technical procedure that might prove useful to the war effort. He explained that the invention was already registered in the patent office of the Reich and that "there is no further interest in the matter here" and Donati should be "on the next transport."³⁹¹ Eichmann was determined to prevent his plans from being impeded by the fact that a number of Jews in the occupied territories were able to obtain passports from neutral nations and were immune from deportation.³⁹² He wrote that in the event that any Jews are attempting to obtain a "new nationality, this does not have to be taken into consideration; on the contrary, the persons concerned are to be given priority for deportation to the East."³⁹³

Eichmann was not far removed from violence. Yehuda Bakon testified that one of his acquaintances, Mrs. Ya'akov Edelstein had been separated from her husband in Auschwitz, and that Eichmann had personally guaranteed they would be reunited. Mrs. Edelstein and her son were

³⁸³ See *id.* at 1245 (Sess. 68, June 7, 1961) (witness Yehuda Bakon).

³⁸⁴ See *id.* at 970-971 (Sess. 53, May 25, 1961) (witness Zaevev Sapir).

³⁸⁵ See *id.* at 1164 (Sess. 64, June 5, 1961) (Ya'akov Friedman).

³⁸⁶ *Id.*

³⁸⁷ *Id.* at 387 (Sess. 24, May 2, 1961).

³⁸⁸ See *id.* at 525 (Sess. 30, May 8, 1961).

³⁸⁹ *Id.*

³⁹⁰ *Id.* at 526.

³⁹¹ *Id.* at 602 (Sess. 33, May 9, 1961).

³⁹² See *id.* at 631 (Sess. 35, May 10, 1961).

³⁹³ *Id.* at 631.

brought together, along with her husband, in one of the crematoriums; all three were then shot.³⁹⁴ Witness Leslie Gordon was arrested in Hungary, in 1944, following the German incursion.³⁹⁵ He was taken to Eichmann's headquarters at the Majestic Hotel in Budapest, abused, and then deported to an internment camp where he was brutally beaten and interrogated for three years.³⁹⁶ Gordon testified that, prior to being taken to the detention facility, he was confronted with a smug and self-satisfied Adolf Eichmann.³⁹⁷ In 1944, Abraham Gordon was conscripted to work at Eichmann's headquarters in Budapest.³⁹⁸ He testified that he witnessed Eichmann enter a shed where a young Jewish boy, who was accused of stealing cherries from a tree, was interned.³⁹⁹ He later saw Eichmann exit the shed with a blood-stained shirt.⁴⁰⁰ Soon after, the young boy was dragged out by the feet, his face was swollen and bloody, and his limbs were torn apart.⁴⁰¹

A significant amount of evidence presented was devoted to Eichmann's negotiation on behalf of the Reich with Hungarian Jews to permit one million Jews to depart for Palestine, in exchange for 10,000 trucks.⁴⁰² Eichmann reneged on a promise to halt the deportations to the death camps during the negotiations.⁴⁰³ When confronted by Hansi Brand concerning the evacuation of children, he dismissed her, commenting that she was taking "a great liberty" and, in the event she continued to speak "like that, I advise you to stop coming to seem me."⁴⁰⁴ Eichmann later reportedly expressed satisfaction when an agreement could not be reached.⁴⁰⁵ In October 1944, he launched a forced-march of thousands of Jews from Budapest, including children and the elderly.⁴⁰⁶ Himmler reprimanded Eichmann for continuing to conduct forced-marches of Jews from Hungary to Auschwitz, located in

³⁹⁴ See *id.* at 1245 (Sess. 68, June 7, 1961).

³⁹⁵ See *id.* at 1130 (Sess. 62, June 6, 1961).

³⁹⁶ See *id.*

³⁹⁷ See *id.*

³⁹⁸ See *id.* at 976 (Sess. 54, May 26, 1961).

³⁹⁹ See *id.* at 977-980.

⁴⁰⁰ See *id.*

⁴⁰¹ See *id.* at 980.

⁴⁰² See *id.* at 1020-1022 (Sess. 56, May 29, 1961) (testimony of Yoel Brand).

⁴⁰³ See *id.* at 1051 (Sess. 58, May 30, 1961) (testimony of Hansi Brand).

⁴⁰⁴ *Id.* at 1052.

⁴⁰⁵ See *id.* at 1052.

⁴⁰⁶ See *id.* at 1054.

Poland.⁴⁰⁷ However, because of Eichmann's substantial power and influence, Himmler awarded Eichmann a service medal at the same time.⁴⁰⁸

C. *Eichmann's Testimony*

Defense attorney Robert Servatius relied on a deluge of documentary evidence to establish that Eichmann was a transportation technician who merely implemented the pernicious plans of the Nazi hierarchy.⁴⁰⁹ His guilt was said to pale in comparison to that of the coterie that controlled the Third Reich.⁴¹⁰

Eichmann consistently characterized his actions as benign, explaining that by assuming responsibility for the evacuation of Jews that he had introduced order into a chaotic situation in which deportation trains remained stuck and standing for days as a result of poor planning.⁴¹¹ Eichmann portrayed himself as subordinate in every detail to Heinrich Muller, the Head of the Gestapo (Section IV) who, in turn, was subordinate to the Chief of the Security Police and Security Service, Reinhard Heydrich and later Ernst Kaltenbrunner.⁴¹² According to Eichmann, Heinrich Himmer, Reichsfuhrer-SS, would issue an order to Heinrich Muller to deport a number of Jews.⁴¹³ Muller then would then assign portions of this quota to various countries.⁴¹⁴ Despite documents indicating that Eichmann negotiated with his subordinates assigned to the occupied territories, he insisted that he merely transmitted deportation directives.⁴¹⁵ The

⁴⁰⁷ See *id.* at 1118 (affidavit of Kurt Becher).

⁴⁰⁸ See *id.*

⁴⁰⁹ See *id.* at 1371-1372 (Sess. 75, June 20, 1961).

⁴¹⁰ See *id.* at 1371. Eichmann initially testified that, in Argentina, the Israelis had handcuffed him to a bed and then required him to declare that he was willing and ready to be tried by an Israeli court. *Id.* at 1372. He testified that he joined the National Socialist Party, in 1932, based on the organization's opposition to the Versailles Treaty. *Id.* Eichmann alleged that the attack against the Jews was a minor part of the early party platform. He complained that following the Reich's military success, the Hitlerite regime became enthralled and intoxicated with victory and adopted "stupid, senseless, unrestricted measures and brought about a tragedy." *Id.* at 1373. Eichmann dismissed the endorsement in his promotion papers that he possessed the requisite "personal severity" as a standard statement. *Id.* at 1374.

⁴¹¹ See *id.* at 1378.

⁴¹² See *id.* at 1396-1397 (Sess. 77, June 22, 1961).

⁴¹³ See *id.* at 1474 (Sess. 82, June 29, 1961).

⁴¹⁴ See *id.*

⁴¹⁵ See *id.* at 1474-1475.

destination of the transport, the number of troops and the disposition of the deportees, as well as other matters, were agreed upon between Muller and Richard Glucks, superintendent of the concentration camps.⁴¹⁶ Eichmann's self-described role was limited to "timetables, technical transport aspects" and "negotiations" with the Reich Transport Ministry.⁴¹⁷ Dieter Wisliceny testified that he had been ordered to Greece and that Eichmann issued orders that the Jews in Athens and the remainder of Greece were to be immediately "concentrated and deported to Auschwitz."⁴¹⁸ Eichmann claimed that this order had been issued by Muller⁴¹⁹ and that "it is possible that I did (transmit the order), but is also possible that he [Wisliceny] received this order directly from Muller."⁴²⁰ In July 1942, a note indicated that Eichmann ordered that transports of children from France "can roll."⁴²¹ He explained that Heinrich Himmler ordered the evacuation of the French Jews without exception and that he merely functioned as a "transmitting agency."⁴²²

Eichmann denied involvement in other incriminating activities. A January 30, 1942 meeting was convened by the Ministry for European Occupied Territories to determine which individuals should be considered Jews.⁴²³ Eichmann's section was represented, but he claimed that he "did not deal with this; it was purely a legal matter."⁴²⁴ Eichmann also claimed that the requirement that 1,000 Jews be transported in train cars with a capacity of 700 was a decision of the Ministry of Transport.⁴²⁵ He explained that the 700 capacity was based on military transports in which individual soldiers carried their bags; in the case of Jews, he explained that separate baggage cars were attached to the train.⁴²⁶

⁴¹⁶ See *id.* at 1473-1474. Eichmann testified that the Head Office for Reich Security, Section IVB4, the S.S. Leadership Head Office and Inspector of Concentration Camps, and the relevant camp all were contacted concerning the departure of the transport. *Id.* at 1473.

⁴¹⁷ See *id.* at 1390 (Sess. 76, June 21, 1961).

⁴¹⁸ *Id.* at 1499 (Sess. 84, July 3, 1961).

⁴¹⁹ See *id.* at 1500.

⁴²⁰ *Id.*

⁴²¹ *Id.* at 1475 (Sess. 82, June 29, 1961).

⁴²² *Id.* Eichmann signed a telegram authorizing the execution of Jews and, once again, claimed that he was implementing the orders of superiors. *Id.* at 1433-1434 (Sess. 79, June 26, 1961).

⁴²³ See *id.* at 1420 (Sess. 78, June 23, 1961).

⁴²⁴ *Id.*

⁴²⁵ See *id.* at 1432 (Sess. 79, June 26, 1961).

⁴²⁶ See *id.*

In other instances, Eichmann denied knowledge of events. A draft letter from the Reich Ministry for the Eastern Occupied Territories indicated that Eichmann agreed to the procurement of gassing equipment.⁴²⁷ Eichmann, however, claimed that his name had been “inserted wrongly” and that “I never received a letter of this nature, and I do not know whether these drafts were ever actually dispatched.”⁴²⁸ As for his alleged remark that Serbian Jews should be shot since they could not be deported to the East, Eichmann claimed that “I made no such comment and I could not have done so, because such a comment would have gone far beyond my area of competence.”⁴²⁹ He also denied defying the Hungarian government by deporting a Jewish transport: “I did not myself take decisions even in minor matters. . . . But in any case I do not know anything about such a matter.”⁴³⁰

Eichmann testified that he was informed by Heydrich, in the late summer or early fall of 1942, that the “Führer has ordered the destruction, the physical destruction of Jewry.”⁴³¹ Eichmann was ordered to Lublin, where he observed the sealing of cottages in preparation for the gassing of Jews.⁴³² He then traveled to the incorporated Polish territory, where was informed that Jews were being gassed to death.⁴³³ In Minsk, Eichmann observed the extermination of Jews standing in a ditch, including a child being shot out of a mother’s arms.⁴³⁴ Eichmann then proceeded to Auschwitz, where he testified that he observed the burning of corpses.⁴³⁵ He claimed that he monitored and reported on these activities, but did not issue directives or demands.⁴³⁶ Eichmann testified that, despite his deep misgivings, he conducted these inspections out of a sense of obligation and duty.⁴³⁷ He reported that he was particularly shaken when he passed a site where Jews

⁴²⁷ See *id.* at 1418 (Sess. 78, June 23, 1961).

⁴²⁸ *Id.*

⁴²⁹ *Id.* at 1492 (Sess. 83, June 30, 1961). Eichmann also denied involvement in the alleged killing of a juvenile who was alleged to have stolen cherries. *Id.* at 1548 (Sess. 87, July 6, 1961).

⁴³⁰ *Id.* at 1548.

⁴³¹ *Id.* at 1559 (Sess. 87, July 6, 1961).

⁴³² See *id.* at 1560.

⁴³³ See *id.*

⁴³⁴ See *id.*

⁴³⁵ See *id.*

⁴³⁶ See *id.*

⁴³⁷ See *id.* “I came into contact [with the extermination of the Jews] against my will—I had to obey. I had to do it. I cannot state anything further on this matter.” *Id.* at 1561.

had been executed and witnessed that “the pressure of the gases” had led to “blood . . . shooting out of the earth like a fountain.”⁴³⁸

Eichmann concluded his direct testimony by pronouncing that he had to “carry out the transports in accordance with my orders” and that he was “aware of the fact that some of these people were killed in the camps.”⁴³⁹ However, he denied having ever proclaimed that he had “anyone’s death on my conscience;”⁴⁴⁰ and contended that only those who issued the orders “can have a guilt feeling in the legal sense, since in the absence of responsibility, there can in the end be no guilt.”⁴⁴¹ In the end, the basis of all organized States is “order and obedience. No political system can seriously be based on spies and traitors.”⁴⁴² According to Eichmann, his misfortune was that he was in uniform and obligated to obey a regime that ordered the extermination of the Jews. He was in the same situation as millions of others who found themselves subordinate to the legal requirements of obedience.⁴⁴³ In the end, he was “simply a tool in the hands of stronger powers and strong forces, and of an inexorable fate.”⁴⁴⁴

D. *Eichmann’s Cross-Examination*

Prosecutor Gideon Hausner next cross-examined Eichmann regarding the accused’s admission that he was an “accomplice to the murder of millions of Jews.”⁴⁴⁵ Eichmann conceded that “I must admit that I have played my part, though under orders. . . . [A]s a recipient of orders, I had no choice but to carry out the orders I received.”⁴⁴⁶ Eichmann cautioned that the determination of his legal guilt must be delayed until the extent of his bureaucratic responsibility was determined.⁴⁴⁷

Eichmann continued to avow that he had no animus towards the Jews and claimed that his statement that he would happily leap into his grave with the satisfaction that five million perished along with him was

⁴³⁸ *Id.* at 1561.

⁴³⁹ *Id.* at 1568 (Sess. 88, July 7, 1961).

⁴⁴⁰ *Id.* at 1567.

⁴⁴¹ *Id.* at 1568. Eichmann viewed ethical guilt as a matter of personal judgment and evaluation. He stated that “you argue with yourself, and you are your own judge. I have done it in my own case, and I am still doing it.” *Id.*

⁴⁴² *Id.*

⁴⁴³ *See id.*

⁴⁴⁴ *Id.*

⁴⁴⁵ *Id.* at 1575 (Sess., 88, July 7, 1961).

⁴⁴⁶ *Id.*

⁴⁴⁷ *See id.*

aimed at all foreign and domestic “enemies of the Reich,” including Jews.⁴⁴⁸ Although Eichmann regarded the Jews as adversaries, he claimed that he favored their emigration rather than extermination.⁴⁴⁹ His aspiration was for the Jews to have their “own land, a country of their own under their feet.”⁴⁵⁰ Eichmann claimed that on numerous occasions that he approached his superiors in an effort to resign.⁴⁵¹ He dismissed affidavits attesting to his harsh approach to issues of Jewish emigration and insisted that these matters were “purely for the legal experts” and that “non-lawyers were not even allowed to take part.”⁴⁵² Eichmann also claimed that his statement calling for a “more elegant way” of dispatching the Jews following his visit to the Eastern Territories referred to a peaceful political method rather than to the utilization of poison gas.⁴⁵³

The accused tended to diminish his depredations and proclaimed that he was determined to dispel the “landslide of untruth.”⁴⁵⁴ In response to an interrogation concerning the Nisko Plan in which he admitted sending Jews to an abandoned and barren area in Poland with water poisoned by typhoid, Eichmann alleged that Jewish leaders enthusiastically embraced this project.⁴⁵⁵ He claimed to have been unaware that Polish farmers had been unable to cultivate the area, testified that he warned the deportees of the typhoid threat and reminded the court that the area was “not the worst.”⁴⁵⁶ Eichmann claimed that he was demoralized by the demise of the Madagascar Plan and reluctantly concluded that he was “too weak and too powerless”⁴⁵⁷ to secure a “normal solution” to the Jewish question.⁴⁵⁸

⁴⁴⁸ See *id.* at 1575 (Sess. 88, July 7, 1961). Eichmann stated that he considered the Jews to be enemies following the statement of Zionist leader Chaim Weitzmann, in 1939, that the Jews would support the Allied cause. *Id.* at 1576.

⁴⁴⁹ See *id.* at 1582.

⁴⁵⁰ *Id.*

⁴⁵¹ See *id.* at 1643 (Sess. 94, July 12, 1961).

⁴⁵² *Id.* at 1736 (Sess. 100, July 18, 1961) (affidavit of Bernard Loesner of the Department of Interior alleging that Eichmann favored deportation from Germany of the children of mixed marriages).

⁴⁵³ See *id.* at 1706 (Sess. 98, July 17, 1961).

⁴⁵⁴ *Id.* at 1605 (Sess. 91, July 11, 1961).

⁴⁵⁵ See *id.* at 1602-1603 (Sess. 91, July 11, 1961).

⁴⁵⁶ *Id.* at 1603. Hans Frank, the Governor General of Poland, objected to the emigration of additional Jews and the project was cancelled. *Id.*

⁴⁵⁷ *Id.* at 1609.

⁴⁵⁸ *Id.* at 1610.

Eichmann dismissed the prosecution's claim that he was the primary and preeminent person on Jewish affairs,⁴⁵⁹ noted that his responsibility was limited to matters of transit,⁴⁶⁰ and characterized Heydrich's comment at Wannsee that he was the Specialist Officer for Jewish Affairs as a mischaracterization.⁴⁶¹ Eichmann claimed that he was a cipher and only acted in accordance with the commands and established policies of his superiors, Gestapo Chief Heinrich Muller and the Chief of the Security Police and Security Service, Reinhard Heydrich and later Ernst Kaltenbrunner.⁴⁶² He stated that documents that credited him with policy determinations on issues such as the treatment of Jews in Italy, were inaccurate:⁴⁶³ "I did not indicate any of my opinions, nor was I authorized to do so, and in these cases I had to obtain the instructions of my superiors."⁴⁶⁴ Eichmann was interrogated concerning a note from one of his operatives, Theodore Dannecker, indicating that he "decided" that Jewish children were to be deported from France to the Governor General.⁴⁶⁵ Eichmann responded that he was "unable to attach any importance or significance to the word 'decided.'"⁴⁶⁶ Questioned about the death of Polish children during a transport, he pled that "I was not responsible for these matters. I was responsible for the matters concerning the timetable for the technical matters, but not for these things."⁴⁶⁷ The accused contended that the number to be deported was determined in accordance with directives from his superiors

⁴⁵⁹ See *id.* at 1625 (Sess. 93, July 12, 1961).

⁴⁶⁰ See *id.* at 1623 (Sess. 91, July 11, 1961).

⁴⁶¹ See *id.* at 1622-1623.

⁴⁶² See *id.* at 1610-1611 (Sess. 91, July 11, 1961). Eichmann noted that he signed his letters, *Im Auftrage* or *I.A.*, meaning "behalf of someone else." *Id.* at 1610. The prosecution characterized this as a matter of protocol. *Id.* at 1611.

⁴⁶³ See *id.* at 1625-1626 (Sess. 93, July 12, 1961).

⁴⁶⁴ *Id.* at 1626. Eichmann estimated that he dealt with 150-200 matters per week and that roughly 50-60 were discussed with Muller. The others were processed according to previously established policies. *Id.* at 1678 (Sess. 93, July 14, 1961).

⁴⁶⁵ See *id.* at 1647 (Sess. 94, July 12, 1961).

⁴⁶⁶ *Id.* Eichmann noted that the decision had taken ten days and that had he made the determination on his own that the decision would have been taken within three or four days. *Id.*

⁴⁶⁷ *Id.* at 1700 (Sess. 98, July 17, 1961). He later denied awareness that "scores and hundreds" that he deported from the Lublin Ghetto to Auschwitz would be exterminated, but conceded that "I did hear and read about that." *Id.* at 1643 (Sess. 94, July 12, 1961).

and that the destinations were established by the Inspector of Concentration Camps.⁴⁶⁸

Eichmann claimed that bureaucratic confusion and complexity was responsible for the fact that his office received inquiries and issued directives on matters unrelated to transport such as the arrest of Polish priests and the public hanging of Jews.⁴⁶⁹ Eichmann claimed that he had been requested by Heydrich to deliver documents to Odilo Globocnik, Security Service Chief in Lublin, authorizing the execution of hundreds of thousands of Jews.⁴⁷⁰ He also had been ordered to issue directives prohibiting clerics from congregating in the vicinity of Jewish labor camps,⁴⁷¹ appointing the commander of a concentration camp,⁴⁷² marking Jews with badges,⁴⁷³ and preventing the emigration of wealthy Jews from Rumania.⁴⁷⁴ In other instances, such as the collection of Jewish skeletons, he disputed his involvement⁴⁷⁵ or, as in the case of the execution of the Jewish children in Lidice, claimed that Muller delegated this to Eichmann's subordinate Rolf Gunther without Eichmann's knowledge.⁴⁷⁶ Eichmann denied having attended a meeting with Heydrich, on September 21, 1939, in which the long-term goal of the extermination of Jews in Poland was outlined.⁴⁷⁷ Confronted with documents recording his attendance, Eichmann retracted his denial and claimed that he did not recall the meeting.⁴⁷⁸ Eichmann also claimed that he was not aware of the deployment of poison gas and that this task had been assigned to his assistant Hans Gunther.⁴⁷⁹ He was unable to explain his involvement in issuing instructions pertaining to the Warsaw Ghetto and for signing death certificates which concealed the cause of death of the ghettoized Jews.⁴⁸⁰ Eichmann conceded that he proposed the forced-march of Hungarian Jewry, but contended that the Hungarians organized and conducted the trek.⁴⁸¹ Challenged to designate the legal basis for the orders to

⁴⁶⁸ See *id.* at 1631 (Sess. 93, July 12, 1961).

⁴⁶⁹ See *id.* at 1700-1701 (Sess. 98, July 17, 1961).

⁴⁷⁰ See *id.* at 1712 (Sess. 99, July 17, 1961).

⁴⁷¹ See *id.* at 1740 (Sess. 101, July 18, 1961).

⁴⁷² See *id.* at 1741.

⁴⁷³ See *id.* at 1413-1414 (Sess. 78, June 23, 1961).

⁴⁷⁴ See *id.* at 1629 (Sess. 93, July 12, 1961).

⁴⁷⁵ See *id.* at 1748-1749 (Sess. 101, July 18, 1961).

⁴⁷⁶ See *id.* at 1745.

⁴⁷⁷ See *id.* at 1599 (Sess. 91, July 11, 1961).

⁴⁷⁸ See *id.* at 1600.

⁴⁷⁹ See *id.* at 1653-1655 (Sess. 95, July 13, 1961).

⁴⁸⁰ See *id.* at 1716 (Sess. 99, July 17, 1961).

⁴⁸¹ See *id.* at 1786-1787 (Sess. 104, July 20, 1961).

deport Jews throughout Europe, Eichmann could only reply that this was not his concern as a section head and that "I am not a lawyer. I had to obey. I had only learned the life of a soldier."⁴⁸²

Eichmann was questioned concerning the December 1941 deportation of German Jews to Riga and Minsk at a time when he was aware that Operation Units were exterminating Jews.⁴⁸³ He claimed that he had not anticipated that Jews from the Reich would be shot.⁴⁸⁴ Eichmann nevertheless stressed that regardless of "[w]hether they were to be killed or not, orders had to be carried out."⁴⁸⁵ Higher echelon officials could defy orders, but Eichmann testified that he enjoyed no such prerogative.⁴⁸⁶ Yet, he conceded that on several occasions that he proceeded without the required authorization of the Foreign Ministry or misled the Foreign Ministry.⁴⁸⁷ For instance, he represented to the Foreign Ministry that only able-bodied Jews were to be deported from Rumania while obtaining Muller's endorsement to deport the aged and the infirm.⁴⁸⁸

Despite his alleged misgivings, Eichmann testified that, after viewing the bodies of dead Germans and Jews, he became inured to death.⁴⁸⁹ He testified that "[g]radually, I reached a stage where neither German dead bodies nor Jewish dead bodies, nor any other dead bodies had that effect on me, like the first dead bodies that I saw."⁴⁹⁰ Still, Eichmann expressed relief that he was not involved in the extermination process and claimed that he implored Muller that he could not tolerate the carnage and requested to be reassigned.⁴⁹¹

At what date was Eichmann aware that he was transporting Jews to their death and that he was complicit in their extermination? The prosecution presumably hoped to establish that his early awareness of the plans to eradicate Jews attested to the centrality of his role in the extermination process.⁴⁹² Eichmann insisted that this was not clear until the Wannsee Confer-

⁴⁸² *Id.* at 1733 (Sess. 100, July 18, 1961). Eichmann also claimed that he only was involved in deportations within a small portion of the Government General. *Id.* at 1728-1730.

⁴⁸³ *See id.* at 1637 (Sess. 93, July 12, 1961).

⁴⁸⁴ *See id.*

⁴⁸⁵ *Id.*

⁴⁸⁶ *See id.*

⁴⁸⁷ *See id.* at 1684-1685 (Sess. 97, July 14, 1961).

⁴⁸⁸ *See id.* at 1685.

⁴⁸⁹ *See id.* at 1643 (Sess. 94, July 12, 1961).

⁴⁹⁰ *Id.*

⁴⁹¹ *See id.* at 1661 (Sess. 95, July 13, 1961).

⁴⁹² *See infra* notes 493-500.

ence of January 20, 1942.⁴⁹³ He claimed that when he wrote the Foreign Ministry, on November 19, 1941, concerning the prohibition of the emigration of a Jews in light of the approaching "Final Solution of the Jewish Question in Europe" that this connoted the Madagascar Plan.⁴⁹⁴ The prosecution, however, pointed out that the Madagascar proposal had been abandoned in August 1940⁴⁹⁵ and the accused acknowledged that when he issued orders, on October 10, 1941, to deport 50,000 from Germany, Austria and Czechoslovakia to Riga and Minsk, that the phrase Final Solution could not have connoted the Madagascar Plan.⁴⁹⁶ The prosecution then noted that the phrase Final Solution also had been utilized in Eichmann's communiques pertaining to the deportation of German Jews from Yugoslavia in March 1941⁴⁹⁷ and the evacuation of Jews from France and Belgium, in May 1941.⁴⁹⁸ In addition, the prosecution pointed out that Eichmann was the recipient of reports from Operation Units in Russia, in July 1941, concerning the extermination of Jews.⁴⁹⁹ This was the thirteenth such report received by Eichmann and the prosecution reminded him that by July 1941 "[i]t was no longer particularly surprising for you to hear that entire Jewish communities had simply been slaughtered."⁵⁰⁰

Despite Eichmann's characterization of the extermination of Jews as "one of the most heinous crimes in the history of mankind,"⁵⁰¹ he responded to a prosecutorial inquiry by describing a hypothetical individual involved in the Final Solution as an "unhappy man" rather than as a "criminal."⁵⁰² Pressed as to whether Rudolf Hoss, the Commandant of Auschwitz, was a criminal, Eichmann replied that he "pitied him and felt sorry for him," but refused to "reveal my innermost feelings."⁵⁰³

⁴⁹³ See *id.* at 1627 (Sess. 93, July 12, 1961). "I have after all never denied that unfortunately I did know that some of the Jews who were deported were sent for extermination. I have never denied that. I could not deny that." *Id.* at 1634.

⁴⁹⁴ *Id.* at 1613.

⁴⁹⁵ See *id.* at 1619.

⁴⁹⁶ See *id.* at 1615.

⁴⁹⁷ See *id.* at 1618.

⁴⁹⁸ See *id.* at 1617.

⁴⁹⁹ See *id.* at 1757 (Sess. 102, July 19, 1961).

⁵⁰⁰ *Id.* at 1758.

⁵⁰¹ *Id.* at 1662 (Sess. 95, July 11, 1961).

⁵⁰² See *id.* at 1661.

⁵⁰³ *Id.*

E. Closing Arguments

The prosecution characterized Eichmann's testimony as obstructionistic and obfuscated.⁵⁰⁴ Eichmann disingenuously avowed that Germany had been pushed into war by foreign forces whose efforts were endorsed by the Jewish community.⁵⁰⁵ Although Eichmann acknowledged that millions were mangled, murdered and massacred,⁵⁰⁶ he contended that he was a mere functionary and transportation technician and was not culpable for these crimes.⁵⁰⁷ Prosecutor Gideon Hausner, however, insisted that, despite Eichmann's minimization of his role, he performed an "executive function" in the deportation, ghettoization and extermination of the Jews.⁵⁰⁸

The prosecution recounted that Eichmann's success in expelling Jews from Vienna and Bohemia resulted in his assignment to Berlin.⁵⁰⁹ The full force of German totalitarian technique and technology then was devoted to the forced emigration and eventual deportation of German Jewry.⁵¹⁰ Eichmann's name appeared on the roster of attendees at a meeting on September 21, 1939, at which Heydrich announced that Jews would be removed from the annexed portions of Germany to the Polish territories comprising the Government General.⁵¹¹ The displaced Jews were to be ghettoized and a Council of Elders was to be created, which would be compelled to cooperate in the eventual deportation and extermination of the Jewish population.⁵¹² Eichmann contended that he persevered through pangs of conscience and that he implored his superiors to release him from his responsibilities.⁵¹³ The prosecutor, however, pointed out that there was no written record of such a petition and that requests for release were regularly approved.⁵¹⁴

In 1939, Eichmann devised the disastrous deportation of Jews from the Reich, Austria and the Protectorate to Nisko.⁵¹⁵ He then propelled the Madagascar plan, which would have cleansed Europe of Jews and con-

⁵⁰⁴ See *id.* at 1973 (Sess. 110, Aug. 8, 1961).

⁵⁰⁵ See *id.*

⁵⁰⁶ See *id.*

⁵⁰⁷ See *id.* at 1975.

⁵⁰⁸ See *id.*

⁵⁰⁹ See *id.* at 1976-1977.

⁵¹⁰ See *id.* at 1978.

⁵¹¹ See *id.*

⁵¹² See *id.*

⁵¹³ See *id.* at 1983-1984.

⁵¹⁴ See *id.* at 1984.

⁵¹⁵ See *id.* at 1998.

demned the deportees to an uncertain future.⁵¹⁶ Heydrich subsequently indicated his confidence in Eichmann's capacity to carry out the extermination of the Jews when he appointed him to direct Jewish Affairs in the Gestapo.⁵¹⁷ Hausner noted that it was a testimony to Eichmann's effectiveness and efficiency that he remained in this post dedicated to the death and depredation of European Jewry for five years.⁵¹⁸

Eichmann claimed that he was not in a position to make recommendations, let alone decisions, but merely followed orders.⁵¹⁹ Prosecutor Hausner pointed out that this was no different from the situation of the other major figures in the Nazi regime who were subordinate to Adolf Hitler.⁵²⁰ Eichmann conceded that he was a link in the chain of command and was responsible for the transport of Jews to camps with full awareness that they were to be exterminated.⁵²¹ The prosecution noted that this admission of complicity in the Final Solution sufficed to convict the accused.⁵²²

However, the prosecution stressed that this was not the entire extent of Eichmann's portfolio.⁵²³ Hausner alleged that Eichmann was the chief representative of Himmler and of the Chief of the Security Police and of the Head of the Gestapo on Jewish questions and acted on their behalf in matters pertaining to the Jews.⁵²⁴ Following Wannsee, Heydrich wrote that Eichmann was his "authorized representative,"⁵²⁵ Eichmann's central role was independently noted by affiants ranging from the Head of the Office for Reich Security Ernst Kaltenbrunner, Foreign Minister Heinrich Himmler, Luftwaffe Commander General Karl Koller, Governor General of the Government General Hans Frank, Chief of the Economic Administrative Head Office Oswald Pohl, Commandant of Auschwitz Rudolf Hoss and Hermann Goring, Marshal of the Greater German Reich.⁵²⁶ Hausner reminded the Court of the fact that thousands of other individuals, ministries

⁵¹⁶ *See id.* at 1985.

⁵¹⁷ *See id.* at 1986.

⁵¹⁸ *See id.* at 1987.

⁵¹⁹ *See id.* at 1987-1988.

⁵²⁰ *See id.* at 1988.

⁵²¹ *See id.*

⁵²² *See id.*

⁵²³ *See id.* at 1990-1991.

⁵²⁴ *See id.* at 1993.

⁵²⁵ *Id.* at 1991.

⁵²⁶ *See id.* at 1990-1991. Thousands of documents were destroyed. The only material relating to the Government General were those pertaining to the treatment of foreign nationals. *Id.* at 1991.

and departments being involved in the Nazi's satanic schemes did not lessen Eichmann's guilt.⁵²⁷

Following Wannsee, the prosecution recounted that the entire European continent was transformed into a hunting ground for Eichmann in which Jews were located, marked and ghettoized.⁵²⁸ The prosecution challenged the accused's contention that he only was concerned with foreign citizens rather than indigenous Poles and Jews within the Government General.⁵²⁹ Eichmann's version was belied by his meetings with Odilio Globocnik at which the prosecution contended that the accused authorized, rather than merely ratified, the extermination of three quarters of a million Jews.⁵³⁰

Hausner pointed out that Eichmann's central role was indicated by Rademacher's note concerning the Jews of Serbia, which recorded "Eichmann proposes killing them by shooting."⁵³¹ Eichmann contended that the note was a fabrication.⁵³² The prosecution, however, observed that this indicated that Rademacher viewed Eichmann as so powerful that the mere mention of his name would legitimize and justify Rademacher's otherwise illicit actions.⁵³³

The prosecution noted that Eichmann conceded he was criminally culpable for having arranged timetables and transport for deportees knowing that he was actively assisting the extermination of Jews.⁵³⁴ He admitted on cross-examination that he sent many deportees, including Jews from the Reich, to camps administered by killing squad commanders Arthur Nebe and Emil Otto Rasch with full knowledge that the deportees would be exterminated.⁵³⁵ The documentary evidence indicated that Eichmann sought a pure and pristine technological process of extermination, but the accused

⁵²⁷ *See id.* at 1991.

⁵²⁸ *See id.*

⁵²⁹ *See id.*

⁵³⁰ *See id.* at 1992. The prosecution also pointed to the documentary evidence linking Eichmann to the Warsaw Ghetto and an instruction from Section IVB4 indicating that involuntary Jewish laborers working for an oil company in the Beskids mountains only should be evacuated to the extent required. *Id.* at 1992. Eichmann also was in charge of amending the so-called "Brown File" which set forth directives for dealing with Jews in the Eastern Occupied Territories. *Id.* at 2005-2006 (Sess. 111, Aug. 8, 1961).

⁵³¹ *Id.* at 1995 (Sess. 111, Aug. 8, 1961).

⁵³² *See id.*

⁵³³ *See id.*

⁵³⁴ *See id.* at 1996.

⁵³⁵ *See id.* at 2003-2004.

claimed that he had been unaware that Muller detailed Gunther to obtain poison gas.⁵³⁶ Yet, Hausner noted that Eichmann had personally witnessed the killing of Jews by exhaust fumes, and that there was little reason for Muller to conceal the employment of poison gas from Eichmann.⁵³⁷ The evidence also indicated that the accused was involved in exhuming and destroying corpses in an effort to cover-up the Nazi's crimes.⁵³⁸

Eichmann was described by Hausner as roaming throughout Europe supervising the efforts of his operatives and visiting concentration camps.⁵³⁹ He effectively controlled the model camp of Terezin and as the tide turned against the Reich, Eichmann began evacuating the internees to Auschwitz.⁵⁴⁰ Eichmann's five or six visits to Auschwitz coincided with the arrival of large transports of Jews.⁵⁴¹ According to the prosecution, Eichmann determined the immediate fate of these deportees.⁵⁴² Hausner also alleged that Eichmann played a significant role in other camps, supervising the maintenance and operation of gas vans at Chelmno and receiving reports on the arrival and disposition of Jews in a host of camps in the area of Lublin Poland.⁵⁴³ As defeat loomed, Eichmann took charge of the evacuation of Hungarian Jewry to Auschwitz⁵⁴⁴ and succeeded in deporting 437,402 Jews to their death.⁵⁴⁵

Dr. Robert Servatius, in rebuttal, argued that the characterization of Eichmann as a central component of the Nazi conspiracy was flawed and fictitious; this could only serve to veil the vicious venality of high-ranking Nazis.⁵⁴⁶ Servatius attacked the statutory scheme that provided Israel jurisdiction beyond its national borders⁵⁴⁷ for crimes against the "Jewish People."⁵⁴⁸ This was an enormous extension of international jurisdiction which

⁵³⁶ See *id.* at 2005.

⁵³⁷ See *id.*

⁵³⁸ See *id.*

⁵³⁹ See *id.* at 2006-2007.

⁵⁴⁰ See *id.* at 2008 (Sess. 112, Aug. 9, 1961). As the war drew to a close, Eichmann transformed Terezin into site for the liquidation of Jews in mixed marriages. *Id.*

⁵⁴¹ See *id.* at 2010.

⁵⁴² See *id.* The prosecution noted that Eichmann was approached to arrange for collection of skeletons. *Id.*

⁵⁴³ See *id.* at 2009. These included Belzec, Treblinka and Wolczek. *Id.*

⁵⁴⁴ See *id.* at 2014.

⁵⁴⁵ See *id.* at 2016.

⁵⁴⁶ See *id.* at 2046 (Sess. 114, Aug. 14, 1961).

⁵⁴⁷ See *id.* at 2047.

⁵⁴⁸ *Id.* at 2050.

was traditionally based on the conventional categories of citizenship and territory.⁵⁴⁹ Servatius also noted that the State of Israel did not exist at the time of Eichmann's alleged transgressions and, in any event, Israel could not now retroactively assert jurisdiction.⁵⁵⁰

Servatius again stressed that Eichmann was a mere administrative adjunct who transmitted directives from his superiors and that he was not empowered to make autonomous decisions.⁵⁵¹ Eichmann was well aware that in the event of defeat that he would be singled out as a scapegoat and, for that reason, carefully documented his directives.⁵⁵²

Servatius challenged the prosecution's pronouncement that Hungary was emblematic of Eichmann's central role as the "Master" of the deportation and destruction of Jewry.⁵⁵³ Servatius argued that the plans for the deportation of Jews was carried out by the Hungarian police and virulently anti-semitic Arrow Cross organization.⁵⁵⁴ Eichmann's role was limited to meeting the trains at the German border and directing them to Auschwitz or to other assigned destinations.⁵⁵⁵ Servatius recounted that Eichmann accepted without protest the decision of Hungarian Regent Miklos Horthy, in 1944, to halt the evacuation of the country's remaining Jewish population.⁵⁵⁶ Horthy was removed by the Germans and the Nazi Foreign Ministry exerted pressure on his successor, Frenck Szlasi, leader of the pro-Nazi Arrow Cross, to resume the evacuations.⁵⁵⁷ This resulted in Eichmann receiving orders to initiate the death-dealing treks to Auschwitz.⁵⁵⁸ Following the war, those responsible attributed the atrocities in Hungary to the accused whose absence prevented him from proffering a defense.⁵⁵⁹

Servatius argued that Eichmann had not been in a position to evaluate the criminality of commands issued by his superiors.⁵⁶⁰ The most compelling obligation of subordinates, such as the accused, was to demonstrate

⁵⁴⁹ *See id.*

⁵⁵⁰ *See id.*

⁵⁵¹ *See id.* at 2058-2059.

⁵⁵² *See id.* at 2059.

⁵⁵³ *Id.* at 2055.

⁵⁵⁴ *See id.*

⁵⁵⁵ *See id.*

⁵⁵⁶ *See id.*

⁵⁵⁷ *See id.*

⁵⁵⁸ *See id.*

⁵⁵⁹ *See id.*

⁵⁶⁰ *See id.* at 2061.

loyalty to the State.⁵⁶¹ Servatius pointed out that there was a measure of hypocrisy underlying Eichmann's trial, since the Allied Powers had been unwilling to extend assistance to European Jews.⁵⁶² While there was no denial of the tragedy of the Jews, Servatius cautioned that the condemnation of Eichmann's criminal conduct must be tempered by an appreciation of the fact that this atrocity was equaled by the extermination of native peoples in North and South America, the enforced slavery of Africans, the elimination of Australian Aborigines, the persecution of the Jews in Spain and of the Huguenots in France.⁵⁶³

The defense again stressed that Nazi elites were able to avoid direct involvement in crimes.⁵⁶⁴ Those in position of obedience, however, did not enjoy this luxury, and disobedience would have been futile and would have met with instantaneous retribution.⁵⁶⁵ In the end, the Holocaust was a crime attributable to high-level State decision-makers for which low-level operatives should not be held culpable.⁵⁶⁶

Servatius argued that Eichmann should be placed in the same position as he would have been had a lawful extradition request been filed.⁵⁶⁷ This would result in Eichmann's trial and punishment being barred under Argentinian law by the tolling of the statute of limitations.⁵⁶⁸ Such an order would be consistent with Jewish law, which traditionally recognized that in the course of time forgiveness was appropriate.⁵⁶⁹ The defense argued that the Court should be content with the fact that the proceedings had supplemented the historical record and the Tribunal should eschew revenge or retribution.⁵⁷⁰ Servatius stressed that in the end that the intricate and profound issues raised by this trial were the terrain and turf of philosophers, theologians and historians rather than legal experts.⁵⁷¹

⁵⁶¹ *See id.*

⁵⁶² *See id.*

⁵⁶³ *See id.*

⁵⁶⁴ *See id.*

⁵⁶⁵ *See id.*

⁵⁶⁶ *See id.* at 2062.

⁵⁶⁷ *See id.* at 2063.

⁵⁶⁸ *See id.*

⁵⁶⁹ *See id.*

⁵⁷⁰ *See id.*

⁵⁷¹ *See id.* at 2050.

F. The Verdict And Sentencing

The District Court ruled that Eichmann was aware, as early as June 1941, of the plans for the extermination of the Jews and, in August 1941, initiated a course of action in furtherance of this cruel campaign of biological extermination.⁵⁷² The Tribunal ruled that Eichmann must be condemned as a principal and accessory in the “comprehensive crime” of the Final Solution.⁵⁷³ The Supreme Court fully concurred with the decision of the lower court.⁵⁷⁴ The Appellate Tribunal stressed that Eichmann had been entrusted by Heydrich, the chief of the Reich Security Service, with the extermination of eleven million Jews and was “no mere ‘cog,’ small or large, in a machine propelled by others; he was himself, one of those who propelled the machine.”⁵⁷⁵ Eichmann’s guilt was indisputable; he freely conceded that he had been aware that those transported to the concentration camps were condemned to die.⁵⁷⁶ The Supreme Court also found that Eichmann passionately pursued, detained and denied safe passage to Jews, and devoted himself to developing devices of death.⁵⁷⁷ The Court concluded with a moral condemnation of Eichmann’s failure to display “remorse or weakness or sapping of strength or weakening of will in performing the task he had undertaken.”⁵⁷⁸ He carried out “his unspeakably horrible crimes with genuine whole-hearted joy and pleasure, to his own gratification and the satisfaction of all his superiors.”⁵⁷⁹

Eichmann was convicted on all counts.⁵⁸⁰ Israeli Attorney General Gideon Hausner argued at the sentencing hearing that the accused “excluded himself by the horrors of his actions from human society;” these were “rampaging destructive and bloodthirsty” actions.⁵⁸¹ The Attorney General concluded with the observation that “[i]f Adolf Eichmann is not sentenced to the severest penalty . . . then this penalty has no significance

⁵⁷² See Dist. Ct. Judgment, *supra* note 12, at 235.

⁵⁷³ *Id.*

⁵⁷⁴ See Sup. Ct. Judgment, *supra* note 12, at 279.

⁵⁷⁵ *Id.* at 331.

⁵⁷⁶ See *id.* at 332.

⁵⁷⁷ See *id.*

⁵⁷⁸ *Id.* at 341.

⁵⁷⁹ *Id.*

⁵⁸⁰ See Transcript, *supra* note 278, at 2205-2206 (Sess. 119, Dec. 12, 1961). Eichmann was convicted under counts one through four, but was acquitted of all acts under these counts committed between March 1938 and October 1941. *Id.* at 2205. This conduct was punished under crimes against humanity pursuant to counts five through seven. *Id.*

⁵⁸¹ *Id.* at 2212 (Sess. 120, Dec. 13, 1961).

whatsoever. . . . If he is not punished for his crime, there will be no one anywhere in the world who will deserve this penalty."⁵⁸²

Robert Servatius, in rebuttal, argued for mitigation of Eichmann's sentence, based on the fact that Eichmann merely acted in obedience to orders issued by his superiors.⁵⁸³ Servatius stressed that there was nothing the accused could have done to ameliorate the consequences of his acts and neither insubordination nor suicide would have changed the course of events.⁵⁸⁴ This was a crisis of human psychology: Eichmann was emblematic of the susceptibility of modern humankind to the clarion call of mass conformity.⁵⁸⁵ The center of this cultural crisis was a lack of leadership rather than a lock-step subordination.⁵⁸⁶ Servatius also argued that the proper measure of punishment was to be determined by the laws of the Federal Republic of Germany, which had abolished capital punishment.⁵⁸⁷

In addressing the Court, Adolf Eichmann expressed disappointment in the Court's failure to provide him a fair trial and proclaimed that he could not "recognize the verdict of guilty."⁵⁸⁸ Eichmann contended that he had been led to murder by his superiors, and that his guilt resulted from his sense of loyalty and adherence to his oath of allegiance.⁵⁸⁹ As a subordinate, he himself was a victim.⁵⁹⁰ He concluded with the admonition that, "I am not the monster that I am made out to be," claiming he had been the "victim" of "untruths."⁵⁹¹ Eichmann insisted that he had been convicted of crimes committed by others and proclaimed that, "I am utterly convinced that I must suffer here for others. I must bear what fate imposes on me."⁵⁹²

Presiding Judge Moshe Laundau asserted that capital punishment was the only suitable punishment for crimes of such "unparalleled horror" in "nature" and in "scope."⁵⁹³ The objective of Eichmann's delicts was to "obliterate an entire people from the face of the earth."⁵⁹⁴ The dispatch of each boxcar implicated the accused as an accomplice in the premeditated

⁵⁸² *Id.* at 2215.

⁵⁸³ *See id.*

⁵⁸⁴ *See id.*

⁵⁸⁵ *See id.*

⁵⁸⁶ *See id.* at 2216.

⁵⁸⁷ *See id.*

⁵⁸⁸ *Id.*

⁵⁸⁹ *See id.*

⁵⁹⁰ *See id.*

⁵⁹¹ *Id.* at 2217.

⁵⁹² *Id.*

⁵⁹³ *Id.* at 2218 (Sess. 121, Dec. 15, 1961).

⁵⁹⁴ *Id.*

murder of a thousand human beings.⁵⁹⁵ Furthermore, Eichmann's acts involved an additional degree of depredation, in that this comprehensive crime was calibrated to exterminate an entire religion.⁵⁹⁶ His degree of legal and moral responsibility was "not one iota less than the responsibility of the person who with his own hands pushed these human beings into the gas chambers."⁵⁹⁷

The District Court recognized that Eichmann may have acted under orders, but that this neither excused nor justified "crimes of such magnitude."⁵⁹⁸ At any rate, Eichmann required little encouragement; he harbored a passionate and fierce determination to cleanse Europe of Jews.⁵⁹⁹ He was sentenced to death for crimes against the Jewish people, crimes against humanity and war crimes.⁶⁰⁰

The Supreme Court later affirmed the District Court's sentence of death,⁶⁰¹ concluding that the Israeli legislature "could not have envisaged a criminal greater than Adolf Eichmann, and if we are not to frustrate the will of the legislature, we must impose on Eichmann the maximum penalty . . . the penalty of death."⁶⁰² The following day, May 31, 1962, a clemency petition was rejected by Yitzhak Ben Zvi, the President of the State of Israel.⁶⁰³ As the hangman's noose was slipped over Eichmann's neck, he proclaimed that "I had to obey the rules of war and my flag."⁶⁰⁴ As requested in Eichmann's will, his body was cremated;⁶⁰⁵ the Israelis scattered the ashes in the Mediterranean.⁶⁰⁶

IX. LEGAL ISSUES

A. *Legal Issues*

The Jerusalem trial of Adolf Eichmann raised several significant legal issues, including the neutrality of Israeli judges, the legality of Eichmann's kidnapping, the extraterritorial and universal jurisdiction of the Is-

⁵⁹⁵ See *id.*

⁵⁹⁶ See *id.*

⁵⁹⁷ *Id.*

⁵⁹⁸ *Id.*

⁵⁹⁹ See *id.*

⁶⁰⁰ See *id.*

⁶⁰¹ See Transcript, *supra* note 278, at 2243 (Sup. Ct. Proc., Sess 1, Mar. 22, 1962).

⁶⁰² *Id.* at 2369 (Sess. 7, May 29, 1962).

⁶⁰³ See PEARLMAN, *supra* note 69, at 627.

⁶⁰⁴ *Id.* at 628.

⁶⁰⁵ See *id.*

⁶⁰⁶ See *id.* at 628-629.

raeli court, the retroactivity of the Nazi and Nazi Collaborators (Punishment) Act, and the admissibility of the Act of State and superior orders defenses. The District and Supreme Court's disposition of these issues is summarized in the following sections.⁶⁰⁷

B. *The Recusal of Israeli Judges*

Doctor Servatius argued prior to trial that there was a "justified apprehension" that the District Court panel would exhibit "prejudice" since both the Israeli State and Jewish People possessed a "political interest" in the outcome of the trial.⁶⁰⁸ Attorney General Hausner responded that "[i]t is possible to have a fair trial even when the judges are required to suppress within their hearts their personal or national anguish, and to judge according to the evidence which is before them."⁶⁰⁹

The District Court refused to accept the argument that the Israeli judiciary was disqualified from hearing the Eichmann case, ruling that the judges are professionals who are "accustomed to weighing evidence" and that they are likely to be well-aware that they are making these decisions "under the critical gaze of the public" and of "learned and experienced" lawyers.⁶¹⁰ A judge "does not cease to be flesh and blood."⁶¹¹ However, the judge is obligated and required by law to "subdue these emotions and impulses," otherwise a judicial officer would never be able "to consider a criminal charge which arouses feelings of revulsion, such as treason, murder or any other grave crime."⁶¹²

C. *Eichmann's Abduction*

Robert Servatius argued that Eichmann had been kidnapped by Israeli agents and that the District Court should divest itself of jurisdiction in order to avoid legitimizing this illegal act.⁶¹³ Attorney General Gideon Hausner, on the other hand, contended that there were well-established English and American precedents that the judiciary will not inquire into the circumstances of an individual's arrest and appearance before the court.⁶¹⁴

⁶⁰⁷ See generally, PAPADATOS, *supra* note 10.

⁶⁰⁸ Transcript, *supra* note 278, at 8 (Sess. 1, Apr. 11, 1961).

⁶⁰⁹ *Id.* at 12.

⁶¹⁰ *Id.* at 60 (Sess. 6, April 17, 1961).

⁶¹¹ *Id.*

⁶¹² *Id.* This ruling was affirmed by the Supreme Court. See Sup. Ct. Judgment, *supra* note 12, at 319.

⁶¹³ See Dist. Ct. Judgment, *supra* note 12, at 57.

⁶¹⁴ See *id.* at 58.

The District Court ruled that an individual prosecuted for an offense against the laws of a State may not oppose his trial by reason of the illegality of his arrest or of the means whereby he was brought within the jurisdiction of that State.⁶¹⁵ In any event, Eichmann lacked standing to raise the alleged illegality of his appearance before the court.⁶¹⁶ Argentina was the aggrieved party whose rights had been purportedly violated by Israel.⁶¹⁷ The two States, however, resolved and settled this matter prior to the filing of indictment against Eichmann.⁶¹⁸ Eichmann thus could not raise the violation of Argentinian rights as a defense and, at any rate, Argentina waived all objections to the kidnapping of the accused.⁶¹⁹ The Court also went on to note that, in any event, that an effort by Argentina to protect a major war criminal such as Adolf Eichmann would constitute an abuse of sovereignty and would not be accorded legal recognition.⁶²⁰

D. Extraterritorial Jurisdiction

Attorney Servatius argued that there was a lack of connection between Israel and Eichmann's victims and, in the absence of a "recognized linking point," Israel lacked authority to prosecute and inflict punishment on Eichmann for "foreign" offenses.⁶²¹ Servatius contended that jurisdiction traditionally had been based on the territorial principle and accordingly was properly vested in any of the eighteen States on whose soil Eichmann carried out his alleged delicts.⁶²²

The District Court found a clear connection between the charge of exterminating the Jewish people and the State of Israel.⁶²³ The Declaration of the Establishment of the State of Israel recognized Israel as the "birth-

⁶¹⁵ See *id.* at 59.

⁶¹⁶ See *id.* at 63-64.

⁶¹⁷ See *id.* at 62.

⁶¹⁸ See *id.* at 63.

⁶¹⁹ See *id.* at 63, 70. A fugitive offender only possessed immunity from prosecution under the specialty principle of international extradition law. This permits an individual to object in the event that he or she is prosecuted for an offense other than the crime for which he or she was extradited. *Id.* at 76.

⁶²⁰ See *id.* at 74. The fact that this prosecution violated Argentina's statute of limitations was not binding on the separate sovereign jurisdiction of Israel. *Id.* at 79. The District Court ruling on Eichmann's abduction was affirmed by the Supreme Court. Sup. Ct. Judgment, *supra* note 12, at 303-308.

⁶²¹ See Dist. Ct. Judgment, *supra* note 12, at 50.

⁶²² See *id.* at 53-54.

⁶²³ See *id.* at 52.

place of the Jewish people”⁶²⁴ and the United Nations General Assembly, in 1948, noted that the establishment of Israel was a manifestation of the “natural right of the Jewish people to be masters of their own fate, like all other nations in their own sovereign State.”⁶²⁵ In addition to this international recognition of the connection between Israel and the Jewish people, there was a close relationship between Israel and the Holocaust; roughly half of the Israeli population had immigrated from Europe, either before or immediately following the war.⁶²⁶ Many of these individuals also lost loved ones as a result of the depredations of the Third Reich.⁶²⁷ In addition, the Jewish population of Palestine participated in the Allied struggle to liberate Europe from the Nazi scourge and possessed the same prerogative as other victorious States to prosecute and to punish enemy war criminals.⁶²⁸

The link between Eichmann’s crimes and the State of Israel, according to the District Court, was thus indisputable; the assertion of jurisdiction was an expression of Israel’s prerogative to protect its vital national interests.⁶²⁹ Eichmann’s aspirations extended to the extermination of the Jews throughout the world, including those in Palestine.⁶³⁰ The District Court stressed that to claim that there is “no connection is like cutting away a tree root and branch and saying to the trunk: ‘I have not hurt you.’”⁶³¹

The District Court also reasoned that prior to the establishment of the State of Israel, the Jewish population in Palestine constituted a “potential State,” which eventually attained sovereign status.⁶³² The lack of sovereignty during World II made it impossible for the Jews of Palestine to enact a criminal law condemning the Nazi crimes.⁶³³ Israel had inherited the sovereign status of the British Mandate and the Nazis and Nazi Collaborators (Punishment) Act “filled a need” in protecting interests which had not been previously addressed.⁶³⁴

⁶²⁴ *Id.*

⁶²⁵ *Id.*

⁶²⁶ *See id.* at 53.

⁶²⁷ *See id.*

⁶²⁸ *See id.*

⁶²⁹ *See id.* at 54.

⁶³⁰ *See id.*

⁶³¹ *Id.*

⁶³² *See id.* at 56.

⁶³³ *See id.*

⁶³⁴ *Id.* The District Court noted that the entire political landscape of Europe had been altered since the termination of World War II, but that this had not been invoked by the accused to bar the assertion of jurisdiction by these countries. *Id.* at 55.

According to the Court, Israel also possessed a “natural right” to “punish” an offender who had harmed its interests.⁶³⁵ In the event that the Gypsy survivors of the Holocaust had established a State, the District Court noted that there was no principle of international law that would have denied this new entity the “inherent power” to prosecute the “destroyers of its people who fell into its hands.”⁶³⁶ Similarly, the State of Israel was carrying out the “right of the Jewish people to punish the criminals who killed its sons with intent to put an end to the survival of this people. . . this power conforms to the subsisting principles of the law of nations.”⁶³⁷

The District Court parenthetically noted that the International Court of Justice decision in the *Lotus Case* recognized the assertion of extra-territorial jurisdiction.⁶³⁸ The Supreme Court’s affirmation of the District Court’s ruling relied on *Lotus* in holding that State sovereignty “demands the preclusion of any presumption that there is a restriction in its [a State’s] independence.”⁶³⁹ The Supreme Court further noted that even if it was true that the territorial principle of criminal law was firmly established, it is “no less true that in almost all such States penal jurisdiction has been extended . . . so as to embrace offences committed outside its territory.”⁶⁴⁰ This assertion of extra-territorial jurisdiction only was limited by an explicit prohibitory doctrine of international law; there was no such rule limiting Israel’s sovereign cognizance over Adolf Eichmann.⁶⁴¹ At any rate, the Supreme Court noted that, in the absence of an international treaty vesting a right in

⁶³⁵ *Id.* at 57.

⁶³⁶ *Id.* at 56. *Cf. Id.* at 57. (The right of an injured group to punish offenders for a crime committed against them by an offender was only limited by the absence of sovereignty. In the event that the people later achieves political sovereignty in any territory, “it may exercise such sovereignty for the enforcement of its natural right to punish the offender who injured it.”) *Id.* at 57.

⁶³⁷ *Id.* at 57. The District Court proclaimed that the fact that the Jewish people “changed from object to subject, from the victim of racial crime to the possessor of authority to punish the criminals, is a great historic right that cannot be abrogated.” *Id.*

⁶³⁸ *See id.* (citing and discussing *Lotus*, P.C.I.J., Series A, no. 10, p. 18 (France v. Turkey 1927) (French ship *Lotus* collided with Turkish vessel outside Turkish territorial waters. Eight Turkish citizens drowned. The officer on watch on the *Lotus* was arrested by Turkish authorities. The International Court of Justice recognized the competence of Turkey to enact a criminal statute covering the negligent conduct of a French citizen while on duty as officer-of-the-watch of a French ship)).

⁶³⁹ Sup. Ct. Judgment, *supra* note 12, at 284.

⁶⁴⁰ *Id.* at 284.

⁶⁴¹ *See id.* at 284-285.

the accused, standing to protest Israel's extra-territorial jurisdiction was vested in the aggrieved States rather than in the accused.⁶⁴² In this instance, West Germany, as well as other European States, had failed to express an interest in bringing Eichmann to trial.⁶⁴³

The Israeli District Court also based its jurisdiction on the "universal character of the crimes in question" which were directed at the "extermination of the Jewish people."⁶⁴⁴ The Court contended that there was no doubt, in light of the resolutions of the General Assembly, the Genocide Convention and the advisory opinions of the International Court of Justice, that the crimes committed by the Hitlerite regime against the Jewish and other peoples⁶⁴⁵ constituted the crime of genocide within the meaning of the 1948 Convention on the Prevention and Punishment of the Crime of Genocide.⁶⁴⁶ Eichmann's delicts were not directed solely against the victims of Nazi oppression; they "struck at the whole of mankind and shocked the conscience of nations" and constituted "grave offences against the law of nations itself."⁶⁴⁷

The District Court stressed that the International Convention on the Prevention and Punishment of the Crime of Genocide affirmed that genocide was a crime under international law whether committed in time of peace or in time of war.⁶⁴⁸ This instrument had been unanimously adopted by the United Nations which attested to the document's universal character as the embodiment of principles binding upon States under international

⁶⁴² See *id.* at 286.

⁶⁴³ See *id.* at 287. The Supreme Court did not center its discussion on Israel's assertion of jurisdiction under the protective (of interests) and passive personality (identity of victims) principles. The Court noted that the *Lotus* case provided the most coherent theory since among the victims were non-Jewish groups such as Poles, Slovenes, Czechs and Gypsies. The Supreme Court, however, noted that "we fully agree with every word said by the Court on this subject." *Id.* at 304.

⁶⁴⁴ Dist. Ct. Judgment, *supra* note 12, at 26.

⁶⁴⁵ See *id.* at 34.

⁶⁴⁶ See *id.* at 39, discussing the International Convention on the Prevention and Punishment of the Crime of Genocide. See Genocide Convention, *supra* note 108. The District Court noted that "inasmuch as it is a crime under the law of nations [crimes against the Jewish People], Israel's legislative authority and judicial jurisdiction in this matter is based upon the law of nations." Dist. Ct. Judgment, *supra* note 12, at 39.

⁶⁴⁷ Dist. Ct. Judgment, *supra* note 12, at 26.

⁶⁴⁸ See *id.* at 34 (quoting Genocide Convention). See also Genocide Convention, *supra* note 108.

customary law as well as the terms of the Treaty.⁶⁴⁹ In the absence of an international criminal court, each country was obligated to enforce these strong strictures of transnational law; the jurisdiction to enforce this law accordingly was “universal.”⁶⁵⁰

The District Court argued that the Convention was meant to apply to cases of genocide that occurred following the ratification of the Treaty, and did not constrain the exercise of Israeli jurisdiction with regards to the crimes committed by Eichmann during the Nazi era.⁶⁵¹ In particular, Article Six, which limited jurisdiction over genocide to the State on whose territory the genocidal acts were committed, did not limit Israel’s power to prosecute Eichmann for genocide under international customary law.⁶⁵² At any rate, the District Court argued that Article Six was a compulsory minimum which did not limit the prerogative of Signatory States to exercise their existing powers within the limits of customary international law, including the exercise of universal jurisdiction.⁶⁵³

The Supreme Court affirmed Israel’s assertion of universal jurisdiction, noting that the crimes attributed to Eichmann possessed an “international character” and that the “harmful and murderous effects were so embracing and widespread as to shake the international community to its very foundation.”⁶⁵⁴ The State of Israel therefore was entitled to assert universal jurisdiction and to prosecute the accused in its “capacity of a guardian of international law and as an agent for its enforcement.”⁶⁵⁵

⁶⁴⁹ See Dist. Ct. Judgment, *supra* note 12, at 25.

⁶⁵⁰ *Id.* at 25 [italics omitted]. The Court noted that these crimes are not merely delicts under Israeli law, but are offenses against the laws of nations. *Id.* at 29. Maritime nations traditionally acted on the principle of universality of jurisdiction in regards to piracy. *Id.* at 26.

⁶⁵¹ See *id.* at 36.

⁶⁵² See *id.* The report of the Sixth Committee of the United Nations appended a statement that Article Six does not affect the right of a State to prosecute before its own tribunals any of its nationals for acts committed outside the State. *Id.* at 37. Article Six, according to the District Court, did not constitute part of the principles of customary law which were binding, absent the application of the Convention. *Id.* at 36.

⁶⁵³ See *id.* at 38-39.

⁶⁵⁴ Sup. Ct. Judgment, *supra* note 12, at 304.

⁶⁵⁵ *Id.* The Supreme Court noted that Eichmann’s crimes extended to numerous countries and that this “drains the territorial principle of all content in the present case and justifies Israel in assuming criminal jurisdiction by virtue of the ‘universal’ principle.” *Id.* at 303. The States which possessed territorial jurisdiction were uninterested in prosecuting Eichmann and, at any rate, Israel was unable to make a rational decision as to which of these countries were best positioned to prosecute

E. Retroactivity

The District Court also addressed the allegation that the Nazi And Nazi Collaborators (Punishment) Act constituted retroactive punishment and therefore was contrary to international legal principles.⁶⁵⁶ The Tribunal stressed that the Statute did not create a new crime unknown in Nazi Germany or in German-occupied territories.⁶⁵⁷ In fact, these acts constituted crimes under the laws of all civilized nations, including Germany, long before the Nazi rise to power; and the perpetrators of these offenses could not possibly claim that they were unaware that the acts were penal offenses.⁶⁵⁸ The Nazis' awareness of the criminality of their conduct was demonstrated by the fact that extensive measures were undertaken to conceal these crimes, including the exhumation and cremation of corpses and the destruction of German archives.⁶⁵⁹ A law that punished Nazis and Nazi collaborators thus complemented, rather than conflicted with the rules of "natural justice."⁶⁶⁰

The District Court reiterated that the Nazi and Nazi Collaborators (Punishment) Act merely affirmed existing principles of international law.⁶⁶¹ At any rate, the prohibition on retroactive punishment was not a limitation on sovereignty under international law and it would be "difficult to find a more convincing instance of a just retroactive law than the legislation providing for the punishment of crimes against . . . the Jewish people."⁶⁶² Eichmann was charged with carrying out the plan for the Final Solution of the Jews: "Can anyone in his right mind doubt the absolute criminality of such acts?"⁶⁶³

The Supreme Court affirmed the reasoning of the District Court and held that there was no prohibition on retroactive punishment under international law.⁶⁶⁴ The Supreme Court agreed that the "sense of justice generally recoils" from punishing an individual for acts which were not prohibited at

the accused. *Id.* Israel, in fact, was the most convenient forum in that it was the location of most of the witnesses and relevant documents. *Id.*

⁶⁵⁶ See Dist. Ct. Judgment, *supra* note 12, at 22.

⁶⁵⁷ See *id.* at 22-23.

⁶⁵⁸ See *id.* In contrast, Hitler's draconian decrees which condoned Eichmann's criminal conduct had been set aside with retroactive effect by the German courts. *Id.*

⁶⁵⁹ See *id.*

⁶⁶⁰ *Id.*

⁶⁶¹ See *id.* at 39-40.

⁶⁶² *Id.* at 42.

⁶⁶³ *Id.*

⁶⁶⁴ See Sup. Ct. Judgment, *supra* note 12, at 282.

the time of their commission, but the “sense of justice must necessarily recoil even more from the non-punishment of the person who participated in such outrages, for he cannot argue . . . at the moment of acting he was not aware that he was violating deeply-rooted universal moral values.”⁶⁶⁵ In this case, the Supreme Court noted that the argument that the accused was unaware of the criminal character of his acts faltered in light of the fact that the acts punished under the Nazi and Nazi Collaborators (Punishment) Act were well-recognized to be contrary to the law of nations from “time immemorial.”⁶⁶⁶

F. Act of State

Robert Servatius argued that an Israeli Court could not sit in judgment over acts carried out in the course of Eichmann’s authoritative responsibilities as an official of the German government absent the consent of the sovereign German State.⁶⁶⁷ He noted that it was a fundamental rule of international law that a State may not judge acts undertaken on behalf of another sovereign State.⁶⁶⁸

The District Court held that the Act of State defense for acts condemned as criminal under international law had been abrogated by the Nuremberg Charter, its judgment, the United Nations and by the Convention on the Prevention and Punishment of Genocide.⁶⁶⁹

The Supreme Court affirmed that the Act of State defense does not shield a governmental official from liability for crimes prohibited by the law of nations, particularly odious delicts such as crimes against humanity.⁶⁷⁰ Such acts were outside the sovereign jurisdiction of the State that ordered or ratified their commission, and those participating in such conduct were personally accountable.⁶⁷¹ Eichmann claimed that his acts were consistent with the law of the Third Reich.⁶⁷² However, the Supreme Court pointed out that West German courts had ruled that the decrees of the Nazi

⁶⁶⁵ *Id.*

⁶⁶⁶ *Id.* at 283.

⁶⁶⁷ *See* Dist. Ct. Judgment, *supra* note 12, at 44.

⁶⁶⁸ *See id.* at 45.

⁶⁶⁹ *See id.* at 45-46. The District Court noted that Germany bore moral, as well as, legal responsibility for crimes committed as “its own ‘acts of State,’ including the crimes attributed to the accused.” This, however, did not detract “one iota from the personal responsibility of the accused for his acts.” *Id.* at 47.

⁶⁷⁰ *See* Sup. Ct. Judgment, *supra* note 12, at 309-310.

⁶⁷¹ *See id.* at 510.

⁶⁷² *See id.* at 312. The Supreme Court noted that the Final Solution of the Jews was not embodied in a personal decree or order issued by Adolf Hitler. *Id.* at 311.

regime were a nullity.⁶⁷³ The Supreme Court ruled that the “discriminatory and plunderous decrees” of Germany were not “laws in the contemplation of international law” and “in no manner render these terrible crimes valid or absolve those who participated in committing them from the personal responsibility they bear.”⁶⁷⁴

G. *Superior Orders*

Robert Servatius contended that Eichmann acted in accordance with superior orders⁶⁷⁵ and that he was inculcated with “blind obedience based on boundless faith” in the wisdom of the leadership of the Third Reich.⁶⁷⁶ Servatius argued that loyalty was the fundamental obligation of a citizen and that a slim line separated those who emerged victorious and received a “decoration” and the vanquished, who were consigned to the “gallows.”⁶⁷⁷

The District Court observed that the Nazi and Nazi Collaborators (Punishment) Act specifically abrogated the superior orders defense.⁶⁷⁸ Section 11 limited superior orders to mitigation of punishment to those instances in which the orders were not manifestly unlawful and specified that the Court shall not impose a lighter punishment than imprisonment for ten years.⁶⁷⁹ The District Court stressed that the superior orders defense had been rejected by the Nuremberg judgment, and by all civilized countries, and that this view had been endorsed by the United Nations.⁶⁸⁰ The Third Reich also limited the superior orders defense and abrogated the defense in those instances in which a defendant knowingly carried out an illegal order.⁶⁸¹ There was little doubt that Eichmann was aware that the directives for the extermination of the Jews was manifestly unlawful and that this order, as well as those providing for arbitrary discrimination against the

⁶⁷³ *See id.* at 312.

⁶⁷⁴ *Id.*

⁶⁷⁵ *See* Dist. Ct. Judgment, *supra* note 12, at 253.

⁶⁷⁶ *Id.* at 254.

⁶⁷⁷ *Id.* The District Court noted that Eichmann was attempting “to turn an order for the extermination of millions of innocent people from a crime into a political act in order thus to exempt from personal criminal responsibility those who gave and those who carried out the order.” *Id.*

⁶⁷⁸ *See id.* at 255-256 (quoting Nazi Collaborators Act), *supra* note 192, §§ 8, 11(a).

⁶⁷⁹ *See id.* at 257 (quoting Nazi Collaborators Act), *supra* note 192, art. 11.

⁶⁸⁰ *See id.* at 257.

⁶⁸¹ *See id.*

Jews, was “contrary to the basic principles of law and justice;” the accused knowingly “engaged in criminal acts on a colossal scale.”⁶⁸²

Eichmann was thus statutorily precluded from pleading obedience to a manifestly unlawful order in his efforts to show mitigation.⁶⁸³ The District Court stressed that Eichmann’s legal liability was paralleled by his moral myopia which led the accused to carry out his duties with “inner conviction,” “whole-heartedly and willingly.”⁶⁸⁴ He possessed a “fanatical belief” that he was fulfilling an “important national mission.”⁶⁸⁵ The District Court noted that there was not a single case in which the accused demonstrated “any sign of human feeling in his dealing with Jewish affairs.”⁶⁸⁶ His activities “displayed indefatigable energy, verging on frenzy, to advance the ”Final Solution.“⁶⁸⁷ Eichmann fervently believed that the Jews were the enemies of the Reich and needed to be destroyed, so he devoted himself to cleansing the continent of Jews.⁶⁸⁸

The Court concluded that Eichmann was central in the Final Solution and his guilt was not lessened by the fact that others participated in this criminal enterprise.⁶⁸⁹ His entire testimony was intended to minimize his responsibility and, when confronted by documented cases of culpability, he fell back on the defense of superior orders.⁶⁹⁰ The Court concluded that this subterfuge faltered in the face of Eichmann’s enthusiastic efforts to exterminate the Jews.⁶⁹¹

The Supreme Court agreed with the District Tribunal that the order for the physical extermination of the Jews was manifestly illegal and that Eichmann was aware that he was complicit in the “perpetration of the most grave and horrible crimes.”⁶⁹² The Court also stressed that Eichmann was not threatened or pressured into obedience; he acted with “full zeal and

⁶⁸² *Id.* at 258. This was not a “single crime, but a consecutive series of crimes committed over the course of many years. The accused had more than enough time to reflect on his deeds and to desist from them. But he did not stop, and as time went on he even intensified his activity. *Id.*

⁶⁸³ *See id.* at 258.

⁶⁸⁴ *Id.* at 263.

⁶⁸⁵ *Id.* at 265.

⁶⁸⁶ *Id.*

⁶⁸⁷ *Id.* at 266.

⁶⁸⁸ *See id.* at 271.

⁶⁸⁹ *See id.*

⁶⁹⁰ *See id.* at 272.

⁶⁹¹ *See id.*

⁶⁹² Sup. Ct. Judgment, *supra* note 12, at 315.

devotion to the task."⁶⁹³ Eichmann acted "independently" and, at times, "even exceeded" his duties.⁶⁹⁴

X. SOME OBSERVATIONS

Adolf Eichmann was kidnapped, removed from Argentina, prosecuted in Israel under an extra-territorial and retroactive statute, and executed for crimes against the Jewish people.⁶⁹⁵ Legal scholars almost uniformly endorsed the reasoning of the Israeli courts, affirming the legality of Eichmann's prosecution and punishment.⁶⁹⁶ The judgment's assertion of universal jurisdiction over genocide elevated the decision into a seminal contribution to twentieth century international jurisprudence.⁶⁹⁷ This principle has evolved into a fundamental mechanism for combating serious crimes under international law and, of late, has been the subject of discussion devoted to establishing standards and limiting principles.⁶⁹⁸ The judgment also affirms that the perpetrators of international crimes may not seek shelter behind the shield of national sovereignty, superior orders or official status.⁶⁹⁹ The recognition of an international interest, which transcends the interests of States, established the foundation for the creation of criminal tribunals for Yugoslavia⁷⁰⁰ and Rwanda⁷⁰¹ and the Statute for a proposed international criminal court.⁷⁰²

⁶⁹³ *Id.* at 318.

⁶⁹⁴ *Id.* at 313.

⁶⁹⁵ See *supra* notes 621-666 and accompanying texts.

⁶⁹⁶ See L.C. Green, *Legal Issues of the Eichmann Trial*, 37 TUL. L. REV. 641 (1963).

⁶⁹⁷ See Kenneth C. Randall, *Universal Jurisdiction Under International Law*, 66 TEX. L. REV. 785, 789-90, 812-15 (1988).

⁶⁹⁸ See PRINCETON PROJECT ON UNIVERSAL JURISDICTION, THE PRINCETON PRINCIPLES ON UNIVERSAL JURISDICTION (2001). Genocide is listed as a crime which should be subject to universal jurisdiction. *Id.* at prin. 2, 29. The Princeton Principles would appear to recognize the validity of Israel's claim of universal jurisdiction. *Id.* at prin. 8, 32 [hereinafter PRINCETON PRINCIPLES].

⁶⁹⁹ See *supra* notes 668-694 and accompanying texts.

⁷⁰⁰ See United Nations Secretary-General's Report on Aspects of Establishing an International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia, 32 I.L.M. 1159 (1993).

⁷⁰¹ See U.N.S.C. Res. 955 (1994), 33 I.L.M. 1598 (1994).

⁷⁰² See United Nations Rome Statute of the International Criminal Court, July 17, 1998, 37 I.L.M. 999 (1998) [hereinafter Rome Statute].

The proceedings, however, remain controversial. Commentators avoid addressing the unprecedented proposition that Israel was justified in extra-territorially extending its jurisdiction to protect the Jewish people.⁷⁰³ The notion that race, ethnicity or religion provides a basis for legal jurisdiction serves as a prescription for the arbitrary assertion of legal prerogatives and conflict between countries.⁷⁰⁴ Eichmann's prosecution for crimes against the Jewish people was particularly problematic when paired with the claim of universal jurisdiction over a crime which was characterized as being directed against global humanity and civilization, not only against Jews.⁷⁰⁵ Yet, a resort to an international tribunal was dismissed by Prime Minister David Ben-Gurion as an admission of moral and political weakness.⁷⁰⁶ There was also apprehension that an international tribunal might display the same lack of regard for the suffering of the Jewish people as had been displayed by the International Military at Nuremberg, which subordinated the issue of genocide to a concern with Nazi aggression.⁷⁰⁷

In the end, Eichmann, although a central cog in the murderous Nazi machine, was not the malevolent "master mind" portrayed by the prosecution.⁷⁰⁸ The prosecutorial focus on Eichmann may have drawn attention from the lesson to be learned from the horror and tragedy experienced by those survivors testifying in court. These stories stand as a stark statement that thousands of Germans were complicit in or condoned Nazi crimes. Eichmann, without a doubt, passionately pursued the extermination of the Jews. But, in the end, his activities catalogue the widespread guilt of thousands of individuals who also carried out commands. Eichmann's conviction should have served as a catalyst, rather than a conclusion to the

⁷⁰³ See Hans W. Baade, *The Eichmann Trial: Some Legal Aspects*, 1961 DUKE L. J. 400, 416-20 (1961).

⁷⁰⁴ See *supra* notes 623-631 and accompanying texts.

⁷⁰⁵ See *supra* notes 644-655 and accompanying texts. The often critical reaction of secularized American Jews who resented this involuntary imposition of a religious identity is discussed in Pnina Lahav, *The Eichmann Trial, The Jewish Question, and the American-Jewish Intelligentsia*, 72 B.U. L. REV. 555 (1992).

⁷⁰⁶ See YOSAL ROGAT, *THE EICHMANN TRIAL AND THE RULE OF LAW* 16 n.11 (1961).

⁷⁰⁷ See ARENDT, *supra* note 80, at 275-276.

⁷⁰⁸ Eichmann's invocation of superior orders, and his refusal to accept responsibility, contributed to diminishing the credibility of the contention that he was the primary person in the Final Solution thereby depriving the Israelis of the satisfaction of achieving a measure of retributive justice. See generally ARENDT, *supra* note 80, at 276-277.

pursuit and prosecution of Nazi war criminals, and should have stimulated a discussion of the collective culpability of the German people.⁷⁰⁹

The Eichmann judgment starkly challenged the concept of State sovereignty. The Court conveniently adjudged the Third Reich as a criminal country whose laws and policies contravened the international code of conduct. The argument that Eichmann was aware of the criminal nature of his acts overlooked that history is marked by malevolent practices, such as slavery and apartheid, which were institutionalized components of State policy. A legal analysis which fails to address the human capacity to engage in and justify cruel and callous violations of human rights impedes our understanding of the processes which propel these atrocities. Eichmann offered self-serving statements recognizing the monstrosity of the Final Solution. However, the imputation of criminal liability based on the notion that Eichmann must have comprehended the cataclysmic character of his crimes lacks persuasive power. He was rewarded and recognized for his role in repressing the Jews and never hesitated or flinched in his fanatical zeal.⁷¹⁰

One lesson to be drawn from Eichmann is that "evil" is not inevitably malevolent; it may be an expression of the empty and unfulfilled personality who adopts an ideology to provide direction and destination for his or her life. The power and potency associated with authority and power provides animation and excitement to these desiccated souls. The pain inflicted on others is an expression of their own internal pain and resentment. In this sense, Eichmann personifies the totalitarian and terrorist personality who derives satisfaction from slaughter. It was this indifference, distance and refusal to concede both knowledge and responsibility, which remains coldly chilling.⁷¹¹

A frequently overlooked aspect of the trial was the decision to execute Eichmann, a judgment that most certainly contravened the contemporary canon of international jurisprudence.⁷¹² There was some muted opposition to Eichmann's execution based upon moral, religious and spiritual injunctions against the taking of a life, and on the pragmatic ground that life imprisonment might prove a more difficult and demanding pen-

⁷⁰⁹ See ROGAT, *supra* note 706, at 12-14.

⁷¹⁰ See ARENDT, *supra* note 80, at 276-278 and accompanying texts.

⁷¹¹ See *id.* at 276-279.

⁷¹² See PRINCETON PRINCIPLES, *supra* note 698, at prin. 10(1), 34. (Extradition may be refused where the death penalty or cruel, degrading or inhuman punishment "likely" will be imposed.)

alty.⁷¹³ The most telling point was that the sacrifice of six million should not be seen to be avenged by the hanging of a single egregious and evil man.⁷¹⁴ In retrospect, there is little reason to believe that Eichmann's execution served as an effective deterrent to the commission of large-scale violations of human rights.⁷¹⁵

There was substantial precedent for prosecuting Nazi war criminals before domestic courts.⁷¹⁶ An Israeli Court nevertheless may have been incapable of meeting the considerable challenge of describing and documenting the Final Solution.⁷¹⁷ Some claimed that the proceedings seemed scripted, the trial confused and cluttered by irrelevant evidence, and the verdict planned and predictable. This resulted in sullied and stained legal proceedings.⁷¹⁸ Hannah Arendt went so far as to suggest that it may have been preferable to assassinate Eichmann in Argentina, and for the assailant to present him or herself for trial. This would have forced global society to confront the justifiability of Jewish retribution and would have avoided the errors and excesses of a "show trial" in Israel.⁷¹⁹ A multi-national proceeding also may have resulted in a judgment that was not tarnished by the controversial circumstances surrounding the verdict of the Israeli courts.⁷²⁰

In the end, an international court was arguably required whose stature and status would support a claim of universal jurisdiction and provide credibility and legitimacy to the verdict.⁷²¹ There is no denying the justifiability of the actions of Israel, the proceedings nevertheless provide strong support for the creation of an international criminal court.⁷²² Genocide is of

⁷¹³ See SEGEV, *supra* note 177, at 361-362 (petition organized by Professor Shmuel Hugo Bergmann of the Hebrew University).

⁷¹⁴ See *id.* at 363-364 (petition requesting commutation petition submitted to President Yitzhak Ben-Zvi).

⁷¹⁵ See *supra* notes 700-702 and accompanying texts.

⁷¹⁶ See Nicholas Kittrie, *A Post Mortem of the Eichmann Case-The Lessons for International Law*, 55 J. CRIM. L. & CRIMINOLOGY 16, 27 (1964).

⁷¹⁷ See ARENDT, *supra* note 80, at 274.

⁷¹⁸ See *id.* at 264-266.

⁷¹⁹ *Id.* at 264-266. Arendt recounts the case of Shalm Schwartzbard who, on May 25, 1926, shot and killed Simon Petlyura, a Ukrainian leader during the Russian civil war who conducted pogroms resulting in one hundred thousand victims. *Id.* at 265. In 1921, the Armenian Tehlirian assassinated Talatt Bey in Berlin, one of the principal figures in the extermination of 600,000 Armenians in Turkey. *Id.* at 265-266.

⁷²⁰ See Kittrie, *supra* note 716, at 28.

⁷²¹ See *id.*

⁷²² See Rome Statute, *supra* note 702 and accompanying text.

international concern and its punishment should not depend upon the strength and sustenance of a single State.⁷²³ Equally as important is the fact that the voices of Eichmann's non-Jewish victims were only heard in muffled and muted tones in the Jerusalem courtroom.⁷²⁴

XI. CONCLUSION

Adolf Eichmann was kidnapped from Argentina and involuntarily spirited to Israel.⁷²⁵ At the request of Argentina, the United Nations Security Council convened and adopted a compromise resolution which both upheld respect for the sovereign authority of Argentina and stressed the obligation of States to cooperate in bringing war criminals to the bar of justice.⁷²⁶

Eichmann then was prosecuted and convicted under the Nazi and Nazi Collaborators (Punishment) Act for crimes against the Jewish people and of the subsidiary offenses of crimes against humanity and war crimes.⁷²⁷ Much of the trial was devoted to documenting the depredations of the Final Solution through eyewitness testimony.⁷²⁸ Eichmann claimed that he was a mere transportation expert who followed superior orders in directing the deportation of Jews to the death camps.⁷²⁹ On cross-examination, Gideon Hausner established that Eichmann had been involved in a range of repressive activities, but the accused insisted that he had acted pursuant to the authorization and direction of superiors.⁷³⁰ Eichmann was convicted on all counts and remains the first and only individual executed in the history of the State of Israel.⁷³¹ The District and Supreme Courts dismissed challenges to Eichmann's conviction based on judicial bias,⁷³² his abduction,⁷³³ and the extraterritoriality⁷³⁴ and retroactivity of the Israeli statute,⁷³⁵ Act of state⁷³⁶ and superior orders.⁷³⁷

⁷²³ See ARENDT, *supra* note 12, at 273-274.

⁷²⁴ See generally Nuremberg Judgment, *supra* note 199, at 480-481.

⁷²⁵ See *supra* notes 81-82 and accompanying texts.

⁷²⁶ See *supra* notes 123-165 and accompanying texts.

⁷²⁷ See *supra* notes 207-220 and accompanying texts.

⁷²⁸ See *supra* notes 299-406 and accompanying texts.

⁷²⁹ See *supra* notes 409-444 and accompanying texts.

⁷³⁰ See *supra* notes 445-503 and accompanying texts.

⁷³¹ See *supra* notes 572-606 and accompanying texts.

⁷³² See *supra* notes 63-107 and accompanying texts.

⁷³³ See *supra* notes 614-620 and accompanying texts.

⁷³⁴ See *supra* notes 621-655 and accompanying texts.

⁷³⁵ See *supra* notes 656-666 and accompanying texts.

⁷³⁶ See *supra* notes 668-674 and accompanying texts.

The *Eichmann* judgment was a catalyst for ushering in an age of global justice devoted to the development of an international jurisprudence dedicated to the punishment of severe and serious international offenses.⁷³⁸ The decision, however, contained seeds of dissonance and disarray. State intervention in the affairs of other sovereign nations, the assertion of extra-territorial and universal jurisdiction by the judiciary of single States, the substitution of ethnic and racial identity for national citizenship, a disregard of international juridical institutions and a concern with substance at the expense of transnational legal procedures all continue to haunt and to threaten the integrity of international law and global stability.⁷³⁹

⁷³⁷ See *supra* notes 675-694 and accompanying texts.

⁷³⁸ See *supra* notes 697-702 and accompanying texts.

⁷³⁹ See Henry A. Kissinger, *The Pitfalls of Universal Jurisdiction*, 80 FOREIGN AFF. 86 (2001). Ironically, Israeli government officials are now themselves fearful of the assertion of universal jurisdiction over alleged misdeeds. See Clyde Haberman, *Israel is Wary of Long Reach in Rights Cases*, N.Y. TIMES, July 29, 2001 at A1.

