



# Rachel Auerbach and the Eichmann Trial: A New Conception of Victims' Testimonies

Leora Bilsky

Tel Aviv University, Tel Aviv, Israel

## ABSTRACT

Since the 1990s, international criminal law has struggled to find the proper role for victims in mass-atrocities trials. Notwithstanding the rise of the victim-centered trial, victims still participate in these trials mainly as witnesses for the prosecution, but not as full and proactive participants. In this article, I return to the forgotten contribution of Rachel Auerbach (1903-1976), a Jewish-Polish journalist, historian, and Holocaust survivor, and explore her important contribution to the Eichmann Trial, where she helped shape a new paradigm of a victim-centered atrocity trial in the wake of World War II. Auerbach's vision for the trial, as I shall present in this article, can be understood as an early precursor of later developments in both international criminal law and, more broadly, in the field of transitional justice.

The contribution of women to the development of international criminal law has been marginalized for many years. Similarly, Auerbach's contribution to the Eichmann Trial has long been viewed as merely technical, limited to finding relevant witnesses for the trial as part of her work as the director of the Testimony Collection Department of Yad Vashem. I show that Auerbach had a groundbreaking vision of the Eichmann Trial and of the way law should perceive victims' testimonies in such trials, based on her "translation" of the legacy of the clandestine *Oyneg Shabes* archive enterprise in the Warsaw ghetto into a legal setting. In her view, the trial would become victim-centered, not only due to the survivors' testimonies, but also because it would recognize their initiative and agency in promoting a new conception of testimony. I argue that her approach to victims' testimonies and its connection to the crime of cultural genocide are still highly relevant to the ongoing legal and historical discussion about atrocity trials.

## KEYWORDS

Holocaust; victim testimony; Eichmann Trial; atrocity; genocide; archive

## Introduction

Since the 1990s, international criminal law has struggled to find the proper role for victims in mass-atrocities trials. Notwithstanding the rise of the victim-centered trial, victims still participate in these trials mainly as witnesses for the prosecution, but not as full and proactive participants. In this article, I return to the forgotten contribution of Rachel Auerbach (1903-1976), a Jewish-Polish journalist, historian, and Holocaust

survivor, and explore her important contribution to the Eichmann Trial, where she helped shape a new paradigm of a victim-centered atrocity trial in the wake of World War II. Auerbach's vision for the trial, as I shall present in this article, can be understood as an early precursor of later developments in both international criminal law and, more broadly, in the field of transitional justice.<sup>1</sup>

Auerbach developed her ideas on victims' testimonies as part of a group of Jewish activists in the Warsaw ghetto, who, under the leadership of historian Emanuel Ringelblum, created a clandestine collection known as the *Oyneg Shabes* archive.<sup>2</sup> These ideas derived from an Eastern European tradition of 'Hurban [destruction] historiography' (*khurban-forshung*), as well as the new practices of oral history developed in the YIVO Institute for Jewish Research in the 1920s.<sup>3</sup> After the war, Auerbach, who was one of the three surviving members of the archive's group, became a central figure in preserving and continuing its legacy. She lobbied to search for the lost archive, which was buried under the debris of the Warsaw ghetto, efforts that led to the eventual discovery of two-thirds of the original archive's collection. She joined other survivor-historians in translating these ideas into a new praxis of victims' testimonies, first in the Central Jewish Historical Commission in Poland (CZKH) – which collected survivor diaries, memoirs, and victims' testimonies, and published several important books of documents and testimonies – and later following her immigration to Israel, as the director of the Testimony Collection Department of Yad Vashem.

In June 1960, in anticipation of the Eichmann Trial, Auerbach gave her first public lecture in Hebrew, in which she presented her novel conception of a victims-centered Holocaust trial.<sup>4</sup> She went on to advise Attorney General Gideon Hausner and the Israeli prosecution, who adopted some of her ideas in the trial, such as the decision to construct the trial around Jewish victims' testimonies.<sup>5</sup> Auerbach herself was also invited to give testimony in the trial, but her contribution and legacy have largely been forgotten in Israeli collective memory, and did not receive recognition in the annals of international law.

In the last decade, there has been increasing scholarly interest in Auerbach's contribution to the *Oyneg Shabes* archive as well as to the Eichmann Trial. Yet this research is mainly historical, and has overlooked legal issues, such as her innovative conceptualization of victims' testimonies and her ideas for a new practice of Holocaust trials. This article seeks to recover Rachel Auerbach's efforts to reimagine the role of the victims in Holocaust trials, and to discuss her new conception of victims' testimony for the Eichmann Trial. But before turning to the particular case of Auerbach, it is important to

<sup>1</sup>For the impact of the Eichmann Trial on the role of victims in criminal international law and transitional justice, see Sonali Chakravarti, 'More Than Cheap Sentimentality: Victim Testimony at the Nuremberg Trials, the Eichmann Trial, and the South African Truth and Reconciliation Commission,' in *Sing the Rage: Listening to Anger after Mass Violence* (Chicago: University of Chicago Press, 2014), pp. 24–56. See also Leora Bilsky, 'The Eichmann Trial: Towards a Jurisprudence of Eyewitness Testimony of Atrocities,' *Journal of International Criminal Justice* 12, no. 1 (2014): pp. 27–57.

<sup>2</sup>The Yiddish term *Oyneg Shabes*, in Hebrew 'Oneg Shabbat,' literally means 'Shabbath Delight' and usually refers to a Shabbat (Jewish day of rest) gathering. It was used in the ghetto as a code name for the clandestine archive, whose members used to meet on Saturdays.

<sup>3</sup>Laura Jockusch, 'Historiography in Transit: Survivor Historians and the Writing of Holocaust History in the Late 1940s,' *Leo Baeck Institute Yearbook*, 58, no. 1 (2013): pp. 83–84.

<sup>4</sup>For the draft outline of the lecture, see Rachel Auerbach, 'Nekudot lehartsa'ah bemo'adon Eliyahu' [Notes for a Lecture at the Eliyahu Club], Haifa, June 24, 1960, Yad Vashem Archives (YVA), P16/41.

<sup>5</sup>Boaz Cohen, 'Rachel Auerbach, Yad Vashem, and Israeli Holocaust Memory,' *Polin: Studies in Polish Jewry*, 20 (2008): pp. 214–215.

consider the general phenomenon of the erasure or marginalization of the contribution of women to international law.

One obstacle to recognizing the contribution of women to international law is connected to the demarcation of disciplinary boundaries and notions of expertise. In the last decade, there has been a 'historical turn' in international law, with a growing body of research on the distinctive role played by Jewish émigré lawyers in its development.<sup>6</sup> Women's contribution to the field, however, is largely absent from this new wave of scholarship. One explanation is that women were often amateur activists – neither professional lawyers nor professional historians.<sup>7</sup> Auerbach is a good example of this; although she studied History and Psychology at university, she did not become a professional historian or a psychologist, but rather pursued a career of journalist, writer, and archivist. Notwithstanding her important contribution to Holocaust historiography (publishing and editing books and articles), she did not become a university professor, and therefore did not have graduate students who could continue her legacy. Her works were published in Polish, Yiddish, and Hebrew, but very few were translated into English.

Another obstacle stems from the fact that even when women make important contributions to the field of international law, their role is often marginalized and/or appropriated by men. This is certainly true of Auerbach's vision and involvement in the Eichmann Trial. The marginalization of Auerbach in the collective memory of the trial is vividly demonstrated by the video clips of the Warsaw ghetto testimony from the trial that appear on YouTube. Four different witnesses appeared in two separate sessions dedicated to the Warsaw ghetto: Zivia Lubetkin and Yitzhak (Antek) Zuckerman, among the leaders of the Warsaw Ghetto Uprising, were the first to testify, and Auerbach and Adolf Berman were scheduled to testify after the lunchbreak. Auerbach testified about the cultural and intellectual life in the ghetto and its destruction, while Berman's testimony dealt with the murder of the ghetto's children and attempts to save them. However, of these four testimonies, only that of Auerbach is missing on YouTube; there is a direct transition from Lubetkin's testimony to that of Berman. Auerbach literally disappeared from the visual record.<sup>8</sup>

In his book on the trial, AG Hausner takes credit for the revolution in the part played by victims in the Eichmann Trial. He dedicates only a few sentences to Auerbach and her role in the Warsaw ghetto, depicting her contribution to the trial as technical and logistical at best:

<sup>6</sup>Doreen Lustig, 'Governance Histories of International Law,' in Markus D. Dubber and Christopher Tomlins, (eds.), *The Oxford Handbook of Legal History* (Oxford: Oxford University Press, 2018), pp. 871–873. For examples of this growing field, see Phillipe Sands, *East West Street: On the Origins of 'Genocide' and 'Crimes against Humanity'* (New York: Random House, 2006); James Loeffler, *Rooted Cosmopolitans: Jews and Human Rights in the Twentieth Century* (New Haven: Yale University Press, 2018); James Loeffler and Moria Paz, (eds.), *The Law of Strangers: Jewish Lawyers and International Law in the Twentieth Century* (Cambridge: Cambridge University Press, 2019); Leora Bilsky and Annette Weinke, (eds.), *Jewish-European Émigré Lawyers: Twentieth-Century International Humanitarian Law as Idea and Profession* (Göttingen: Wallstein Verlag, 2021).

<sup>7</sup>Immi Tallgren, 'Absent or Invisible? 'Women' Intellectuals and Professionals,' in Frédéric Mégret and Immi Tallgren, (eds.), *The Dawn of a Discipline* (Cambridge: Cambridge University Press, 2020), pp. 381–413.

<sup>8</sup>Criminal Case no. 40/61, District Court of Jerusalem, *The Attorney General of the Government of Israel v. Eichmann* (hereafter, Eichmann Trial), Minutes of Session no. 25–26, May 3, 1961, ISA-PMO-GPO-000xkq8 [Hebrew]. For the video clips, see 'The Eichmann Trial, Minutes of Session no. 25–26, May 3, 1961,' [https://www.youtube.com/watch?v=d8o\\_kHC1r3A](https://www.youtube.com/watch?v=d8o_kHC1r3A). Note that there is no video recording of Auerbach's testimony in the trial to be found in Yad Vashem, only an audio recording.

We read through hundreds of statements deposited at the Department for Oral Testimony of Yad Vashem, the National Holocaust Memorial Institute, headed by Rachel Auerbach, an historian, a survivor of the Warsaw ghetto, and later one of our witnesses to the events there. She was most helpful in placing at our disposal her department's huge collection of statements and putting us in touch with prospective witnesses.<sup>9</sup>

New historical research has tried to do Auerbach retrospective justice, arguing that it was her initiative to open the trial to the testimonies of Holocaust survivors.<sup>10</sup> Indeed, already in the first document Auerbach prepared for the trial, dated November 3, 1960, she requested that it rely on 'living witnesses' and Jewish sources.<sup>11</sup> She feared that the proceedings would be conducted as an ordinary criminal trial, based solely on incriminating German documents and eyewitnesses who had seen Eichmann face to face and could directly inculcate him.<sup>12</sup> Historian Boaz Cohen explains that in contrast to the police's legalist understanding of eyewitnesses, Auerbach wished to summon witnesses who had not necessarily encountered Eichmann, but rather had survived the 'horror of extermination' and could testify about their experiences.<sup>13</sup>

Historian Sharon Geva offers another explanation for Auerbach's marginalization that relates to the content of her own testimony, which lacked personal stories of suffering and was focused on cultural activities in the ghetto: 'It seems that she had no chance: Given the scant familiarity of the Israeli public with the realities of Jewish life in Poland during the Holocaust, her testimony did not raise any interest, let alone convince the public that these [cultural] activities should be considered resistance.'<sup>14</sup>

According to Geva, Auerbach's testimony actually harmed the prosecution, as it gave the impression that life had not been so bad in Warsaw. Geva maintains that Auerbach had unrealistic expectations of the trial. She failed to understand the difference between law and history, and between the strict procedures of a criminal trial and a public lecture.<sup>15</sup> I would like to offer a different explanation. The problem, I believe, was not Auerbach's failure to understand the limits of law, but rather her attempt to revolutionize law in a manner that diverged in important ways from the approach adopted by the prosecution. Even though both Hausner and Auerbach agreed on basing the Eichmann Trial on survivor testimonies, their views on those testimonies and the role they should play in the trial differed.<sup>16</sup> Both desired to give voice to the victims, but Auerbach also sought to promote a more collaborative conception of the trial, in which Holocaust survivors would be considered equal partners to the prosecution. In her view, the trial would

<sup>9</sup>Gideon Hausner, *Justice in Jerusalem* (New York: Harper and Row, 1966), p. 293.

<sup>10</sup>Cohen, 'Rachel Auerbach'; Boaz Cohen, 'The Eichmann Trial's Impact Reconsidered,' in Rebecca Wittman, (ed.), *The Eichmann Trial Reconsidered* (Toronto: University of Toronto Press, 2021), pp. 153–168.

<sup>11</sup>Minutes of the session of Yad Vashem on the subject of 'edei sho'ah bamishpat Eichmann' [Holocaust Witnesses in the Eichmann Trial], November 23, 1960, YVA, AM11/1760.

<sup>12</sup>Rachel Auerbach, 'Edim ve'edyot bemishpat Eichmann (trumet hamahlakah legviyat eduyot shel Yad Vashem)' [Witnesses and Testimonies in the Eichmann Trial (the Contribution of the Yad Vashem Testimony Collection Department)], *Yedi'ot Yad Vashem*, 28 (December 1961): pp. 35–41. Cited in Cohen, 'Rachel Auerbach,' p. 214.

<sup>13</sup>Cohen, 'Rachel Auerbach,' p. 214.

<sup>14</sup>Sharon Geva, *El ha'ahot halo yedu'ah* [To the Unknown Sister] (Tel Aviv: Hakibbutz Hameuchad, 2010), p. 197.

<sup>15</sup>*Ibid.*, pp. 197–198.

<sup>16</sup>Cohen observes that at first Auerbach was full of admiration for Hausner, who preferred her approach over the legalist approach advocated by the police. She wrote that Hausner 'fought to broaden the historical Jewish framework during the trial through an unbending struggle for the right of witnesses to be 'irrelevant' – that is, to testify about what had happened even if they had had no direct contact with Eichmann during the war.' Auerbach, 'Edim ve'edyot,' p. 41, cited in Cohen, 'Rachel Auerbach,' pp. 214–215.

become a victim-centered trial not only because of the survivors' testimonies, but also because it would recognize their initiative and agency in promoting a new conception of testimony.

In the following, I will elaborate on Auerbach's conception of victims' testimonies, trace its origins to the practices of the *Oyneg Shabes* archive, note its difference from ordinary eyewitness testimonies, and show how Auerbach sought to adapt it to the trial. I will explain where Auerbach's approach clashed with Hausner's, and conclude by fleshing out the more radical concept of a victims-centered Holocaust trial that she envisioned.

### **The Eliyahu Club lecture in Haifa (June 24, 1960)**

About a month after Eichmann was captured, Auerbach delivered a public lecture at the Eliyahu Club, a cultural meeting place, in Haifa. She began with an apology: 'This is my first lecture in Hebrew. I will ask for help, here and there, with a word, or to fix an error. If I don't succeed, I'll turn to Yiddish.'<sup>17</sup> In her lecture, Auerbach tried to familiarize her audience with the work of the Testimony Collection Department that she directed at Yad Vashem, in order to explain her conception of victims' testimony and how it could be brought to bear on the structure of the Eichmann Trial. I will reconstruct her ideas from a handwritten document found in her archive that contains an outline of the lecture, as well as from her other writings (both published and unpublished). I discern five themes in the new conception of victims' testimony that Auerbach promoted: testimony as Jewish historical sources; a particular practice of collecting testimonies; testimony as part of a grassroots/collective movement; the psychological role of testimonies; and the trial as cooperation between the state and Holocaust survivors. Expanding on Cohen's analysis in an article that focuses on Auerbach's work in Yad Vashem in the 1950s,<sup>18</sup> I turn to the 1960s and take a closer look at the ways in which she sought to adapt survivors' testimonies to the criminal law setting of the Eichmann Trial, and advanced a new framework for a Holocaust trial that would enable the active participation of victims.

### ***Victims' testimony as Jewish historical sources***

Auerbach wrote in her lecture notes: 'Testimony as a central Jewish source – as opposed to archival material from German sources. Therein lies its historiographical importance.'<sup>19</sup>

Contrary to the document-centered approach prevailing in the International Military Tribunal (IMT) in Nuremberg, which was wary of the testimony of Jewish victims because of their potential biases and psychological injuries,<sup>20</sup> Auerbach believed that

<sup>17</sup>Auerbach, 'Nekudot lehartsa'ah.'

<sup>18</sup>See Cohen in 'Rachel Auerbach,' where he identified three aspects of Auerbach's approach to victims' testimonies that contributed to Holocaust historiography: testimonies as Jewish sources; the psychological role of testimonies; and testimonies in anticipation of a future criminal trial. Cohen argues that 'Auerbach prepared the ground, unknowingly, for the inclusion of survivor testimonies in the Eichmann Trial.' Cohen, 'Rachel Auerbach,' p. 200.

<sup>19</sup>Auerbach, 'Nekudot lehartsa'ah.'

<sup>20</sup>Donald Bloxham, *Genocide on Trial: War Crimes Trials and the Formation of Holocaust History and Memory* (Oxford: Oxford University Press, 2001), p. 11.

the Eichmann Trial should not be limited to German archival sources. As a stateless, persecuted group, the Jewish victims did not have their own archive. Nevertheless, Auerbach sought 'Jewish sources,' and believed that victims' testimonies could supply this missing perspective. Her views were shaped during her work with the *Oyneg Shabes* archive group, and later in the CZKH.<sup>21</sup>

Auerbach's view of the importance of testimony as 'a central Jewish source' should be understood in the context of the early postwar historical writing of Holocaust survivors. Auerbach was part of what historian Boaz Cohen described as a 'unique group of Jewish East-European survivors, who belonged to the Jewish intelligentsia,' who 'devoted themselves to Holocaust research and commemoration in the immediate aftermath of the Holocaust and thereafter.'<sup>22</sup> While later general historical writing focused on German documents, these early postwar Jewish historians 'solicited, collected, and organized' survivor testimonies, and developed practices to 'transform them into a viable historical source.'<sup>23</sup> The first CZKH director, historian Philip Friedman, argued that German documents were 'not capable of portraying the most difficult, saddest chapters of our martyrdom ... in a true and thorough manner ... The official German documents rarely indicate the horror of the *Aktionen* ... and concentration camps; on the contrary, German official documents tried to cover up these horrors through the camouflaging jargon of criminals.'<sup>24</sup> Historian Laura Jockusch explains that the Commission developed necessary methodological tools for such a task. '[It] used tools of social history, such as questionnaires, interviews, and statistics, to investigate the social, cultural, and economic effects of the German occupation and persecution on Jewish society,' and insisted that Holocaust research 'must also use source materials from the victims,' such as survivor testimonies and memoirs.<sup>25</sup>

Another reason for Auerbach's preference for the victims' testimonies is given by historian Samuel Kassow: 'Unlike some scholars who regarded survivor testimony with suspicion, Auerbach believed that for many aspects of the Holocaust, their [the victims'] testimony was a critical resource.'<sup>26</sup> In this respect, she was a disciple of her mentor historian Emanuel Ringelblum, who reminded the Jewish occupants of the ghetto that the writing of their history should not depend on gentile documents and hostile sources, and encouraged them to take agency and write their own history by collecting and recording victim testimonies.

Auerbach saw the opportunity in the Eichmann Trial to publicly hear the testimonies of Holocaust survivors that she and other victim-historians had been collecting since the early postwar days. She convinced Hasuner and the Israeli prosecution that it was

<sup>21</sup>Laura Jockusch, *Collect and Record! Jewish Holocaust Documentation in Early Postwar Europe* (Oxford: Oxford University Press, 2015), p. 91.

<sup>22</sup>Boaz Cohen, 'Holocaust Testimonies and Historical Writing: Debates, Innovations, and Problems in the Early Postwar Period,' *Yad Vashem Studies*, 45, no. 2 (2017): p. 162.

<sup>23</sup>*Ibid.*

<sup>24</sup>Quoted in Jockusch, *Collect and Record!*, p. 95. In a 1948 article, Friedman wrote: 'Without these testimonies, we would know almost nothing about the way of life in the ghetto, about the way they earned a living, the cultural life, the fate of the people there, their creation and their destruction, about the folk creations (folklore, etc.) in the ghetto and the concentration camp, about the inner, psychological aspect of the external events, etc.' Philip Friedman, 'Di Elementen fun Undzer Khurbn-Forshung' (Yiddish), *Hemshekh* (April 1948), p. 10. Quoted in Cohen, 'Holocaust Testimonies and Historical Writing,' p. 163.

<sup>25</sup>Jockusch, *Collect and Record!*, pp. 95-96.

<sup>26</sup>Samuel Kassow, *Who Will Write Our History? Emanuel Ringelblum, the Warsaw Ghetto, and the Oyneg Shabes Archive* (Bloomington: Indiana University Press, 2007), p. 206.



essential to open the trial to survivor testimonies. However, Hausner's reasons for adopting this approach differed significantly from hers. In his memoirs, Hausner wrote:

In order merely to secure a conviction, it was obviously enough to let the archives speak; a fraction of them would have sufficed to get Eichmann sentenced ten times over. But I knew we needed more than a conviction; we needed a living record of a gigantic human and national disaster, though it could never be more than a feeble echo of the real events.<sup>27</sup>

Like Hausner, Auerbach sought to balance German archival documents with Jewish victims' testimonies, referring to survivor testimonies as 'a living archive.'<sup>28</sup> However, unlike Hausner, she did not see the testimonies as merely illustrative, as a way to bring the historical record to life. Instead, in her view, survivors' testimonies bore an independent historiographical and legal value, since they could reveal what the German documents often concealed – the experience of the crime from the point of view of its victims. While Hausner sought to use the trial to overcome doubts about the reliability of survivors' testimonies, Auerbach supposed the survivors' testimonies to be crucial in order to overcome doubts about the Holocaust itself, as she explained in a later article: '[B]ut we knew that if there was a factor that could silence these doubts, it would only be the witnesses: and not necessarily those who had seen Eichmann face to face, but [rather] the witnesses who had been deep inside the horrors of the extermination and had survived in order to tell. ...'<sup>29</sup>

This is one of the reasons why she opposed the legalist approach of the police, who evaluated the survivors' testimonies as potential eyewitnesses, according to forensic considerations over their probative value in proving Eichmann's guilt. Instead, Auerbach believed that the trial should have a dual goal – legal and historical. It should help understand the Holocaust as a whole, and show how Eichmann's actions had contributed to the genocide of the Jews. This was an 'opportunity, which may not repeat itself, to condemn the mass destruction of European Jewry for the world to see.'<sup>30</sup>

### **Testimony as praxis**

'[C]reating historical material whose source is the memory of a living human being. ... [N]ot just testimonies, but the collection of existing memory material, eliciting and writing down testimony, prompting, encouraging, and guiding people to write independently. Diaries.'<sup>31</sup>

This quote from Auerbach's Eliyahu Club notes reveals her attempt to challenge the common notion that testimonies exist in the world 'ready-made,' just waiting to be collected. Auerbach emphasizes the difficulty by using different verbs to describe the process of collecting them: eliciting, writing down, prompting, encouraging, guiding. Here again, she followed the approach used in *Oyneg Shabes*, where various methods for eliciting testimonies had been created, such as encouraging ordinary people to write diaries, join

<sup>27</sup>Hausner, *Justice in Jerusalem*, p. 291.

<sup>28</sup>'To the great potential of documents and files ... we shall add the human material that the prosecution found in the 'living archive' of Yad Vashem, that is, its collections of testimonies.' Auerbach, 'Nekudot lehartsa'ah.'

<sup>29</sup>Auerbach, 'Edim ve'eduyot,' p. 35.

<sup>30</sup>Ibid.

<sup>31</sup>Auerbach, 'Nekudot lehartsa'ah.'

writing contests, and collect everyday materials. After the war, the CZKH developed these methods, and even wrote several manuals for collecting testimonies.<sup>32</sup>

Auerbach argued that the high quality of the witnesses whom her department at Yad Vashem recommended to the Eichmann prosecution could be attributed precisely to these meticulous methods of collecting testimonies:

Our witnesses were among the best and most prominent witnesses, not only because they were selected on the basis of material that had been collected for years, but especially because our methods of eliciting testimony had trained them to fulfill this task and helped them extract from the depths of their memory the images and experiences that were buried there.<sup>33</sup>

One important difference between this process and that of collecting testimonies in a legal setting was its collaborative character. Auerbach regarded the process of giving testimony as a collaborative effort between victim and interviewer. In contrast to the legal approach that views with suspicion any intervention in the witness's testimony, Auerbach insisted that Holocaust testimonies required the interviewer to actively encourage the victims to bear witness, given their preference to forget and repress traumatic events.<sup>34</sup> The practice of survivors collecting testimonies of other survivors was also first developed by the Jewish East-European historical commissions in the postwar period.<sup>35</sup> Therefore, an important role for the survivor-interviewer was 'to convince the witness to give testimony in the first place.' A prerequisite for the interviewer was familiarity with the events in question, and the commissions preferred someone from the same region of the interviewee. In this context, the historical commissions also developed a unique method of 'group testimonies.'<sup>36</sup>

This proactive role of victims in collecting other victims' testimonies is well demonstrated by the testimony given by Leon Weliczker (Wells), a Holocaust survivor who, in June 1943, had been assigned to the so-called 'death brigade' (Sonderkommando 1005), whose task was to clear the Lviv district in Eastern Galicia of mass graves, to exhume and cremate thousands of bodies, and to obliterate all traces of murders committed in this area. Through her work in the CZKH, Auerbach helped edit Weliczker's wartime

<sup>32</sup>Jockusch, 'Historiography in Transit,' pp. 80–81. Boaz Cohen, 'Holocaust Testimonies and Historical Writing,' p. 181.

<sup>33</sup>Hofa'ot edim venosei eduyot bemishpat Eichmann (trumatah shel ha-mahlakah legviyat eduyot lama'amatz hakolektivi shel Yad Vashem) [Appearances of Witnesses and Topics of Testimonies in the Eichmann Trial (the Contribution of the Testimony Collection Department to the Collective Effort of Yad Vashem)], YVO, AM.11/10 (images 114–26), p. 11.

<sup>34</sup>Auerbach's approach to testimony as a collaborative endeavor of witness and interviewer found resonance many years later in the theories of psychoanalyst Dori Laub. See Dori Laub, M.D., 'Bearing Witness: Or the Vicissitudes of Listening,' in Shoshana Felman and Dori Laub, M.D., (eds.), *Testimony: Crises of Witnessing in Literature, Psychoanalysis, and History* (New York: Routledge, 1992), pp. 57–58. This approach was adopted by the Fortunoff Archive of Holocaust Testimonies in Yale. See Michal Givoni, 'The Ethics of Witnessing and the Politics of the Governed,' *Theory, Culture & Society*, 31, no. 1 (2014): p. 131.

<sup>35</sup>Cohen explains that in the aftermath of the Holocaust, the historical commissions relied on survivors to collect testimonies both because they were the only manpower available and due to their belief that 'it was ideologically appropriate for the people to write their own history.' Cohen, 'Holocaust Testimonies and Historical Writing,' p. 175.

<sup>36</sup>As explained by Philip Friedman: 'In a place where a large number of people from the same town or the same concentration camp resided, they gathered them together and read the existing testimonies or chronicles of their city out loud to them, asked them for their amendments, improvements, etc. Through such a collective editing for certain reasons, very frequently ... a higher degree of objectivity was achieved than in individual interrogations.' Cited in Cohen, 'Holocaust Testimonies and Historical Writing,' p. 180. According to Jockusch, 'In general, interviewers and interviewees came from the same geographic area. Although this helped to avoid factual error in the testimony, the interviewer was cautioned against allowing personal biases and knowledge of events to influence the witness's testimony.' Jockusch, *Collect and Record*, p. 98.



diary, in which he related his horrendous experiences in the Janowska forced labor and concentration camp, as well as part of Sonderkommando 1005. She also wrote an introduction that presented the unique challenges of collecting such testimonies.<sup>37</sup> On her recommendation, Wells was invited to give testimony at the Eichmann Trial, and he provided a long and detailed account of his horrifying encounters.<sup>38</sup> According to Haim Gouri, an Israeli poet and journalist who reported on the trial, the international reporters found it hard to believe Wells; they considered it impossible for anybody to recall events in such detail.<sup>39</sup>

Another important difference in Auerbach's approach to collecting testimonies was related to time. Ordinarily, the law sees testimony as something that occurs after the fact, when the witness testifies about a crime that has happened in the past. In the Warsaw ghetto, however, the victims understood the need to document the catastrophe while it was happening ('testimony in real time'), thereby returning to a premodern understanding of the historian as eyewitness.<sup>40</sup> Thus, the victims turned themselves into historians of sorts and began collecting testimonies in anticipation of a future trial.<sup>41</sup>

For Auerbach, too, the practice of collecting testimonies began in real time, as represented in her contribution to the *Oyneg Shabes* archive, but also continued afterwards, first at the CZKH and later at Yad Vashem. However, the purposes of testimony collection evolved over the years. The early function of this activity was political: to warn the Jewish victims and the world at large of the nature of the new crimes. Afterwards, historical and juridical purposes gained prominence. As to the later postwar documentation efforts (including testimony collection), Jockusch writes: '[It] could at once provide evidence for the juridical, material, and moral redress of anti-Jewish violence, a documentary foundation for future history writing, and a platform for mourning and commemorating the dead.'<sup>42</sup>

The early practice of collecting testimonies by the victims themselves therefore diverged both from traditional history writing (by professional historians, after the fact) and from legal practices (by policeman and lawyers, after the fact).<sup>43</sup> In her testimony during the Eichmann Trial, Auerbach gave the example of how she had recorded the testimony of Abraham (Jakub) Krzepicki, the first Jewish prisoner who had managed to escape from Treblinka to the Warsaw ghetto after spending eighteen days in the death camp. Auerbach interviewed him in the ghetto over a period of several weeks, and wrote down his testimony in his own words (adding her comments in parenthesis), in over 323 pages of notebooks.<sup>44</sup> Boaz Cohen writes: 'More than a historical document, his

<sup>37</sup>See Jockusch, *Collect and Record!*, p. 130; Leon Weliczker, *Brygada śmierci* (Łódź, 1946) (with an introduction by Auerbach).

<sup>38</sup>Eichmann Trial, Minutes of Session no. 22–23, May 1–2, 1961; ISA-PMO-GPO-000xkq8, Kk1.

<sup>39</sup>Haim Gouri, *Facing the Glass Booth: The Jerusalem Trial of Adolf Eichmann*, trans. by Michael Swirsky (Detroit: Wayne State University Press, 2004), p. 39.

<sup>40</sup>David N. Myers, *The Stakes of History: On the Use and Abuse of Jewish History for Life* (New Haven: Yale University Press, 2018), p. 74.

<sup>41</sup>Emanuel Ringelblum stated in a 1942 report that the archival material would be 'of great significance for the future tribunal for the war, which will call the guilty to responsibility, be they among the Jews, the Poles, or the Germans.' Cited by Jockusch, *Collect and Record!*, p. 35.

<sup>42</sup>Jockusch, *Collect and Record!*, p. 43.

<sup>43</sup>A hybrid understanding of victims' testimonies (between history and law) was developed by the directors of the Jewish Historical Commission, Joseph Kermish and Nachmann Blumental. See Alexander V. Prusin and Gabriel N. Finder, *Justice Behind the Iron Curtain: Nazis on Trial in Communist Poland* (Toronto: University of Toronto Press, 2008), pp. 180–182.

<sup>44</sup>Eichmann Trial, Minutes of Session no. 26, May 3, 1961; ISA-PMO-GPO-000xkq8, Dd1. For elaboration, see Lea Prais, "'Jews from the World to Come': The First Testimonies of Escapees from Chelmno and Treblinka in the Warsaw Ghetto, 1942–1943," *Yad Vashem Studies*, 42, no. 1 (2014): pp. 47–82.

testimony, disseminated in the ghetto and smuggled to London, alerted the Jews in the ghetto and the world to the extermination of the Jews in the camp and to the Final Solution.<sup>45</sup> Krzepicki was subsequently killed in the ghetto uprising; if Auerbach had not taken his detailed testimony of Treblinka in ‘real time,’ in the ghetto, it would have been lost for history. As Krzepicki himself could not become an eyewitness to Treblinka in the Eichmann Trial, Auerbach ‘smuggled in’ his testimony via her own. In a legal memo Auerbach composed for Unit 06 of the Israeli police, she suggested that it might be worthwhile to enlarge the framework of the trial to include testimonies and memoirs by ‘dead witnesses,’ written during or after the Holocaust.<sup>46</sup> Referring to Krzepicki in her trial testimony was her way of deliberately blurring the line between the living and dead witnesses of the Holocaust, and expanding the trial’s conception of eyewitness testimony.

### **Testimony as part of a grassroots movement**

‘Just as there is no precedence for the Shoah, so there has never been such a collective spontaneous and elemental movement, not in our, and not in any other nation or language . . . . All our organized activity is but an instrument in the service of this movement . . . . Here lies the secret of our existence.’<sup>47</sup>

Auerbach regarded testifying as an expression of a collective grassroots movement. True to the legacy of the *Oyneg Shabes* archive, she rejected the traditional distinction between detached history writing and involved political action.<sup>48</sup> Indeed, the *Oyneg Shabes* documentary enterprise was part of a broader initiative in the ghetto of *Aleynhelf* (Self-Help), which included a network of soup kitchens, refugee centers, house committees, etc. In the ghetto, the grassroots organization began with the agency of the victims themselves, as part of what Auerbach dubbed ‘passive resistance.’ Kassow explains that relief work and historical research in the Warsaw ghetto were interdependent: ‘The *Aleynhelf* made the functioning of the *Oyneg Shabes* archive possible. Ringelblum used the soup kitchens and refugee centers to gather information and find writers – as well as to save the cadres of the Jewish intelligentsia by giving them jobs.’<sup>49</sup>

Auerbach herself was recruited by Ringelblum to the archive because of her role as the director of a soup kitchen in the ghetto, which at its peak fed 2,000 Jews a day. According to Kassow, the soup kitchen offered Auerbach a unique vantage point from which to observe and write the social history of hunger in the ghetto, by telling the story of the

<sup>45</sup>Cohen, ‘Holocaust Testimonies and Historical Writing,’ p. 166.

<sup>46</sup>Rachel Auerbach, ‘Kamah ra’ayonot bishvil hatvi’ah neged Eichmann’ [Some Ideas for the Prosecution of Eichmann], cited by Cohen, ‘Rachel Auerbach,’ p. 214, fn 67. In a newspaper article she published on the occasion of the opening of the trial, Auerbach implicitly challenged the law’s clear distinction between the testimonies of living and dead victims by relating a Jewish folktale about the dead’s attempt to join the prayers of the synagogue during the High Holidays. She saw the Eichmann Trial as an opportunity to invite the dead to mingle with the living – to listen to their ‘silent cry.’ Rachel Auerbach ‘Al tasiru et hatalitot’ [Don’t Take Off the Prayer Shawls], *Davar*, April 13, 1961.

<sup>47</sup>Auerbach, ‘Nekudot lehartsa’ah.’

<sup>48</sup>For a similar contemporary criticism of the distinction made in the literature between Holocaust (nonpolitical) testimonies and testimonies collected by human rights organizations, see Michal Givoni, *The Care of the Witness: A Contemporary History of Testimony in Crises* (Cambridge: Cambridge University Press, 2016).

<sup>49</sup>Samuel Kassow, ‘The Warsaw Ghetto in the Writings of Rachel Auerbach,’ in Glenn Dynner and François Guesnet, (eds.), *Warsaw. The Jewish Metropolis: Essays in Honor of the 75th Birthday of Professor Antony Polonsky* (Leiden: Brill 2015), p. 509.

soup kitchen as a microcosm of human relationships and choices.<sup>50</sup> As many cultural and intellectual figures gathered in her soup kitchen and became her 'customers,' Auerbach also began to document the cultural destruction and attempts at 'spiritual resistance.'<sup>51</sup>

In her Eliyahu Club lecture, Auerbach depicted the process of collecting testimonies that began in the ghetto as part of a popular movement, rather than as the domain of expert jurists or historians. She regarded collecting testimonies and history-writing as part of a popular movement 'of the people, for the people.'<sup>52</sup> She stressed the collective aspects of the enterprise, and linked it to the YIVO tradition of recruiting hundreds of *zamlers* (collectors) for its historiographical project in Eastern Europe.<sup>53</sup> In an essay she wrote on Emanuel Ringelblum, she explains how this tradition informed the documentation efforts in the ghetto: '[T]he field gatherers assembled (often by stealing or by secretly taking down from fences) posters, announcements, notifications, and so forth ... writing down testimonies, reports, incidents, and also taking polls, making observations, and researching the period of the occupation.'<sup>54</sup>

This bottom-up, grassroots approach based on collecting victims' testimonies continued in the Jewish historical commissions after the war, and was brought to Yad Vashem by the historian-survivors who immigrated to Israel.<sup>55</sup>

What distinguished Auerbach's particular approach to Holocaust testimonies was the importance she attributed to the individual voice of the witness. According to Kassow, '[I]n a world hitherto dominated by traditions and ideologies that stressed the primacy of the collective over the individual, Auerbach ... believed that one could not understand *klal yisrael* (the collective) without grasping the needs of *reb yisroel* (the individual).'

<sup>56</sup> Unlike most of the historian-survivors active in postwar historical documentation efforts, Auerbach succeeded in making a lasting impact because she knew how to translate the popular movement of giving and taking testimony, which was largely restricted to survivor circles, into a form of individual testimony compatible with the requirements of a courtroom.<sup>57</sup> The Eichmann Trial provided her with the perfect opportunity to adapt her approach to victim testimonies to a legal setting. Since testimonies in a trial are given in the first person, Auerbach promoted the idea of telling the collective history of the Holocaust through the individual testimonies of around 100 survivors.

Auerbach also offered a conceptual framework for the victims' testimonies in the Eichmann Trial, divided into chronological, geographical, and phenomenological categories. She acknowledged that while there could be some repetitions in the testimonies, there was also a clear legal advantage:

<sup>50</sup>Kassow, 'The Warsaw Ghetto,' p. 510.

<sup>51</sup>This became the basis of her posthumous book, translated from Yiddish and published in Hebrew. Rachel Auerbach, *Tsava'ot Varshah: Mifgashim, ma'asim, gorolot, 1933–1943* [Warsaw Testaments: Encounters, Activities, Fates 1933–1943], trans. by Rivka Gorfein-Uchmani (Tel Aviv: Sifriat Poalim, 1985).

<sup>52</sup>'An entire people clutching pens, in ghettos, in hiding places, in the face of gas chambers and machine gun muzzles, found the strength to write – for the sole reason that at some time the world should know, so that these things should be known to their brothers.' Rachel Auerbach, 'Al mah natush hama'avak beYad Vashem?' [What is the Struggle in Yad Vashem All About?], *Davar*, October 7, 1958, cited in Cohen, 'Rachel Auerbach,' pp. 200–201.

<sup>53</sup>Cohen remarks that the *zamlers* embodied the idea articulated by historian Israel Kaplan of the Central Historical Commission in Munich that 'the public's participation in this national project should be *Folksarbeit*, the work of the people.' Cohen, 'Holocaust Testimonies and Historical Writing,' pp. 172–173.

<sup>54</sup>Auerbach, *Tsava'ot Varshah*, p. 145.

<sup>55</sup>Kassow, *Who Will Write Our History?*, p. 206.

<sup>56</sup>*Ibid.*, p. 202.

<sup>57</sup>I thank Laura Jockusch for this insight.

In all the countries, there was a chronological development of stages and systems of killing, and there existed territorial variations in the way they [the killings] were carried out in different areas. However, there was also a *characteristic uniformity* in the organization and methods used to carry them out, which supports the supposition that one hand ruled over them.<sup>58</sup>

According to Auerbach, the multiple testimonies from different places and times could help expose a 'pattern' of persecution, revealing that there was a plan and organization, and thus support the charge of genocide (based on a strategy to annihilate a group). Decades later, the prosecution in the International Criminal Tribunal for the former Yugoslavia (ICTY) trials adopted a similar approach for proving the systematic campaign of ethnic cleansing, by relying on multiple testimonies by victim-witnesses that revealed a recurring pattern.<sup>59</sup> Importantly, it also adopted a victim-centered approach, similar to the one Auerbach advocated for the Eichmann Trial. However, in the international tribunals of the 1990s, the victims were brought mainly as direct eyewitnesses, and not as 'participants' or 'civil parties' to the trials.<sup>60</sup>

### ***Testimony as catharsis: The psychological aspect***

The psychological aspect: release from tragic content. A psycho-hygienic popular enterprise. Protest and tears. ... To overcome the tragic content with creative *catharsis*, with the help of mental effort to overcome the destruction and death ... A kind of renewal of the people – rising above the mass graves. On the one hand the State, and on the other hand internal renewal from a mental source.<sup>61</sup>

While Auerbach shared the approach developed by the *Oyneg Shabes* archive members, she was unique in her emphasis on the psychological aspects of giving testimony. Auerbach had studied Psychology at the University of Lwów, and in her journalist career often wrote about psychological factors in the behavior of individuals and groups.<sup>62</sup> This background evidently influenced her understanding of survivor testimony. She did not believe that the therapeutic aspects of testimony conflicted with a criminal trial, but rather saw them as complementary: 'On the one hand, the state, and on the other hand, internal renewal from a mental source.' Unlike the American prosecution at Nuremberg, which, as noted, had excluded Jewish victims from the trial as unreliable witnesses, Auerbach not only regarded the victim-witnesses as reliable, but also saw the act of testifying itself as therapeutic, and hence as part of the responsibility of the law toward the victims.

Auerbach rejected the prevailing perception that forgetting or silence enabled the Holocaust survivor to recover.<sup>63</sup> On the contrary, she viewed testimony as part of a

<sup>58</sup>Auerbach, 'Edim ve'eduyot,' p. 41, cited by Cohen, 'Rachel Auerbach,' p. 215 (emphasis in the original).

<sup>59</sup>Richard Wilson, *Writing History in International Criminal Trial* (Cambridge: Cambridge University Press, 2012), pp. 112–139.

<sup>60</sup>For a discussion on the limited role of victims as witnesses in the ad hoc tribunals, see Gideon Boas et al., 'The Role and Status of Victims in International Criminal Procedure,' in *International Criminal Law Practitioner Library: International Criminal Procedure*, vol. 3 (Cambridge: Cambridge University Press, 2011), pp. 303, 309–310. For a discussion on the role of victims in the ICTY, see also Åsa Rydberg, 'Victims and the International Criminal Tribunal for the Former Yugoslavia,' in Marijke Malsch and Hendrik Kaptein, (eds.), *Crime, Victims, and Justice: Essays on Principles and Practice* (London and New York: Routledge, 2004), pp. 131–132, 138.

<sup>61</sup>Auerbach, 'Nekudot lehartsa'ah' (emphasis added).

<sup>62</sup>Kassow, *Who Will Write Our History?*, p. 202. Auerbach also analyzed the Germans' brilliant use of psychological factors against the Jewish population under their control. See, for example, Rachel Auerbach, 'In the Fields of Treblinka,' in Alexander Donat, (ed.), *The Death Camp Treblinka: A Documentary* (New York: Holocaust Library, 1979), pp. 19–74.

<sup>63</sup>See Judith Stern, 'The Eichmann Trial and Its Influence on Psychiatry and Psychology,' *Theoretical Inquiries in Law*, 1, no. 2 (2000): pp. 393–428.

process of catharsis, '[a] release from the tragic material,' and regarded the trial as playing an important role in this process. However, it would be wrong to understand Auerbach's approach in terms of individual therapy, such as takes place in the private clinic of the psychotherapist. Even with respect to the therapeutic goals of the trial, she emphasized the collective dimension, describing the process of recovery, or 'renewal,' in national terms.<sup>64</sup> She thereby returned to the original Greek understanding of catharsis as a process of social purification that depends on a public forum and public speech.<sup>65</sup> Greek tragedy and trials were integral parts of the public sphere. Likewise, Auerbach saw survivors' testimony as part of a collective 'psycho-hygienic' enterprise. In the margins of the page of her lecture, she wrote: 'In this trial, too, we have to release ourselves from the destructive content,' and she added at the end of her notes: 'Finally, we have to make a productive, constructive rectification, by passing on the knowledge of the Holocaust ...'<sup>66</sup>

By understanding testimony in therapeutic terms, Auerbach was ahead of her time, as this view of Holocaust testimonies emerged only many years later as part of a psychoanalytic approach to trauma.<sup>67</sup> In law, it was only in the late 1990s, when the new model of the 'truth and reconciliation commission' was developed during South Africa's transition to democracy, that a therapeutic approach to victims' testimony appeared.<sup>68</sup> However, this transformation occurred outside the setting of a criminal trial, and later attempts to expand the goals of international criminal law from 'retributive' to 'restorative' justice to allow for therapeutic considerations met with mixed results.<sup>69</sup>

The complicated relationship between victims' testimonies and trauma was present already in the Eichmann Trial itself, most dramatically in the testimony of Auschwitz survivor K-Zetnik (Yehiel Dinur), which became one of the most remembered moments of the trial.<sup>70</sup> In the years since the Eichmann Trial, experience has shown that in some circumstances, victims' testimonies might not serve the therapeutic purpose that Auerbach envisioned, and that victim-witnesses, in particular victims of sexual violence, might be retraumatized in the courtroom.<sup>71</sup>

<sup>64</sup>Kassow, 'The Warsaw Ghetto,' pp. 506–507, writes that Auerbach insisted that the importance of finding and recovering the *Oyneg Shabes* archive after the war lay in its contribution to the process of national renewal: 'Auerbach held up the model of the *Oyneg Shabes* ... In the aftermath of the catastrophe, a wounded nation had to look to its record, the good as well as the bad. To tell the whole truth, to add and subtract nothing ... [in order to allow] the nation to recover and rebuild.'

<sup>65</sup>She returns to the original etymology of forensics, 'before the forum,' seeing the importance of the trial as creating a public forum for the testimonies of Holocaust survivors.

<sup>66</sup>Auerbach, 'Nekudot lehartsa'ah.'

<sup>67</sup>Laub, M.D., *Testimony*; Shoshana Felman, *The Judicial Unconscious: Trials and Traumas in the Twentieth Century* (Cambridge, MA: Harvard University Press, 2002); José Brunner, "Mishpat Eichmann bein historia legeneologia" [The Eichmann Trial Between History and Genealogy], *Zmanim: A Historical Quarterly*, 98 (2007): pp. 72, 74–75.

<sup>68</sup>Martha Minow, *Between Vengeance and Forgiveness: Facing History after Genocide and Mass Violence* (Boston: Beacon Press, 1998), pp. 70–72; Bronwyn Leebaw, *Judging State-Sponsored Violence, Imagining Political Change* (Cambridge: Cambridge University Press, 2011), pp. 119–144.

<sup>69</sup>For a critique of the therapeutic turn in law that puts victim testimony at the center, see Ronald Niezen, 'Human Rights as Therapy: The Healing Paradigms of Transitional Justice,' in Danielle Celermajer and Alexandre Lefebvre, (eds.), *The Subject of Human Rights* (Stanford: Stanford University Press, 2020), pp. 153–171; for the difficulties of integrating restorative goals in the International Criminal Court, see Sergey Vasiliev, 'Victim Participation Revisited: What the ICC Is Learning about Itself,' in Carsten Stahn, (ed.), *The Law and Practice of the International Criminal Court* (Oxford University Press, 2015), pp. 1133–1202.

<sup>70</sup>See Felman, *The Judicial Unconscious*, p. 146.

<sup>71</sup>See, for example, Binaifer Nowrojee, "Your Justice is Too Slow: Will ICTR Fail Rwanda's Rape Victims?," UNRISD Occasional Paper no. 10 (2005), V.

### ***The role of the Eichmann Trial***

‘For us it is a big thing, it releases us from a sense of loneliness.’<sup>72</sup>

With this point in her lecture Auerbach refers to what she sees as the most important contribution of the trial. While the prosecution treated the Eichmann Trial as an ‘exceptional’ event, Auerbach noted that ‘[f]or us, Eichmann is all year long. Big criminals, small ones ...’<sup>73</sup> With the use of the plural pronoun ‘us,’ Auerbach puts the survivors at the center. Instead of viewing the victims as instrumental for the prosecution, as potential eyewitnesses in a criminal trial conducted in the name of a sovereign state and a national community, she sees victims as its main addressees. In this way, Auerbach reinserted the viewpoint of the Holocaust survivors into the center of the trial.

While Hausner regarded the trial as a means of giving a voice back to Holocaust survivors by turning them from passive victims into witnesses for the prosecution, Auerbach did not view the trial in these terms, as the victims themselves had already started the project of ‘living documentation,’ while collecting testimonies for the *Oyneg Shabes* archive in the ghetto, in the historical commissions they created after the war, and at Yad Vashem. In her lecture notes, she lists the various ‘aspects’ or goals of the trial: revenge, Israeli independence – the first trial in which Jews sat in judgment over a Nazi criminal – public opinion, human drama, and historical research. She then notes what is most significant in her view: the ability of the Eichmann Trial to ‘release’ the survivors ‘from a sense of loneliness.’ The trial could play an important role, not because it transformed silent victims into witnesses, but rather because it enabled them to address a wider audience, instead of being confined to speaking to their own circle. Two days after the opening session of the trial, on April 13 (Israel’s national Holocaust Remembrance Day in 1961), Auerbach wrote in a newspaper article: ‘Only now is the public willing to listen, to hear the story, Jews and non-Jews, in a way that they were not willing to do previously. Isn’t it strange, that this has become possible only now, ‘thanks’ to the person in the glass booth?’<sup>74</sup>

### ***Auerbach’s testimony at the Eichmann Trial***

Auerbach’s own testimony at the Eichmann Trial demonstrates how her ideas regarding victim testimonies were related to her views on the nature of the new crime of genocide. Auerbach planned to testify on the issue of cultural genocide, the deliberate cultural destruction wrought by the Nazis on Jewish Warsaw as part of their attempt to annihilate the Jewish people.<sup>75</sup> Accordingly, Auerbach did not perceive herself as an ordinary eyewitness in the trial, nor did she understand her testimony in terms of telling her personal story of pain and suffering. Instead, she saw herself as an ‘expert witness’ on the crime of genocide and the Jewish counter-response – the agency of victims in finding ways to resist through testimony.<sup>76</sup> In her testimony, she sought to explain the link between

<sup>72</sup>Auerbach, ‘Nekudot lehartsa’ah.’

<sup>73</sup>*Ibid.*

<sup>74</sup>Auerbach, ‘Al tasiru.’

<sup>75</sup>On the history of the legal concept of cultural genocide, see Leora Bilsky and Rachel Klagsbrun, ‘The Return of Cultural Genocide?’, *European Journal of International Law*, 29, no. 2 (2018): pp. 380–390.

<sup>76</sup>Leora Bilsky, ‘Rachel Auerbach: Re-imagining the Victim as ‘Eyewitness’ to the Nazi Camera,’ in Leora Bilsky and Annette Weinke, (eds.), *Jewish Émigré Lawyers* (Wallstein Verlag, 2021).



genocide and the act of giving testimony as a form of 'spiritual resistance' to the crime, a perception shared by many survivors connected to Ringelblum's archive.<sup>77</sup>

Unlike ordinary witnesses, Auerbach wrote her own proposal to the prosecution about the subjects her testimony should cover, and kept in her own archive many drafts of her intended testimony.<sup>78</sup> But all her preparations came to naught. Her testimony paled in comparison to her writings, and failed to reflect the points she had prepared.<sup>79</sup> Moreover, her testimony was often interrupted by the prosecutor and the judges, who repeatedly asked her to focus on the prosecutor's questions.

In a letter she sent to Hausner immediately after giving her testimony, she wrote:

It pains me in particular – and my conscience is not quiet – that I did not manage to tell, as I had intended to, the story of the spiritual annihilation of the intellectuals ... *the case of the murder of the intellectuals ... is of particular significance in the overall balance of biological genocide*. I think that Prof. Baron touched on this case [in his testimony], but did not give concrete data on it.<sup>80</sup>

The reference to the prominent Jewish historian Salo Baron is significant. Baron, a professor of Jewish History at Columbia University was invited to the trial as an expert-historian to present the historical narrative of the Holocaust as a whole, and was the first witness for the prosecution. But Baron, like Auerbach, chose to emphasize the cultural aspects of the crime of genocide, as well as his efforts at cultural reconstruction (the restitution of heirless Jewish books to the Jewish people).<sup>81</sup> His testimony was viewed by Prime Minister Ben Gurion as a 'shame,' maybe because he chose to dwell on the Diaspora and its powers of renewal.<sup>82</sup> From Auerbach's letter, we learn that she had wanted to continue in the same vein in order to substantiate Baron's thesis by testifying to the cultural destruction of Jewish Warsaw and the victims' agency in 'spiritual resistance.'

However, the message she had wished to impart was not understood. In a confidential letter she sent to Aryeh Leon Kubovy (then the Chariman of Yad Vashem Directorate), Auerbach expressed the shock that her experience in the trial had caused her, and analyzed the reasons for her failure: 'I suddenly felt a contraction of my heart muscles until my only thought at that moment was just to step down, to step down as soon as possible, and only not to faint and not to become a subject of stupid sensation in the press.'<sup>83</sup> She blamed the prosecution for its decision to postpone her testimony to the afternoon session (she was supposed to have given the first of the testimonies on the Warsaw ghetto), and to place it after the testimony on the uprising by its heroes, Zivia Lubetkin and Yitzhak (Antek) Zuckerman, and before the testimony of Adolf Berman on the fate of the children. To try to relate the story of cultural genocide in between these two extremes, and after the story of the heroic ghetto uprising, proved impossible.

<sup>77</sup>See Jockusch, *Collect and Record!*, pp. 36–37.

<sup>78</sup>In a letter Auerbach wrote after giving the testimony, she also refers to the multiple stages it went through during its preparation. See Auerbach to Kubovy – May 6, 1961, YVA AM.11/10 (Images 111–113).

<sup>79</sup>See Cohen, 'Rachel Auerbach,' pp. 217–218.

<sup>80</sup>'15.4.1961,' YVA AM.11/10 (Image 89) (my emphasis).

<sup>81</sup>Bilsky and Klagsbrun. 'The Return of Cultural Genocide?,' p. 386.

<sup>82</sup>Hanna Yablonka, *The State of Israel vs. Adolf Eichmann* (New York: Schocken Books, 2004), pp. 103–106.

<sup>83</sup>Auerbach to Kubovy – May 6, 1961, cited in Cohen, 'Rachel Auerbach,' p. 218.

Auerbach had planned to testify about the Nazi decrees, the increasing hunger and disease, self-help organizations, and the various endeavors by the Jews to maintain political and cultural life in the ghetto (such as newspapers, schools, libraries, and cultural events). In this context, she wished to present the uniqueness of Ringelblum's leadership and the *Oyneg Shabes* archival project. But how could she make the court understand that the various attempts to maintain cultural life were as heroic as the armed resistance that was so lauded at the time? Notwithstanding her meticulous preparations and many drafts for her testimony, at the trial itself she testified in broken Hebrew, and failed to convey what was so unique about the collecting of testimonies by the victims themselves. Tragically, the woman who had convinced the prosecution to open the trial to the testimony of around 100 Holocaust survivors was unsuccessful in her own testimony. Still, it is important to emphasize that Auerbach's testimony did not fail due to a personal difficulty to come forward and tell her story. Rather, it was bound to fail because of the tension between her own worldview and the context of her times, which emphasized armed resistance, heroism, and physical courage.<sup>84</sup>

When asked about Ringelblum's archival project, Auerbach tried to explain the connection between relief work and the clandestine documentation efforts by describing her own work in the soup kitchen:

Just as Ringelblum found me to help in the work of the kitchens, a year later he called upon me for this work. This was a conspiratorial enterprise . . . . He set me to work in that same kitchen and from the same unique observation point – from the place where I saw complete communities of exiles built up and dying off and new ones coming in their stead, where I saw entire families coming and going and others coming again – to describe all this. As a first step, he demanded of me that I should write about the works of writers living in the ghetto. But in the mental state I was at that time, the first thing I wrote was a monograph on the public kitchen.<sup>85</sup>

Auerbach tried to condense the whole novelty of the *Oyneg Shabes* archive team into a few words, but without further elaboration, their activities did not sound at all conspiratorial, let alone like acts of resistance. She also did not manage to convey the radical nature of the Ringelblum group's ideas – the attempt to combine relief work with documentation, and a spontaneous grassroots movement of collecting victims' testimonies – or their innovative approach to testimony. Instead, her account of running a soup kitchen was interpreted as the typical philanthropic work of a woman.

The clash between her ideas regarding victim testimonies and Hausner's reformulations of them came to a peak in their final exchange about the significance of Ringelblum's archive that ended her testimony:

Q. Did you begin not only to record the characters but also to assemble actual historical material?

A. Yes.

Q. In fact, the foundations for the research of Yad Vashem were laid at this time?

<sup>84</sup>See Sharon Geva, "And Now You Are Married and You Have Two Children': Women Witnesses at the Eichmann Trial," *Yad Vashem Studies*, 47, no. 2 (2019): pp. 151-155.

<sup>85</sup>Eichmann Trial, Minutes of Session no. 26, 17 Iyar 5721 (May 3, 1961) (translated to English by the Nizkor Project website).

A. I wanted to say that in my opinion, Dr. Ringelblum was the first to start with the writing of a great indictment and there is a direct path leading from that place in the ghetto to this courtroom.<sup>86</sup>

We see here that while Hausner limited the important legacy of the ghetto archive to the realm of historical research, Auerbach insisted that the archive and its collected materials had laid the foundations for the Eichmann Trial.

## Conclusion – there is a direct path ...

AG Hausner, as we have seen, regarded the Eichmann Trial's ability to 'give voice' to silent victims as its main innovation.<sup>87</sup> He believed that only a sovereign state could restore agency to the Jewish victims by opening the trial to their testimonies. Auerbach shared his understanding of the trial as a symbol of Israel's sovereignty, but she deeply disagreed with his view of victims as passive recipients of justice from the state. She saw the victims' efforts to collect testimonies while they were still in the ghetto as having given birth to the Eichmann Trial. She promoted a 'bottom-up' understanding of law and history and of the community's participation in criminal trials, an approach that recognizes the important agency of the victims.

Auerbach's testimony failed for many reasons. But with the disappearance of her testimony from the annals of international law, the important alternative she promoted was also forgotten. International criminal law still struggles with the questions that preoccupied her: Can we expand the crime of genocide beyond physical violence and mass murder to encompass cultural genocide? How can we make victims an integral part of atrocity trials without presenting them as passive and helpless? Is erasing the agency of victims the necessary 'price' for conducting a criminal trial? Can a criminal trial adapt its individualist rules and procedures to community participation?

One solution that has developed since the 1990s in an attempt to overcome these difficulties is the truth and reconciliation commission. This institution ascribes importance to victims' testimonies, and emphasizes its therapeutic and historical functions in a way similar to Auerbach's vision. Auerbach, however, resisted the language of reconciliation; instead, she saw the importance of a criminal trial as lying precisely in its retributive functions.

The role of victims in the trials of mass atrocities and political violence has changed since their early exclusion from the IMT in Nuremberg. The special tribunals for the former Yugoslavia and Rwanda in the 1990s relied heavily on victims as eyewitnesses for the prosecution. However, they did not become full participants in the trial.<sup>88</sup> As a result, the historical narrative these trials advance is of victims as passive recipients of international justice.<sup>89</sup> This is especially true of female victims, whose testimonies are

<sup>86</sup>Eichmann Trial, Minutes of Session no. 26, May 3, 1961, ISA-PMO-GPO-000xkq8, Cc2.

<sup>87</sup>This is evident already in his opening statement: 'When I stand before you here, Judges of Israel, to lead the Prosecution of Adolf Eichmann, I am not standing alone. With me are six million accusers. But they cannot rise to their feet and point an accusing finger towards him who sits in the dock and cry: 'I accuse!.' Ibid., Minutes of Session no. 1, April 11, 1961.

<sup>88</sup>Leora Bilsky, 'The Right to Truth in International Criminal Law,' in Kevin Jon Heller et al., (eds.), *The Oxford Handbook of International Criminal Law* (Oxford: Oxford University Press, 2020), pp. 473, 478.

<sup>89</sup>For a similar critique of the 'criminal turn' in human rights law, see Karen Engle, 'Anti-Impunity and the Turn to Criminal Law in Human Rights,' *Cornell Law Review*, 100 (2015): pp. 1069-1127; Karen Engle, Zinaida Miller, and D.M. Davis, (eds.), *Anti-Impunity and the Human Rights Agenda* (Cambridge: Cambridge University Press, 2016).

confined to stories of rape and sexual violence.<sup>90</sup> The Rome Statute of the International Criminal Court (ICC) adopted a more victim-centered perspective, and began to perceive victims as participants whose ‘views and concerns’ should be given consideration, but it still did not recognize them as full parties to the trial.<sup>91</sup> Auerbach’s vision was more radical, since she believed that the victims should play a proactive role in atrocity trials, not just as victims who have ‘personal interests’ in the proceedings, but also as active participants in the indictment and prosecution, including in the choice of witnesses.

We saw that Auerbach viewed victims’ testimonies not only in terms of their usefulness as legal evidence, but also as an important medium for restoring victims’ agency in the wake of a crime designed to eradicate their humanity. Her conception of victims’ agency is highly relevant to the current debate about the status of victims in ICC proceedings. Sara Kendall and Sarah Nouwen argue that when the ICC invokes ‘The Victims’ as a justification for the court’s legitimacy and authority, it does not refer to specific, actual victims, but rather to an abstraction ‘which is based on the idea of victims.’<sup>92</sup> This abstraction serves as ‘a placeholder for the agency of others,’ the active agents who represent or speak on behalf of the helpless, passive, and depoliticized victims.<sup>93</sup>

Auerbach’s view of testimony as a collaborative effort between victim and interviewer is also highly relevant to current debates on community participation in international criminal trials.<sup>94</sup> Recent research has focused on how survivors ‘come to tell their stories to representatives of an international tribunal.’<sup>95</sup> Writing on testimonies of sexual violence at the International Criminal Tribunal for Rwanda (ICTR), sociologist Jonneke Koomen remarks, in a similar fashion to Auerbach, that testimonies are not ‘texts that speak for themselves, [but rather] they are stories that are collected by tribunal workers and their collaborators, often in precarious and politicized circumstances.’<sup>96</sup> Koomen quotes Rwandan women who stated that ‘they would have reported sexual violence to ‘someone from the community or a women’s organization with whom they are familiar,’ preferably to women investigators and interpreters.’<sup>97</sup> Indeed, many Rwandans witnesses refused to speak to foreign ICTR investigators. In these circumstances, language assistants from the local community, who were meant to provide technical assistance, played a vital role in negotiation and communication.<sup>98</sup> Koomen concludes that ‘The

<sup>90</sup>For a critical discussion of the focus on sexual violence in feminists’ engagements with international criminal tribunals, see Karen Engle, *The Grip of Sexual Violence in Conflict: Feminist Interventions in International Law* (Stanford: Stanford University Press, 2020); Janet Halley, ‘Rape at Rome: Feminist Interventions in the Criminalization of Sex-Related Violence in Positive International Criminal Law,’ *Michigan Journal of International Law*, 30, no. 1 (2008): pp. 1-123.

<sup>91</sup>Article 68(3) of the Rome Statute of the International Criminal Court. For elaboration, see Bilsky, ‘The Right to Truth in International Criminal Law,’ pp. 480-481.

<sup>92</sup>Sara Kendall and Sarah Nouwen, ‘Representational Practices at the International Criminal Court: The Gap Between Juridified and Abstract Victimhood,’ *Law and Contemporary Problems*, 76, no. 3/4 (2013): p. 254.

<sup>93</sup>*Ibid.*, pp. 255-256.

<sup>94</sup>For a general discussion on non-governmental organization (NGO) participation at international criminal and human rights courts, see Heidi Nichols Haddad, *The Hidden Hands of Justice: NGOs, Human Rights, and International Courts* (Cambridge: Cambridge University Press, 2018). For critical discussion on the way in which community participation can also hinder certain testimonies of women, see Kimberly Theidon, ‘Gender in Transition: Common Sense, Women and War,’ *Journal of Human Rights*, 6, no. 4 (2007): pp. 453-478.

<sup>95</sup>Jonneke Koomen, ‘Without These Women, the Tribunal Cannot Do Anything’: The Politics of Witness Testimony on Sexual Violence at the International Criminal Tribunal for Rwanda,’ *Signs*, 38, no. 2 (2013): p. 257.

<sup>96</sup>*Ibid.*

<sup>97</sup>*Ibid.*, p. 259. It is interesting to compare this with the practice of testimony collection by the *Zamlers* in postwar Poland. Jockusch, *Collect and Record!*, p. 98.

<sup>98</sup>Koomen, ‘Without These Women,’ p. 261.

work of uncovering Rwandan women's stories is not just the work of legal professionals; it is made possible also by care work performed by women's and survivors' groups.<sup>99</sup>

Auerbach's vision is also relevant to current debates over the gendered dimension of international criminal law more generally. Feminist engagement with international criminal law has largely focused on conflict-related sexual violence. Auerbach adopted a more holistic understanding of genocide that encompassed its economic, cultural, and physical aspects. This allowed her to turn her attention to the hunger in the ghetto on the one hand, and to cultural resistance on the other. Both aspects involved the specificity of women's suffering, but also their agency. Her view of testimony-giving and -collecting as antidotes to genocide enabled her to depict acts of resistance in which both women and men took part. The emphasis on the importance of cultural resistance to genocide, and in particular the act of collecting testimonies, draws attention to the agency of women such as Auerbach herself.

Even though Auerbach's vision of victims' testimonies and of atrocity trials more generally did not fully materialize, it can offer an important alternative. It shows how an understanding of the crime of genocide as a unique attack on a group's culture and identity may be combined with a procedural reform of the criminal trial that puts victim testimonies at the center, thereby allowing them to become full and equal partners in atrocity trials. Her innovative approach, which is as relevant today as it was over sixty years ago, is therefore worthy of serious consideration.

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## Notes on contributor

**Leora Bilsky** is the Benno Gitter Chair in Human Rights and Holocaust Research at the Tel Aviv University Faculty of Law, as well as the director of the Minerva Center for Human Rights, also at Tel Aviv University. She clerked at the Israel Supreme Court and completed her J.S.D. at Yale University Law School. Bilsky is the author of *Transformative Justice: Israeli Identity on Trial* (Ann Arbor, MI: University of Michigan Press, 2004) and *The Holocaust, Corporations, and the Law: Unfinished Business* (Ann Arbor, MI: University of Michigan Press, 2017). She has been the editor of *Theory and Criticism* (Teoria ve-Bikoret), and of several law journals, including *Mishpatim: the Hebrew University Law Review*, *Tel-Aviv University Law Review*, and *Theoretical Inquiries in Law*. Her areas of research include law and the Holocaust, transitional justice and the era of the witness, political trials, criminal international law, and feminist legal theory. She is currently working on the history of genocide and cultural restitution.

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<sup>99</sup>Ibid., p. 273.