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FORUM

The Eichmann Trial Fifty Years On

On 11 May 1960, a team of Israeli intelligence operatives captured Adolf Eichmann in a suburb of Buenos Aires. Eichmann, former head of the Jewish Department in the Reich Security Main Office, was taken to Israel to stand trial for his role in the Holocaust, accused of crimes against the Jewish people and against humanity. His trial opened in Jerusalem on 11 April 1961. It proved to be a watershed moment in postwar history, helping to raise global awareness of the Nazi genocide of the Jews, demonstrate Israel's willingness to assert itself on a global stage, and, for the first time since the Nuremberg trials, put the question of justice for Nazi atrocities back on the world stage. The following decades saw continued efforts to institutionalize international jurisdiction over mass atrocities, efforts that finally came to fruition in 1998 with founding of the permanent International Criminal Court. Yet alongside the ICC, national, mixed and ad hoc tribunals continue to operate, making it particularly complex to judge the relationship between the Eichmann trial and subsequent developments. At the same time, the Eichmann trial was not only an important legal moment in postwar history, it also contributed significantly to shaping the historiographical and psychological understanding of Nazi genocide. For popular audiences in particular, Eichmann continues to figure as an archetypical Holocaust perpetrator. On this fiftieth anniversary of the opening of Eichmann's trial in Jerusalem, *German History* has asked five leading legal historians to reflect on some of the trial's historical and legal legacies. They are Leora Bilsky (Tel Aviv), Donald Bloxham (Edinburgh), Lawrence Douglas (Amherst), Annette Weinke (Jena) and Devin Pendas (Boston College). The questions were posed by the editors.

1. Why did the Eichmann trial elicit such a strong popular response at the time, given that the trials of the 1950s largely failed to resonate? Was it simply the adventure narrative associated with Eichmann's capture? Was it a matter of a changing media landscape? What role did the fact that the trial took place in Israel rather than Germany play in this?

Bloxham: The question hints at several salient explanations. The adventure narrative, however, was no more important, and probably less so, than the ramifications of the breach of national sovereignty entailed in Eichmann's abduction from Argentina. The latter drew a great deal of media attention and was the main international political focus, judging by the ensuing UN debates and resolutions. Moreover, the blow to Argentinian amour-propre catalyzed a number of antisemitic attacks in Argentina itself.

Media developments were also important but, again, their role is not entirely straightforward. The filming of the trial had greater impact outside Israel, especially in the USA. Most interested Israelis relied on the nightly radio digests. Besides, the media furore around the case did not itself guarantee extensive engagement with the substantive historical content of the trial, as opposed to its simple fact and form.

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The trial's impact is further relativized by other consciousness-raising events that came before and after it. Total silence about the Holocaust did not prevail before Eichmann's arraignment, though any survey of general historiography from the 1950s and 1960s will reveal the marginal status of Nazi genocide in mainstream historical thought, while in all affected European countries, genocide was subsumed within larger political narratives of suffering and sacrifice. Israel itself had been home to projects of recording survivor testimony shortly after the war, and Holocaust-related issues had entered Israeli courtrooms via the trials of the Jewish camp Kapos from 1951, and the 1954/55 libel trial over claims that Rudolf Kasztner had collaborated with Nazi Germany. Shortly after the Eichmann trial, West Germany went through one of its periodic bouts of 're-discovering' the murder of the Jews via the Auschwitz trials of the mid-1960s, some of the responses to which gave the impression that Eichmann and the Holocaust had never before been subjected to legal or any other examination, despite the earlier recorded popular interest in the Jerusalem proceedings. But these contextualizations cannot obscure the relatively great intensity of interest surrounding the Eichmann trial in Israel, nor the unprecedented, simultaneous international scope of attention that the proceedings garnered.

Weinke: When Adolf Eichmann was abducted his name was probably known only to a small circle of initiates. Similarly, only a few experts were familiar with the role that his former department had played in the complex network of the National Socialist extermination apparatus. These were mainly historians, prosecutors and Jewish survivors who had set themselves the task of tracking down Nazi perpetrators who had fled or gone into hiding after the end of the war. By the time the main proceedings against Eichmann began a year later in the District Court in Jerusalem, this situation had fundamentally changed. The fact that the trial became a transnational media sensation must be explained in part by longer-term developments. For instance, the historical-cultural approach to National Socialism had already begun to change in numerous ways ten years after the war. To be sure, a heroicizing perspective on the events of World War II continued to dominate, but beneath the surface a gradual transformation in memory culture was already taking place in most of the Western democracies. This was not only becoming increasingly pluralistic, but also increasingly focusing on the victims of political repression and genocidal policies.

Three developments in particular helped pave the way for the Eichmann trial to become a media sensation. First, a series of Jewish survivors and historians undertook the first attempt to counter the dominance of national 'master narratives' through counter-narratives that usefully focused on the history of antisemitism and the extermination of the Jews. Publications such as those by Gerald Reitlinger, Josef Wulff, Léon Poliakov, Elie Wiesel, André Schwarz-Bart and Raul Hilberg met with growing public and media interest. Among the common features of these and other early works on the Holocaust was, on the one hand, that they dealt more closely with the victims, who had previously played hardly any role in academic historical works; and on the other hand, that the crimes of the 'Final Solution' were rendered concretely comprehensible, in that perpetrators were named and their involvement was described in minute detail. Above all in the Federal Republic, which had up to then avoided any detailed debate

concerning those responsible for mass crimes, this represented an unparalleled violation of the taboo concerning the rules of polite discourse.

The second factor was the fact that the Federal Republic had resumed the criminal investigation of National Socialist crimes beginning at the end of the 1950s. In contrast to the Nuremberg trials, these new German trials concentrated overwhelmingly on the murder of Jews in Eastern Europe. Thus, it was above all those who had been present at the execution pits or served as SS guards in the concentration camps who were the subjects of criminal investigation. Since these investigations frequently relied on legal aid from Israeli and American officials, an international network of investigators and criminologists concerned with Nazi crimes formed. It was no accident that Mossad was put on Eichmann's trail by a German prosecutor: Fritz Bauer, himself a former victim of Nazi persecution, so deeply mistrusted West German officials that he instead appealed to his Israeli colleagues.

Finally, a few years before the opening of the trial, Eastern bloc states had launched a propaganda campaign against the Federal Republic. This created a social climate in which the remarkable reintegration of the majority of former Nazi bureaucratic elites was followed with growing distrust. The German Democratic Republic in particular was able to mobilize a critical subset of the public through its propaganda bluster. Western states, too, were becoming sensitized to the problem of personnel continuity. Although the leadership of the Federal Republic sought to ignore the 'antifascist' barrage, they could not prevent numerous Western media outlets from publicizing the exposure of real and alleged Nazi desk criminals.

Pendas: We ought not to underestimate the significance of the adventure narrative itself. If one examines the early *New York Times* coverage of Eichmann's capture, for instance, there is a clear fascination with the technical details of the operation. Equally significant, in terms of the popular resonance of the Eichmann case, was that it occurred at a moment of transition. In the first decades after the war, popular culture had been concerned mainly with the heroic representation of the war itself. Alistair MacLean's *Guns of Navarone* (1957) could be seen as prototypical. This started to change in the 1960s, as the legacies of Nazism started to interest the culture industry outside Germany. One thinks, for example, of Stanley Kramer's *Judgment at Nuremberg* (1961). At the same time, the Eichmann case in some ways shaped this transition as well. By the 1970s, the figure of the hidden but still dangerous Nazi became a staple of popular thrillers such as Frederick Forsyth's *The Odessa File* (1972), William Goldman's *Marathon Man* (1974) or Ira Levin's *The Boys from Brazil* (1976). Of course, the notion that elderly Nazis hiding in South America continued to pose a potent threat in the 1970s played into the paranoid style of Watergate-era American culture, but the deliberate connection to Eichmann, and to Dr Josef Mengele, whose whereabouts were the source of much speculation at the time, linked this paranoia to a historical reality.

The other issue that I would stress is that it mattered very much that this trial took place in Israel, specifically a pre-1967 Israel. Before the Six Days War and the problematic occupation of Arab lands that followed it, Israel enjoyed much broader popularity with Western publics both in the US and, especially, in Europe than would be the case later. In

particular, with its left-wing Zionist governments and its Kibbutzim, Israel at this point enjoyed substantial popular legitimacy within left-wing and oppositional circles in America and Europe, precisely those groups that were most likely to be fascinated by a trial of former Nazi functionaries and to be convinced that Nazis had been aided and abetted by conservative elites after the war.

2. While the trial obviously attracted enormous popular and intellectual attention at the time, it is worth asking what, if anything, it contributed to the long-term development of efforts to develop a legal response to mass atrocity. Did the trial make any significant contributions, legal, symbolic or political, to the development of efforts to pursue justice for mass crimes?

Bilsky: The Eichmann trial and the International Military Tribunal at Nuremberg together indicate a radical transformation of international law in the treatment of mass atrocity. They signal a move from the political solution on the level of states to a legal solution on the level of individual perpetrators. This change was the result of a realization that wars, and the atrocities committed under their cover, can no longer be left outside the ambit of criminal law. However, this change was not easy to implement, as criminal law was traditionally under the monopoly of a nation state. In order to bring individual state-actors who implemented the policy of a criminal state to trial, the link between state sovereignty and criminal law had to be severed. In this respect, although the Eichmann trial relied on many of the precedents set by the previous Nuremberg trial, it had to break new legal ground, because this was the first occasion on which a national court relied on domestic criminal code to adjudicate international crimes that had occurred outside its territorial jurisdiction. Here we can identify one of the most important contributions of the Eichmann trial towards ending the age of impunity—the recognition of the principle of universal jurisdiction of third-party courts over crimes such as 'crimes against humanity' and genocide. At the time, the decision of the Israeli court was criticized as political, undermining the neutrality of criminal law by introducing a type of victims' justice. The legal implications did not become apparent until after the end of the Cold War. However, since the 1990s this neglected doctrine has become the cornerstone of a growing jurisprudence of atrocity.

Another important innovation of the Eichmann trial was to revolutionize the status of the victims. At the time, the decision of the Israeli prosecutor to open the trial to the testimonies of one hundred and twenty survivors was harshly criticized as undermining the possibility of a fair trial. However, in hindsight we can trace the important changes in the status of victims in criminal international law to this decision. While criminal law traditionally sought to balance the rights of defendants against the power of the state, the jurisprudence of atrocity has been facing the opposite problem: the need to protect the rights of victims against the power of states. Thus, we can trace important changes in the protection of victims' rights by international tribunals and in the status of the International Criminal Court to this realization. It is important to notice, however, that international law still treats victims' testimonies as secondary or instrumental to the main goal of establishing the guilt of the defendant. The revolutionary treatment of victims' testimonies as central to larger societal changes has had its most remarkable impact in

the development of truth commissions, such as the South African Truth and Reconciliation Commission in which 'truth' was preferred to 'punishment'. It is in the context of transitional justice that we can identify the most important legacy of the Eichmann trial, the shift from the traditional goals of criminal law—retribution and deterrence—to more symbolic goals such as the clarification of history and the construction of collective memory.

Bloxham: David Ben Gurion referred to the Eichmann trial as the 'Nuremberg of the Jewish people', suggesting that it itself was already set in a context of developing legal responses to mass atrocity. That context was one in which crimes against Jews were seen as having hitherto been addressed insufficiently, or at least inadequately in terms of their specificity. The charge 'crimes against the Jewish people' stands in a clear relationship to the more universal 'crimes against humanity' charge that Nuremberg helped render from a fragile legal concept into one of the most rhetorically powerful of international legal devices. Because of its own specificity, 'crimes against the Jewish people' was clearly not widely transferable as a legal concept. Contrary to some of the received wisdom about the trial, however, 'crimes against humanity' were part of the indictment.

Douglas: Among international prosecutors and scholars of international criminal law, the Nuremberg trial of the Major Nazi War Criminals (IMT) continues to be lauded as *the* watershed moment in international criminal law; in fact, its reputation is far stronger today than at the time of its staging. The Eichmann trial, by contrast, remains unfairly neglected as an important precedent in the development of international law. Ironically, the one legacy of the Eichmann trial that some legal scholars consider noteworthy was its jurisdictional profile. The Eichmann court established jurisdiction over the accused by appealing to a number of arguments, one of which was the theory of universal jurisdiction, that is, jurisdiction conferred exclusively by the nature of the crime. Eichmann, the court reasoned, was an international pariah, like a Barbary pirate, and so could be treated as a *hostis humani*, an enemy of humanity. His crimes were so extreme as to authorize any court, anywhere, to sit in judgement on the former Nazi official.

In the decades following the Eichmann trial, universal jurisdiction seemed to be little more than a moribund juridical curiosity, only to experience a remarkable revival with the Pinochet affair, the prosecution of Serbs in Germany for atrocities in the Balkans, and the passion of Belgian prosecutors to seek indictments against a slew of the world's most prominent statespersons. That this should be considered the principal legal legacy of the Eichmann trial is ironic, because the invocation of universal jurisdiction implies that *any* domestic national court can serve the interests of universal justice. The Eichmann trial, however, stands as *the* outstanding example of a very different proposition: that in order for a trial of a perpetrator of international crimes to succeed in all its dimensions—as an exercise in retributive justice, as a tool of establishing a baseline historical account, and as a means of conferring dignity on the lived experience of survivors—there must be an organic link between proceeding, people and place. The Eichmann court relied on the device of universal jurisdiction to help anchor its claim to the defendant, but the trial itself stood for the importance of situating international trials in venues with a meaningful organic connection to the crimes before the court.

Pendas: I am actually rather sceptical about the notion that the Eichmann trial made any significant long-term contributions to the development of what has come to be called 'transitional justice'. In a jurisprudential sense, the prominence of the charge of 'crimes against the Jews' rendered the case too idiosyncratic to serve as a useful precedent. Indeed, an admittedly cursory review of rulings by the International Criminal Tribunal for Former Yugoslavia (ICTY), International Criminal Tribunal for Rwanda (ICTR), or the still inchoate ICC reveals relatively few references to the Eichmann case, in contrast, say, to Nuremberg. And when the Eichmann case is cited, it is often on narrowly technical issues, such as functional immunity for state officials subpoenaed as witnesses. As for the issue of universal jurisdiction, in the Eichmann case, I think that is something of a red herring. Israel neither claimed nor exercised universal jurisdiction in this case. Rather, they claimed jurisdiction on behalf of the victims. In a way, one could say that Israel claimed a kind of sovereign jurisdiction, as the successor state to the diasporic Jewish communities of Europe destroyed by the Nazis. This is clearly a unique situation.

Politically, one could say that the Eichmann trial did have some significant longer-term impact in that it highlighted the issues of temporality and unofficial impunity. Eichmann was seized fifteen years after the end of World War II. It was the first in a renewed wave of Nazi trials that lasted at least into the 1980s and in some ways, especially in terms of civil litigation, well beyond. The sense that people had in the 1950s that World War II was over was disrupted by this and subsequent trials like it in Germany and France. It turned out that World War II was, to borrow a phrase from François Furet, not only not over, it was not even past. The debate concerning the statute of limitations for murder in West Germany would be another dimension of this. The upshot of this was the establishment of an international law principle of non-prescriptability for genocide and crimes against humanity. The problem that the trial brought to light, namely that it sometimes takes many decades to punish perpetrators of the worst political crimes, was ultimately resolved in favour of perpetuity. The second issue that the Eichmann trial brought to light was unofficial impunity. In other words, there are many cases where serious offenders are not officially granted amnesty, de jure, but where a de facto policy of non-prosecution reigns. In Eichmann's case, this was less about West German policy than it was about Argentina's. Providing refuge for human rights violators from other countries remains a common practice in the world. To the extent that we have come to believe that such violators ought to be punished in courts of law, this amounts to abetting their crimes after the fact. Yet as a matter of politics, legal claims of jurisdiction will continue to have only as much force as the host government wants them to have. And that will be a purely political, rather than a legal calculation.

Weinke: In terms of its own self-understanding, the Eichmann trial represented a continuation and further development of the Nuremberg trials. This manifested itself in the first instance in the material legal foundations of the proceedings, since the Israeli Nazi Punishment Law of 1950 was partially based on the London Charter authorizing the IMT at Nuremberg. To a certain extent, though, this was also true for the historical-cultural objectives of the Israeli prosecution. In their desire to use the trial to formulate a consensual historical understanding, the Israelis followed the lead of the American prosecution at Nuremberg, whose pedagogical concept had been to disseminate a strongly intentionalist interpretation of National Socialism. At the same time, the Israelis

sought to overcome Nuremberg, in that they put victim witnesses at the centre of the proceedings, instead of documentary and filmic evidence. This testimony served as a memorial vehicle for conveying a particular interpretation of the Holocaust, namely, that it was the culmination of a predominately negative Jewish history. It was less this particular strategy than what many felt was the striking transformation of the courtroom into a venue for the formulation of national sentiments that generated criticism of this kind of 'didactic legality' (Lawrence Douglas), both at the time and since.

Despite this in many ways justified critique, the trial doubtless contributed to the new energy brought to efforts to punish National Socialist crimes in many countries in the 1960s. In the Federal Republic itself, where the first wave of new trials got underway shortly before Eichmann's capture, this led to the substantial expansion of investigations and the extension, after much debate, of the statute of limitations. In a period in which the remembrance of the murder of the Jews was increasingly supplanted and repressed by generational conflict and the revival of Neo-Marxist theories of fascism, West German Holocaust trials continued to represent an important site for historical self-understanding. The Eichmann trial unleashed at least temporary impulses to intensify the prosecution of Holocaust crimes in other European countries as well. Unlike the Federal Republic, where National Socialist crimes continued to be prosecuted on the basis of national criminal law and which, as a consequence, achieved mainly inadequate results, the French, for example, integrated the Nuremberg principles into national law. Thus, the French National Assembly passed a new law in December 1964 declaring the non-prescriptability of crimes against humanity. Moreover, in response to various initiatives from Eastern bloc countries, the General Assembly of the United Nations approved the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity in November 1968. (It should be noted, though, that this had more to do with American military involvement in Southeast Asia than it did with the Holocaust.)

3. Gideon Hausner, Israeli Attorney General and lead prosecutor in the trial, pursued a broad historical strategy in the Eichmann trial. He called a wide range of witnesses and sought to use their testimony to tell the history of the Holocaust comprehensively and from a decidedly Jewish point of view. How well do you think this strategy worked? And to what ends?

Pendas: I think Hausner's strategy succeeded brilliantly on its own terms. For Hausner, the Holocaust was the last and worst in a long line of atrocities perpetrated against the Jews, stretching back to biblical times. Unlike earlier trials for Nazi atrocities, this one would focus on the 'tragedy of Jewry as a whole'. In other words, Hausner set out to disentangle the Nazi genocide of the Jews from the broader history of the Third Reich and the Second World War, to deal with it in its specificity. Although Hausner was perhaps somewhat unfair to the Nuremberg trials, and to the *Einsatzgruppen* Case in particular, when he claimed they had failed to identify the specificity of the Holocaust, he was surely right that in no previous case had the mass murder of European Jewry been identified as the end point of European *Jewish* history. This was, I think, enormously influential at the time in bringing out and defining the Holocaust as a distinct event. To

the extent that people globally began to think of Nazi crimes against Jews as distinct from Nazi crimes against Poles or Russians or downed Allied airmen, the Eichmann trial, with its narrative of Jewish suffering and loss, marked a turning point. (In this respect, the stress that people such as Peter Novick place on the impact of the Six Days War strikes me as overstated).

At the same time, we ought not to underestimate the contemporaneous political import of Hausner's interpretation. His was very much a Zionist history of the Holocaust. The long history of Jewish suffering was a diasporic history, one to be resolved by the founding of a Jewish state. In the closing section of his opening statement, Hausner offered a lament for the lost culture of European Jewry destroyed by the Nazis. 'Providence, which preserved a saving remnant', thwarted the Nazi ambition to obliterate Jewry and Jewish culture in its entirety, he concluded. That saving remnant, he did not bother to add, resided in a small, embattled state surrounded by hostile neighbours. Israel, the nation state, was to redeem the nearly destroyed culture of European Jewry. The success of this aspect of Hausner's strategy was decidedly more mixed. My impression is that the Eichmann trial was fairly successful within Israel in linking contemporary politics, security concerns in particular, to a historical self-understanding rooted in the history of the Holocaust and antisemitism. Outside of Israel, I think this strategy was only partially successful. To be sure, the long-standing American support for Israel gained steam around this time, but this has more to do with the Americans' post-Suez quest for a reliable ally in the region to counter Soviet moves than with any cultural identification with a narrative of Zionist redemption. And in Europe, the Six Days War and an emerging Left that increasingly identified with anti-colonial politics, as a result of post-colonial guilt and anti-American sentiment fuelled by Vietnam, meant that Hausner's Zionist narrative fell on deaf ears.

Douglas: Hausner's strategy of arranging the prosecution's case around the testimony of survivors worked brilliantly as a means of galvanizing national and international attention around the trial. As is by now familiar, Allied prosecutors at Nuremberg structured their case around captured documentary evidence, material considered harder and more reliable than eyewitness testimony. Unfortunately, this approach left the trial without an 'affirmative human aspect', turning it, to borrow Rebecca West's memorable formulation, into a 'citadel of boredom'. The failure of the prosecution to call more than a token number of victims, and the virtual absence of testimony from Jewish survivors, disappointed victims' groups and eroded support for the trial within victim communities.

The Eichmann trial consciously attempted to correct the Nuremberg approach. Although Arendt lamented the spectacle of survivors unburdening themselves in court, Hausner's survivor testimony strategy brilliantly succeeded in capturing the hearts and minds of a large audience. I think it's fair to say that Hausner himself did not anticipate just how successful the strategy would be. Indeed, I think it would be no exaggeration to say that the trial was instrumental in *turning the Final Solution into the Holocaust*. By this I mean that a terrifying episode of state-sponsored atrocity, until then treated as one chapter in the overall horror of World War II, now was liberated from the logic of armed conflict, and so came to be seen as perhaps *the* emblematic event of the twentieth century: as the model of the genocidal potential bound up in the modern state.

As a second matter, I believe the trial played a crucial role in ushering us into the 'age of testimony'. Yad Vashem reports that in the wake of the Eichmann trial, many survivors came forward to record their story for posterity. In this regard, the trial assumed the quality of an oral history project, with the crucial difference that the trial conferred an immediate efficacy and power to the testimonial act. When delivered in court, testimony is transformed from a narrative of victimization into a probative article of evidence; it becomes part of the prosecution's case. This empowers victims, turning stories into a potent tool of indictment and possible conviction.

It is no surprise that if we look to the more recent work of the ICTY and ICTR, we see that it now becomes possible to speak of victims' *rights* in international cases. These include matters of voice and of control; they embrace everything from a protection of the interest that victims have in telling their stories told in court to a relaxation of the norms that conventionally protect the defendant's rights of confrontation, and to a recognition of the right of civil interveners to represent victims groups in the trial process. The International Criminal Court (ICC) likewise acknowledges the rights of victims to participate in proceedings, to receive protection from intimidation and threats, and to get reparations. This last right, of course, goes beyond anything contemplated by the Eichmann trial, which envisioned the act of bearing witness, of offering testimony in open court, as itself a form of reparations. But the Eichmann trial must be seen as a crucial moment of transition that helped usher the lived experience of victims and survivors to the centre of the international criminal trial.

Bilsky: I believe that it is important not to be taken in by the polemics surrounding Hausner's debate with Hannah Arendt. These paint a simplistic picture according to which Hausner was solely concerned with the extra-legal goals of shaping memory and history while Arendt upheld a narrow legalistic conception of the trial. Such a dichotomous view does not allow us to understand the competing conceptions of jurisprudence and history that were at the centre of the debate. In fact, we cannot understand the debate if we do not see a deeper agreement between the two. Arendt and Hausner shared the belief that justice depended on a proper understanding of history, and in particular, that the law had to throw light on the novelty of the crimes committed by the Nazis. Hence it was crucial to both that the trial get the history right. They also, moreover, shared a jurisprudential understanding that law would have to change dramatically in order to cope with these unprecedented crimes. However, the clash between Arendt and Hausner was informed by two opposing views of historiography and justice. Hausner sought to remedy the 'silences' of the Nuremberg trial by placing the Jewish Holocaust at the centre of the Eichmann trial. The historical narrative that he advanced was a Jewish-national narrative about the long history of persecution of the Jews throughout the ages that culminated in Auschwitz. Accordingly, the prosecution chose to focus its case on the new legal category of 'crimes against the Jewish people'. Building the prosecution's case on the testimonies of the victims was meant not merely to substantiate the guilt of the defendant, but rather to tell the history of the final solution from the point of view of the survivors. In doing so, Hausner introduced a new type of testimony, now known as 'ethical testimony'. Arendt was strongly opposed to this attempt as it dangerously moved the law too close to the realms of the irrational and the emotional (she called these testimonies 'testimonies of

suffering'). It threatened to distract the court from finding evidence for the guilt of the accused. However, Arendt's own conception of the trial was also informed by an understanding of history, albeit very different from the one upheld by Hausner. Arendt wanted to understand Eichmann's actions using the tools of modern historiography. She saw the unprecedented nature of the crime as connected to the rise of the totalitarian state and depicted Eichmann as the product of his own age—the age of bureaucracy, science and ideology. Arendt's main effort was to expose the limitations of traditional categories of criminal law that are irremediably connected to the nation state, and she urged the court to rely on new crimes such as genocide and crimes against humanity.

Bloxham: Chief Prosecutor Gideon Hausner was largely correct that the Nuremberg strategy had 'failed to reach the hearts of men' because of the limited use of witnesses. Yet it was not just a question of witnesses as such, but the type of witness. The French and Russian prosecutions at Nuremberg had used victim witnesses selectively in the interests of their own state agendas, while the dominant American prosecution, where it used witnesses at all, drew them predominantly from the German side. In Jerusalem, the prosecution witnesses were mostly victims, and more specifically Jewish victims—the only non-Jewish eyewitness to Nazi criminality to testify for the prosecution was the German Protestant pastor and associate of Martin Niemöller, Heinrich Grüber. Though some of their testimonies were curtailed from the bench, many of these victim witnesses went on to provide real depth and substance to the historical narrative sketched by Hausner.

The legal relevance of the use of victim witnesses is that it helped cement a new rationale for the pursuit of justice for mass atrocity. To established justifications such as general prevention, specific prevention, or Kantian retribution, the use of victim witnesses added what has come to be called 'restorative justice'. This refers to the catharsis or validation that supposedly comes with having one's experiences of suffering acknowledged in a public, official forum. The perpetrator is a particularly important part of the victim's audience, as he is obliged to listen, removed from his erstwhile position of arbitrary power and placed in the role of witness to the impact of his own crimes. More recently, historians and witnesses have been used in varying balances, as courts such as the ICTY have tried to combine historically contextualized narratives of mass atrocity with a determination to render these narratives publicly accessible and to give them a human face, in the knowledge that the trial is of broader social relevance than simply the guilt or innocence of individual defendants. Whatever balance each trial establishes, the use of victim witnesses for the symbolic as well as practical value of their testimony is today an integral part of many criminal proceedings and other 'transitional justice' mechanisms such as truth and reconciliation processes.

4. The Eichmann trial also had a substantial impact on historical understanding of the Holocaust. Arguably, the most influential historical concept to emerge from the trial was Arendt's notion of the 'banality of evil'. In the light of recent historical research, is there any value left in Arendt's formulation, or was it simply a misreading of Eichmann and the trial that ought to be abandoned by scholars?

Douglas: Arendt's understanding of the banality of evil must be understood in dialogue with Kant's notion of 'radical evil'. As opposed to Plato, who considered evil a product of ignorance, a failure to distinguish the content of the 'good', Kant understood certain acts of evil as born of a conscious misdirection of the will. Radical evil is willed evil, evil pursued in a conscious inversion of the categorical imperative. The temptation to view the Holocaust as the product of such radical evil is all but irresistible. And perhaps we still need the concept of radical evil to make sense of figures such as Hitler, Himmler and Heydrich.

Arendt's focus was not on the logic of genocide or the motives behind it. Her concern was with the implementation and operation of genocide. Her argument concerning the banality of evil pointed to an important disconnect: between the astonishing, inconceivable horror of mass extermination and the rather unremarkable persons who kept the machinery of death running. In this her argument was not entirely original. Raul Hilberg, whose magisterial study *The Destruction of the European Jews* appeared roughly contemporaneously with the trial and provided a valuable source for Arendt, made a similar argument concerning the relationship between bureaucracy and genocide, famously arguing that the Holocaust was the largely the work of a loose affiliation of part-timers. Indeed, Hausner himself described Eichmann as a 'new kind of killer, the kind who exercises his bloody craft behind a desk'.

Of course, Arendt went further. Hilberg observed that the bureaucratic subdivision of tasks facilitates a kind of psychological evasion in which an official is able to ignore, deflect or suppress awareness of the moral wrongness of his acts. Arendt, by contrast, insists that Eichmann completely lacked moral knowledge of the wrongness of his acts. She believes that Eichmann acted not because he feared the consequences of refusal, not because he was prompted by careerism and ambition, but because he was prompted by a spirit of obedience, moral obligation and law-abidingness. Here again, she does not argue that Eichmann perceived a clash between the claims of conscience and the call of duty, choosing the latter over the former. Instead, Arendt makes the far more extreme claim that Eichmann was utterly unaware of any such clash. If accepted on face value, this reconstruction of Eichmann's mind would destroy the concept of *mens rea*, the idea that criminals have moral knowledge of the wrongness of their acts, an idea that supplies the conceptual lynchpin of the criminal law. It is no surprise, then, that the court in the Eichmann trial rejected this understanding out of hand; no court could accept it and continue to do its business.

Indeed, I also find the logic of Arendt's thesis untenable. If applied in the sense better associated with Hilberg's argument—that the subdivision of tasks within a bureaucratic organization provides powerful psychological cover for acts of atrocity—then the banality of evil remains a useful concept. But Arendt went too far. Without any evidence stronger than her powerful polemics, she insisted that Eichmann was a new kind of criminal, whose *only* sense of obligation was to those who commanded the most extreme crimes. Perhaps her claim strikes me as preposterous because it threatens to disable not simply legal judgement but the very act of moral reasoning.

Bloxham: Hannah Arendt's analysis of the trial (which she did not consistently attend) was less compelling than her account of Eichmann and her related concept of the banality of evil, which is still misunderstood by many historians unacquainted with the

philosophical tradition in which she wrote. The journalistic quality of *Eichmann in Jerusalem* can obscure what she meant in ascribing Eichmann's genocidal role to his 'thoughtlessness' or 'lack of imagination'. This misreading of Arendt took her as seeing Eichmann as merely having failed to see beyond his desk; she thereby allegedly reinforced the image of a small, unquestioning 'cog in a wheel' that Eichmann propagated in his Jerusalem 'memoirs'. Arendt's Eichmann supposedly evinced a symptom of what Weber called instrumental rationality, which Zygmunt Bauman has identified as one of the main culprits in the Holocaust. Yet Arendt meant something else. Eichmann, she thought, had distorted Immanuel Kant's 'categorical imperative' to read: 'Act as if the principle of your actions were the same as that of the legislator or of the law of the land'—or, in Hans Frank's formulation of 'the categorical imperative in the Third Reich', which Eichmann might have known: 'Act in such a way that the Führer, if he knew your action, would approve it'.

Arendt understood that in the Nazi system quasi-legal precepts emanated often unwritten and imprecise from the charismatic personage of Hitler, in a manner requiring imaginative interpretation. The importance of her characterization is that it bespeaks not instrumental rationality, but instead a commitment to what some scholars have imagined as a possible ameliorative to the coming dominance of the robots: what Weber termed *Wertrationalität*, a 'substantive' or value-based rationality. Arendt's Eichmann was acting substantively-rationally, since he had to have a reflective understanding of the 'will' that stood above the 'law', and proved very adept at self-organizing towards that 'will'. Arendt's depiction of Eichmann here has much in common with the historiographical consensus on Nazi policy-making around the concept of 'working towards the Führer'.

There is much more to it than this, of course, especially as regards the interaction between the two forms of rationality, which Weber understood would always co-exist in real life rather than ideal-type conception. Moreover, Weber based each form of rationality on a specific ethic: instrumental rationality was predicated upon a more consequentialist 'ethic of responsibility', in which the actor was aware of the costs of competing ultimate ends; substantive rationality was underpinned by a deontological 'ethic of conviction' in which the deepest inner motive for the act in itself was all-important. In the explanation of genocide perpetration, the complex way these 'ethics' end up relating (or not) to the 'rationalities' requires further explanation, and here Arendt gave insufficient attention to Eichmann's own early ethical choices to affiliate himself with right-wing organizations and ultimately Nazism. What is important here is that reports of the irrelevance of Arendt's general concept are premature. Even if her account does not quite work for Eichmann himself, it remains one hugely stimulating heuristic device with which to approach the perpetration of genocide, and may well shed important light on other perpetrators.

Pendas: Two things are worth noting immediately about Arendt's understanding of the Eichmann trial. The first is that empirically, she was wrong about Eichmann himself. There is ample evidence to show that Eichmann was, in fact, a rather zealous antisemite who should be understood as a perpetrator of conviction. Indeed, Serviatus's defence strategy was largely informed by the contemporaneous jurisprudence in West German Nazi cases, where perpetrators who 'merely assisted in a foreign deed' and who 'did not

make the act their own' were treated as accomplices and typically received quite mild sentences. Serviatus appears to have been trying to suggest that Eichmann was merely an accomplice to the genocide of the Jews. This was a futile strategy in an Israeli court, however well it might have worked in West Germany. Yet Arendt, with her decidedly German sensibilities, appears to have bought into the defence's version of Eichmann.

The second thing to note about Arendt's interpretation is that for all that she got Eichmann wrong, she captured something essential about the nature of modernity in her analysis and, I would add, also about the conundrums facing the law in cases of state-sponsored mass crimes. The banality of evil, as I read that concept, is meant to capture the difficulties of formulating and operationalizing ethical principles in a complex social world organized by impersonal, value-neutral social structures. For complex historical reasons, according to Arendt, the scope for what she termed 'action', that is, for autonomous, willed human agency, was decreasing in the world. In this context, which she took as a historically and sociologically demonstrable fact, rather than a theoretical prescript, the faculty of judgement risked paralysis. This was true for bureaucratic actors, such as Eichmann, but also for those who sat in subsequent judgement on their atrocities. The notion of banal evil was an attempt to preserve some small space for judgement in such a world. Unlike the Kantian notion of radical evil, which depended on a notion of autonomous will, and was therefore historically outmoded, banal evil sought to recognize the diminished scope for autonomy in the modern world, while still preserving the capacity for moral and legal condemnation. Whether Arendt ultimately succeeded in this project, philosophically, is open to debate, but I at least am convinced that she accurately diagnosed one of the central dilemmas of modernity. Even if we are not ultimately persuaded by her answers, in other words, she was at least asking the essential questions.

Bilsky: Arendt's provocative phrase, the 'banality of evil', was directed at exposing a gap that has opened up between the central assumption of Western criminal law about the mental state and motives of a murderer and the new notion of the perpetrator of administrative crimes. It aimed to illuminate the way in which the bureaucratic setting of the crime and its commission under the direction of a criminal state stand at odds with the individualist and subjectivist assumptions of the criminal law. The provocative phrase ignited a heated public debate to which historians, philosophers, sociologists and others have contributed. However, it was mostly ignored by legal scholars. The Israeli prosecution was keen to prove Eichmann's ideological fanaticism and lies as a way to adapt the new type of criminal to the strictures of criminal law. This, however, did not answer the larger challenge to the law identified by Arendt. The new historical findings can therefore refute Arendt's depiction of Eichmann the man, but they cannot answer the more troubling criticism about the disjuncture between the legal tools and the social reality of administrative crimes. The banality of evil, as a heuristic concept, calls for an investigation of the way in which modern crimes are committed within a bureaucratic setting (within the army, state organizations, or business corporations). The challenge that the setting of the crime creates for the law has not weakened during the years, as international criminal law has strengthened its commitment to the individualistic framework, abandoning some of the more important innovations of the Nuremberg trial that were directed at encompassing the collective and organizational aspects of the

crimes. Thus the banality of evil, as a concept, continues to challenge the law today to find better tools for addressing bureaucratic crimes. Contrary to Arendt, I suggest that it is not the law as such, but rather the dominance of criminal law that has obstructed the law from addressing the involvement of bureaucracy (both state and private) in the Holocaust. Indeed, we can identify a shift in historians' attention from the banality of state bureaucrats to that of entrepreneurs and leaders of business corporations. It is in relation to this area of historical investigation that we see the most creative legal developments that rise to the challenge of the banality of bureaucracy. We can identify a shift away from the limitations of criminal law in the wave of Holocaust restitution lawsuits filed against German and European companies in American courts during the 1990s. This civil litigation may offer a solution to a problem that has haunted Holocaust jurisprudence for more than six decades. Most importantly, the class-action suit dispenses with the need to establish the liability of individual perpetrators within private bureaucratic organizations and in this way allows the courts to confront bureaucracy on its own terms. Thus, while Arendt was right to point out the need to develop new legal tools to adjudicate the involvement of bureaucratic organizations in the Holocaust, she wrongly assumed that the only legal road open for handling the problem is through criminal law. I would like to suggest that the restitution class actions of the 1990s provide us with the first instance in which the idiom of the law corresponded to the bureaucratic aspects of the crimes. The restitution litigation removed one of the most formidable obstacles to bringing Auschwitz under legal judgement: the need to establish subjective individual intent.

5. Does the Eichmann trial continue to have contemporary relevance, as either a site of memory or a site of law? Or has Holocaust memory diminished in importance as subsequent mass atrocities (Cambodia, Rwanda, Yugoslavia, the civil wars in Central Africa, Darfur) have attracted increased attention? And does the emergence of the International Criminal Court render nationally based trials such as the Eichmann trial less valuable as precedent?

Bloxham: Nationally-based trials will remain highly relevant given that the International Criminal Court operates on the principle of complementarity, meaning it is effectively a court of last resort, coming into play only if signatory states will not or cannot fulfill their own obligations to try. What this arrangement implies is that there is some sort of harmonious institutional relation in place between international and national courts. Since there was no permanent international legal machinery in place in 1960/61, and since, even had there been, the Eichmann trial would not have accorded with the demands of institutional relations, even though it did accord with natural law, in some ways the most relevant legacy of the Eichmann trial in the national-international connection concerns the punishment of criminals who do not technically fall under one's own jurisdiction. In other words, the abduction of a suspect by one sovereign state from the territory of another sovereign state for crimes committed on behalf of a third such state is an interesting precursor of some of the issues that may arise as signatory states prove less enthusiastic about trial in practice than when they were when securing

the moral capital on offer from signing up to the ICC in the first place. Of course this opens up questions of international relations between states that are powerful enough to enforce ICC arrest warrants in other states or to protect other states from such enforcement, and so is an issue about the basic equity of international criminal law as a form of politics by other means.

We have already discussed some of the more and less relevant legacies of the Eichmann trial's practices for latter-day courts. Respectively, these amount to the use of eyewitness testimony in matters of restorative justice on one hand, and crimes against the Jewish people on the other hand. But at most levels of concrete courtroom practice, rules of evidence and procedure, and jurisprudence, the development of the justice mechanisms of the ICC, 'hybrid' and national courts (each with their own particular foci) are developing fast and will owe less and less, save the vital matter of legal precedent, to anything that went before 1989. And the most important precedent was provided by Nuremberg rather than Jerusalem.

While the Holocaust and the early legal confrontations with it have a prominent place in the lore of contemporary international criminal law, the Eichmann trial is less frequently invoked in that connection than are the Nuremberg trials. I would argue that the idea, which features in some of the transitional justice literature, of the trial of the major war criminals as a crucible of extensive international and (thus) German confrontation with the Holocaust, is nothing but a 'Nuremberg *imaginaire*', though it is no less powerful an inspiration for being illusory. Insofar as the Eichmann trial fits into this narrative, it is as a subordinate version of much the same story—one that has more accuracy in terms of courtroom content, but a little less convenience given some of the awkward technical-legal circumstances of the trial and the simple fact that it came later than Nuremberg.

Bilsky: The source of the most heated disagreement about the Eichmann trial continues to be its depiction as a political trial. The tense relations between law and politics have been an ongoing concern for liberal thinkers. The Eichmann trial challenged many of the liberal assumptions about the rule of law, as it was a trial in which the judges were all Jews, the survivors were given central stage to tell their stories at the expense of witnesses for the defence, the spatial and temporal coordinates of the trial were transgressed, and the concept of the trial changed to encompass 'external' goals such as the construction of collective identity and memory. Nonetheless, many of these innovations, which seemed illegitimate at the time of the trial, have been given new justifications both in the literature on transitional justice and in the international jurisprudence of atrocity.

I believe that the Eichmann trial continues to stand out among the many trials of atrocities that we have witnessed since World War II, and continues to be a source of reflection and debate because of the special way in which it has been transmitted to us. Unlike many other political trials that provide a coherent historical narrative or construct a unified collective memory, the Eichmann trial never had a single meaning. This was largely due to the way in which it was transmitted to the world at large—through the critical commentary of Hannah Arendt in the *New Yorker*, and later in *Eichmann in Jerusalem*. It is this unique characteristic of the Eichmann trial that does not allow us to rest assured that the law has got it right, that we can rely on professional lawyers or historians to provide us with the right answers. Rather, the Eichmann trial continues to

disturb us, thus forcing us to think for ourselves. I believe that this is the most important legacy of the Eichmann trial, the intimate relationship it exposes between a political trial and the public intellectual that can turn a 'media trial' into an important setting for reflection and debate. It thus urges us as citizens of this world to take responsibility by beginning to think for ourselves.

Weinke: In *Eichmann in Jerusalem,* Hannah Arendt criticized the Israeli government for failing to lobby internationally for the creation of an International Criminal Court for gross human rights violations in the aftermath of the Eichmann verdict. Some years later, though, the world was no closer to this vision of a permanent 'world court'. Against the backdrop of ongoing protests against the Vietnam war, the British philosopher and peace activist Bertrand Russell therefore formed the so-called 'Russell Tribunal' in November 1966. The purpose of this was to subject American involvement in Vietnam to a judicial investigation. The organizers sought to compensate for the fact that it had no official legitimacy to do so and lacked any executive authority by appealing to the historical example of the Nuremberg trials which had, in their view, likewise used global outrage at historical injustice as the starting point for a judicial quest for the truth. Although the indictment of Lyndon B. Johnson's administration was based on the four well-known charges in the London Charter of the IMT, it was the Eichmann trial that formed the most important point of reference for the tribunal. As in Jerusalem, it was the testimony of eye-witnesses that formed the core of the proceedings. And like the Israelis, Russell and his comrades wanted to publicize a political agenda, to formulate a counter-narrative to the sovereignty-based paradigm of the Cold War, one based on empathy and identification with the victims of state and neo-imperial violence.

To be sure, the tribunal's main demands—the creation of a permanent international criminal court and the criminalization of aggressive war—would not be met in the ensuing decades. Nor, given the one-sided opposition to the US and its allies, could the tribunal ultimately escape charges of partisanship. Still, the persuasive power of the data contained in the numerous witness statements, expert testimony and other forms of evidence helped to discredit the American military campaign in Southeast Asia, on the one hand, and to preserve the idea of an independent, supranational tribunal on the other. To this extent, the Russell tribunal can perhaps be viewed as a human rights linkage between the Eichmann trial and the 'new' humanitarianism of the 1970s. Leaving aside the ongoing discussions concerning the civilizing force of international humanitarian law, it is worth noting that it was the Eichmann trial that first created the preconditions for the formation of a broad public discourse that sought to overcome the obvious limitations and deficits of the Nuremberg trials through a reconceptualization and expansion of international legalism, as, for example, in the UN definition of aggression in 1974, the Additional Protocols to the Geneva Conventions in 1977, or the formation of the ICC in 1998.

Pendas: The contemporary relevance of the Eichmann trial as a site of law is limited. It was neither an international nor really a domestic tribunal. Obviously, Eichmann was tried before an Israeli court on the basis of Israeli law. This was less 'international' in its political or legislative basis than even the American successor trials at Nuremberg. So as a model for international jurisdiction, it has little value. Yet the Eichmann trial shares

very little with other domestic trials for past atrocities either. The defining feature of domestic trials in transitional justice settings is that the perpetrators and the victims continue to coexist in the same territory and generally within the same polity. The problems facing such tribunals are well known. There is, on the one hand, the risk that the perpetrator group, which is frequently the military, as in Argentina or Chile, could exercise violence or even stage a coup. On the other hand, there is the potential for victim groups to use trials for past atrocities to consolidate a new authoritarian regime, as was done within Eastern Europe after World War II and appears to be happening in contemporary Rwanda. None of this applies to the Eichmann trial. So both legally and politically, the Eichmann trial seems to me to have been sui generis, fascinating and important in its own right, but of little value in terms of precedence in the longer term.

As a site of memory, on the other hand, it continues to offer a rich vein of historical evidence. In particular, what continues to fascinate me about the trial is the tension between the universal and the particular that it manifests. The evidence in the trial shows better than many other sources the specifically Jewish dimensions of the Holocaust. Many years before Saul Friedlander's *Nazi Germany and the Jews*, the Eichmann trial integrated Jewish and German sources. At the same time, though, many of the policy dynamics that emerge in the evidence are apparent in other instances of mass atrocity. So the Eichmann trial seems to me to offer a rich venue for thinking about comparative genocide.

Douglas: Far from rendering nationally based trials such as the Eichmann trial less valuable as precedent, the emergence of the International Criminal Court powerfully validates the Eichmann paradigm. For Arendt, the failure to try Eichmann before an international tribunal constituted the greatest shortcoming of the entire proceeding. Arendt understood Eichmann's crimes as an attack on humanity writ large and his death sentence as a declaration of his exclusion from membership in the human fold. And so Arendt insisted that only an international court could have done justice to the global semiotics of the historic trial. Only an international court could claim the requisite neutrality and objectivity to vindicate the norms of the rule of law.

Yet the experience of more recent experiments in international justice sternly challenge Arendt's rigid defence of international courts and institutions. Clearly international courts can claim the requisite independence and impartiality demanded of the rule of law. Independence refers to the judge's structural insulation from political pressure; impartiality specifies the judge's emotional and evaluative distance from the issues of the case. The judges in the Dujail reprisal killings trial of Saddam Hussein, for example, lacked both.

But if justice is impaired by insufficient distance, can it also be impaired by *too much* distance? Can a case be so far removed as to erode the efficacy, if not the possibility, of justice? This issue has vexed both the ICTY and the ICTR. The ICTY prosecution of Slobodan Milosevic lacked any organic connection to the history and memory of the communities caught up in Milosevic's crimes. This became clear even in such matters as the organization of space and spectatorship. Many of the most famous photographs associated with the Eichmann trial were not the images of the man in the glass booth. Rather, they were shots of the spectators at the trial reacting to the testimonial drama in the courtroom, their faces caught in expressions of grief, disbelief, anger and horror.

Their gasps, snickers and occasional violent outbursts were part of the trial and constituted a crucial point of primary reception for the journalists following the case.

The contrast with the Milosevic trial could not be greater. There it was the court itself that sat in the glass booth, sealed from the gallery of spectators by sheets of glass thick enough to repel rocket-propelled grenades. The glass was also soundproof. The only sounds that the spectator could hear were those broadcast over the headsets made available to each observer; the court was likewise sealed from any sounds from the spectators. As a consequence, there was no interaction between the court and the spectators—usually no more than a handful, though on occasion filling the gallery.

I do not mean naïvely to suggest that Milosevic should have been tried in Serbia. Clearly this was not an option, though it is worth noting that the ICTY now removes cases with less high-profile defendants back to the region for trial. But these observations do challenge the alacrity with which Arendt championed the priority of international courts, a position that continues to be defended by many in the human rights community today. Against this misplaced enthusiasm, I believe the Eichmann trial offers powerful support for the jurisprudential vision that undergirds the ICC. The ICC stands for the propositions that international courts should be used only as courts of last resort. This is as it should be and is fully consistent with the vision of international trials framed in the Eichmann proceeding. The Eichmann court succeeded, both as an instrument of justice and as a didactic drama, because of the organic connections between people, place and crimes. Without the intimate connections between proceeding, people and place, if courts attempts to defend the interests of all humanity from a position of Archimedean neutrality, the act of judgement threatens to turn into something arrogant and ultimately arid. The Eichmann trial delivered a powerful template for the future of international criminal prosecutions.