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The Unusual Dynamic of the Eichmann Trial: Prosecution and Defense Versus the Court

FRANK TUERKHEIMER*

The Eichmann trial stands as a milestone both in the history of the Holocaust and in law.[1] The law part is easy. The trial brought to justice a principal operator in the most pernicious conspiracy in history: the conspiracy to murder eleven million Jews.[2] It is a given that the most severe sanction the law can impose in a civilized system is a quickly administered death penalty.[3] Eichmann's conviction and execution meant the law succeeded in arriving at a just result. Historically, the trial was significant because it humanized the Holocaust and, through the new medium of television, brought that human element to the world.[4]

The ability of the prosecution to educate the public at large about the Holocaust, as opposed to more narrowly confining itself to what Eichmann did and said, rested on both the determination to do so, and the unusual dynamic of the trial and its tensions. Perhaps the best way to articulate these tensions is to look at the three fundamental players in a criminal trial: the court, the prosecution, and the defense. What is truly unusual about the Eichmann trial is that in broad terms, the prosecution and defense were aligned while the court tangled with the two, mainly

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1. DANIEL LEVY & NATAN SZNAIDER, THE HOLOCAUST AND MEMORY IN THE GLOBAL AGE 105 (Assenka Oksiloff trans., 2006).

2. *The Wannsee Protocol and a 1994 Report on Auschwitz by the Office of Strategic Services*, *in* 11 THE HOLOCAUST: SELECTED DOCUMENTS IN EIGHTEEN VOLUMES (John Mendelsohn ed., 2010) [hereinafter *The Wannsee Protocol*].

3. Richard Lowell Nygaard, *On Death as Punishment*, 57 U. PITT. L. REV. 825, 826 (1996).

4. Sara J. Bloomfield, *Op-Ed: From the Nuremberg and Eichmann Trials, a Challenge for Today*, JTA: THE GLOBAL NEWS SERVICE OF THE JEWISH PEOPLE (May 1, 2011), http://www.jta.org/news/article/2011/05/01/3087351/op-ed-from-the-nuremberg-and-eichmann-trials-a-challenge-for-today (explaining that the fifteen-year gap between the major Nuremberg trial of 1945–46, and the Eichmann trial in 1961, saw the enormous spread of television in the communications media. The world learned about Nuremberg largely through newspapers; television brought the Eichmann trial to millions of homes).

the prosecution. In a nutshell, the prosecution wished to present as much of a picture of the Holocaust as could be legitimately based on the charges brought, and it was the court, rather than Eichmann, who stood in the way.

For starters, the prosecution had enormous latitude since the conspiracy, of which Eichmann was charged with being part, was itself of historical dimensions.[5] The general rule is that in conspiracy trials, the prosecution is not limited to proving only what a particular defendant did, but whatever was done in furtherance of the conspiracy.[6] For example, in a prosecution against the kingpin of a massive drug importation conspiracy, most of the trial will be consumed with proof of what lower level operatives did, persons totally unknown to those masterminding the operation. Indeed, a standard jury instruction on conspiracy is that a particular defendant need not know all the members of the conspiracy; all that matters is that they act in concert to effect a larger criminal purpose.[7]

Thus, it was perfectly consistent with the rules governing conspiracy trials for the prosecution in the Eichmann case to place into evidence the killings conducted by the *Einsatzgruppen*, roving SS bands that followed the German army eastward across western Russia after the phenomenal success with which the Germans invaded the Soviet Union.[8] That success, coupled with earlier military victories, placed the vast majority of Europe's Jews under German control and permitted the realization of Hitler's earlier prophecy that another World War would mark the annihilation of European Jewry.[9] That Eichmann did not pull the trigger on one of the 1–1.5 million Jews killed by the *Einsatzgruppen* mattered not a bit. While they were doing their part, he was doing his—a conventional division of responsibility in any conspiracy.[10]

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5. MINISTRY OF JUSTICE, THE TRIAL OF ADOLF EICHMANN: RECORD OF PROCEEDINGS IN THE DISTRICT COURT OF JERUSALEM, ISRAEL 3 (1992) (although the word "conspiracy" did not appear in the charge, the allegation was that Eichmann acted in concert with others; for example, the first count of the indictment alleged that Eichmann, "together with others" caused the deaths of millions of Jews) [hereinafter *Eichmann Trial Record*].

6. *See, e.g.*, 5 LEONARD B. SAND, MODERN FEDERAL JURY INSTRUCTIONS 19–51 (2011) (providing the necessary element of commission of an overt act to prove a charge of conspiracy in the United States).

7. *See, e.g.*, *id*. at 19–31 (providing the necessary element of knowing, willing, and voluntary membership to prove a charge of conspiracy in the United States).

8. *Eichmann Trial Record*, *supra* note 5, at 3.

9. Hitler's actual term, the German: "Vernichtung."

10. *See, e.g.*, SAND, *supra* note 6, at 19–32.

How did this bring about the unusual alignment of prosecution and defense on one side and the court on the other? The court, sitting without a jury, was interested in Eichmann; it needed no instructions on the Holocaust.[11] Aside from what they knew as educated persons, each of the three judges had left Germany for Palestine in the 1930s and it would be unusual if none of their extended families had emerged unscathed from the Holocaust. The prosecution's effort to paint a broader picture was, from their perspective, unnecessary and unhelpful.[12] The defense did not object to this "larger picture" approach that characterized what the prosecution did because it found it advantageous for the record to be saturated with facts having no connection to Eichmann at all. For example, when the prosecution offered into evidence the "diary" of Hans Frank, the German Governor-General of a major chunk of Poland during the war, there was no objection from the defense.[13] This diary consisted of memoranda, speeches, and a rather complete history of Frank's brutal administration in Poland, which Frank preserved, perhaps because he thought that his conflicts with the SS, fully documented in the diary, might be exculpatory.[14]

That this was not so was Frank's misfortune at the first Nuremberg trial where the details of the diary turned out to be dynamite evidence for the prosecution's case.[15] At Eichmann's trial, a small part of the diary was read into evidence, specifically documents showing that Frank complained that it would be impossible to rid Europe of Jewry in a short time since Jews had been around for five thousand years.[16] Eichmann's lawyer, Robert Servatius, who knew the diary well from his work as defense counsel at the first Nuremberg trial, did not object to its admission or this reading from it and on cross-examination of the witness, through whom it was put into evidence, asked only one question: Was the name of Adolph Eichmann mentioned in any of these twenty-nine volumes?[17] The answer was that there was no mention of

11. Gary Grobman, *Eichmann: Trial Info*, PBS ONLINE (1997), http://remember.org/eichmann/study4.htm.

12. *See, e.g.*, *Eichmann Trial Record*, *supra* note 5, at 397–98.

13. *Id.* at 392.

14. *Id.*

15. *Hans Frank*, HOLOCAUST EDUC. & ARCHIVE RES. TEAM (2007), http://www.holocaustresearchproject.org/ar/frank.html.

16. *Eichmann Trial Record*, *supra* note 5, at 395.

17. *Id.* at 396.

Eichmann.[18] The prosecution was thus satisfied: a major component of Holocaust history was now in evidence; Eichmann was satisfied: among the hundreds of thousands of words proving this Holocaust component, his name did not appear, thereby arguably minimizing his role. The court was burdened with a record that was of no help.

The question of Jewish resistance raised comparable issues. How, conceivably, could the resistance of Jews be part of the conspiracy? Thus, when the prosecution indicated it was calling a witness to testify as to the Warsaw Ghetto revolt, it described the proposed testimony as part of "the general picture."[19] At that point the court stated:

> This is a very delicate matter, Mr. Hausner. I know that. But I do not have to tell you we are not presenting a general picture here. If the picture is portrayed incidentally in the course of the trial – well and good; but we have an indictment and this indictment constitutes a framework for the trial.[20]

The prosecution then proceeded, completely oblivious to the court's expressed desire to contain such general picture evidence. There is more than posturing to the prosecution's position. The first count of the charge against Eichmann accused him of violating Israeli law by, together with others, causing the deaths of millions of Jews by implementing a plan, which was called The Final Solution to the Jewish Question.[21] There can be no doubt that the evidence showed Eichmann's awareness of the breadth of the conspiracy. His undisputed involvement at the Wansee Conference, where the object of killing eleven million Jews was brought to the attention of the major bureaucratic entities of the Third Reich, amply demonstrated his awareness.[22]

Other subtle details demonstrated such awareness as well. The court received into evidence the statement of Dieter Wisliceny, an Eichmann subordinate.[23] At his trial in Czechoslovakia, Wisliceny testified that Eichmann told him, "Himmler has received orders from Hitler for the complete biological extermination of European Jewry."[24] In response to the court's concern that a general picture was to be avoided, the prosecution's answer was simple: Jews killed while

18. *Id.*
19. *Id.* at 397.
20. *Id.* at 397–98.
21. *Id.* at 3.
22. *Id.* at 1420–26.
23. *Id.* at 237.
24. *Id.* at 884.

resisting were no less victims of the Holocaust than those killed without resistance. To prove that they were killed required placing into evidence the context of their killing which, it turned out, was in the context of resistance. It is one thing for the court to say that such evidence was not helpful in assessing Eichmann's guilt or innocence. It is another, however, to say that the evidence is not admissible.

Evidence of Jewish resistance tended to precipitate the collision between the court and the prosecution. During the testimony of Abba Kovner, a Lithuanian resistance fighter who testified about resistance efforts both in the Vilna ghetto and in the Lithuanian countryside, the prosecution asked the court for "patience" as it approached what the prosecution deemed a very important subject.[25] The court responded: "I do not believe that you can complain of a lack of patience on the part of the court."[26] Kovner, in extraordinarily dramatic testimony, went on to disparage the question as to why there was not more resistance, stating that the question should be how come there was resistance at all.[27] At the end of this dramatic testimony, the following colloquy between the court and prosecution took place:

> *Presiding Judge:* Thank you very much, Mr. Kovner. Mr. Hausner, we have heard shocking things here, in the language of a poet, but I maintain that in many parts of this evidence we have strayed far from the subject of this trial. There is no possibility at all of interrupting evidence such as this, while it is being rendered, out of respect for the witness and out of respect for the matters he is relating. It is your task to prepare the witness, to explain matters to him, and to eliminate everything that is not relevant to the trial, so as not to place the Court once again – and this is not the first time – in such a situation. I regret that I have to make these remarks, after the conclusion of evidence such as this.
> *Attorney General:* Your Honours, perhaps when my turn comes for a final summation of my arguments, it will become clear to the Court that these things are not of such a nature.
> *Presiding Judge:* This was not the first time that I have mentioned this. The Court has a certain view of this trial according to the indictment, and we have stated this more than once – sometimes in a hint, sometimes more clearly, and the Prosecution must direct itself in accordance of what it hears from the Court.
> *Attorney General:* This we do, undoubtedly.

25. *Id.* at 461.
26. *Id.*
27. *Id.* at 461–66.

> *Presiding Judge*: Yet, nevertheless, I do not see that these matters have penetrated to the extent that they should penetrate.
> *Attorney General:* Perhaps this is so, because Your Honours are not yet aware of everything which we still intend to bring before you.
> *Presiding Judge:* We heard your opening address which, it seems to me, lays down the general lines of what you wish to place before the Court.[28]

Proof on the lack of resistance was, in fact, within the scope of the charge. Why were so many of the prosecution witnesses asked why they did not resist—questions that generated Kovner's criticism of the prosecution in which others joined? The answer is simple: the conspiracy was designed to deceive its victims, to weaken them, and to leave them in no position to resist. For example, most of Warsaw's Jews were taken by train to Treblinka where only those assisting in the looting and killing process were spared—and usually just temporarily. The distance between Warsaw and Treblinka—about 65 miles—would ordinarily take two to three hours by train; it often took two to three days or longer.[29] Why? To weaken, debilitate and demoralize those inside so that upon arrival at Treblinka their trip to the gas chambers would proceed smoothly. This too was part of the plan (conspiracy). Every conspiracy contains components designed to insure its effectiveness. This one was no different. Here, however, Eichmann's involvement was more than just through the conduct of others; he was directly implicated.[30]

Eichmann coordinated the train schedules.[31] The evidence, however, proved even more damning. When he arranged for the deportation of Jews from Hungary, he arranged for them to send post cards to their remaining relatives, post cards that said they should hurry and join them before all the good places were taken.[32] Perhaps still more perniciously, he had the deportees urge their relatives to bring good hiking boots, suggesting bucolic strolls in the rustic surroundings of

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28. *Id.* at 466.

29. YITZHAK ARAD, BELZEC, SOBIBOR, TREBLINKA: THE OPERATION REINHARD DEATH CAMPS 66 (1987).

30. Doron Geller, *The Capture of Adolf Eichmann*, JEWISH VIRTUAL LIBR., http://www.jewishvirtuallibrary.org/jsource/Holocaust/eichcap.html (last visited Mar. 24, 2012).

31. *See Eichmann Trial Record*, *supra* note 5, at 577–78, 592–96 (evidencing Eichmann's involvement in scheduling trains for deportation from France, especially with respect to Jewish children).

32. *See id.* at 944.

their destination.[33] The duplicity of imagined country walks to facilitate further deportations was also to obtain the best possible foot-ware for the German military upon the murder of the deportees.[34]

There is no question that the prosecution won this regular battle with the court. It was difficult for the court to cut off witnesses when the defense did not object. As a consequence, considerable evidence not having Eichmann's fingerprints on it saturates the record of the trial. This may have contributed to a massive misinterpretation of the trial and Eichmann's role in the Holocaust. All of this began with a series in the New Yorker magazine.

Within two years of the trial, a series of essays on the trial appeared in the New Yorker written by Hannah Arendt.[35] By most objective standards, Arendt is one of the great intellects of mid-twentieth century thought. Arendt's *The Origins of Totalitarianism* remains one of the most incisive dissections of the modern totalitarian state, distinguishing it from the despotisms of an earlier day. Thus, it should not be surprising that an entire generation of interested persons, including me, derived their understanding of the Eichmann trial from her articles which later appeared in book form, in two sequential editions.[36] What are Arendt's observations that pointed a reader of her description of the trial in the wrong direction?

Although, this is not the occasion to engage in an extended review of Arendt's book, a brief discussion is appropriate.[37] Arendt claimed that the prosecution, to add stature to its case, puffed up Eichmann's role in the Holocaust beyond what it actually was, thereby enhancing the importance of its case and downplaying the role of other perpetrators.[38] She saw Eichmann not as a pivotal person in the implementation of the Final Solution but rather as a dull bureaucrat who

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33. Gabriel Bach, *The Eichmann Trial*, 34 LOY. L.A. INT'L & COMP. L. REV. 315, 327 (2012).

34. Interview by Frank Tuerkheimer with Justice Gabriel Bach, Senior Prosecutor in the Adolf Eichmann Trial, in Jerusalem, Israel (Nov. 2006), *available at* http://www.eichmannprosecutorinterview.org.

35. Hannah Arendt, *Eichmann in Jerusalem*, NEW YORKER, Feb. 16, 1963, at 40.

36. HANNAH ARENDT, EICHMANN IN JERUSALEM: A REPORT ON THE BANALITY OF EVIL (1963).

37. One of the Israeli prosecutors at the trial was a historian, and he subsequently wrote about Arendt's take on the trial. JACOB ROBINSON, AND THE CROOKED SHALL BE MADE STRAIGHT: THE EICHMANN TRIAL, THE JEWISH CATASTROPHE, AND HANNAH ARENDT'S NARRATIVE (1965).

38. Amos Elon, *Introduction*, *in* EICHMANN IN JERUSALEM: A REPORT ON THE BANALITY OF EVIL xiv, xiv (2006).

simply did what he was told and tried to do it well. Her view of Eichmann is perhaps best summarized in her own statement that Eichmann was more clown than monster.[39]

My own recent interest in the trial derived from a presentation given by Chief Justice Gabriel Bach in New York City almost ten years ago. Justice Bach, a senior prosecutor in the case, spoke about the trial and mentioned the story of Jenny Cozzi, the Jewish widow of a Christian Italian Army officer. Cozzi was detained in Riga, Latvia, and the Italian Government, then an ally of Germany in the war, asked that in honor and in the memory of her deceased husband, she not be deported but be permitted to return to Italy.[40] This request crossed Eichmann's desk and he decided against sparing Cozzi, notwithstanding the request from the Italian Foreign Office.[41] In the end she was deported to a concentration camp and became one of the Holocaust's victims.[42]

The Eichmann depicted in this brief but telling anecdote was not the dull, mechanized bureaucrat that Arendt depicted. Rather, it revealed an activist in the plan to murder Jews, dedicated enough to take on an ally of Germany in the war to insure that still one more Jew was added to the list of those to be killed. The transcript of the trial reveals that the Cozzi incident was one of many in which Eichmann's ardor and initiative in killing Jews stands out, which either eluded Arendt, or which she simply ignored.[43]

Before turning to these other examples of Eichmann's key role in the Holocaust, it is important to see where Eichmann stood in the Nazi bureaucracy with respect to the Holocaust. Hitler, of course, was at the apex of the conspiracy followed immediately by his number two person, Hermann Goering.[44] Unquestionably acting pursuant to Hitler's wishes, on July 31, 1941, when it was clear that the invasion of the Soviet Union was proceeding well, and the vast majority of European Jewry was now or was soon to be under German control, Goering, in a written memorandum addressed to Reinhard Heydrich, head of the Main Security Office of the Reich (RSHA) advised Heydrich that the RSHA

39. ARENDT, *supra* note 36, at 54.

40. *Eichmann Trial Record*, *supra* note 5, at 525.

41. *Id.*

42. *Id.*

43. *See id.* at 518–27; *see generally* ARENDT, *supra* note 36 (omitting any mention of the Cozzi incident or any similar incidents).

44. Richard W. Sonnenfeldt, Remarks, *The Nuremberg Trials and the Occupation of Germany* , 27 CARDOZO L. R. 1609, 1611–12 (2006).

would be responsible for implementing the Final Solution to the Jewish Question.[45] Heydrich's subordinate in the RSHA was SS Lieutenant General Heinrich Mueller and Eichmann was, on paper, subordinate to Mueller.[46] (Heydrich was assassinated in Czechoslovakia in 1942 and replaced by Eichmann's friend, Ernst Kaltenbrunner)[47] One way to look at Eichmann is to say that he was low in the bureaucratic process; another is to observe that as one worked one's way down the Nazi bureaucracy, Eichmann was the first person whose sole responsibility lay with implementing the killing of Jews. All those above him had other responsibilities; he did not.

Eichmann carried out that responsibility with great thoroughness.[48] When a request was made to spare a Jewish scientist with a specialty in electronics because of his potential value to the German military, Eichmann noted that his invention had already been filed with the Patent Office and he should be treated like everyone else.[49] The file notes that the scientist was deported on the next transport.[50]

When Marshal Petain, head of the Vichy Government in France, a government openly committed to collaboration with Germany,[51] asked that a French Jew named Roger Masse be spared, he fared no better. Masse was a member of the Legion d'Honneur and had been awarded France's highest military honor, the Croix de Guerre. Eichmann turned Petain down, stating, "As a matter of principle I cannot agree to his being returned. Please Note. By order – Eichmann."[52]

When it was pointed out to Eichmann that a Swiss Jew named Michaelis was married to a Christian woman whose father was prominent in Switzerland and inclined to Germany, and that his deportation could lead to adverse consequences for Germany in

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45. *"Final Solution,"* U.S. HOLOCAUST MEM'L MUSEUM, http://www.ushmm.org/wlc/en/article.php?ModuleId=10007328 (last visited Feb. 4, 2013).

46. *S.S. and Other Nazi Leaders*, HOLOCAUST EDUC. & ARCHIVE RES. TEAM (2007), http://www.holocaustresearchproject.org/holoprelude/ssleaders.html.

47. *Id.*

48. *Eichmann Trial Record*, *supra* note 5, at 1836. One of Eichmann's own witnesses said of Eichmann: "[W]hen in doubt, Eichmann always acted in accordance with Party doctrine in its most extreme interpretation." *Id.*

49. *Id.* at 602.

50. *Id.*

51. *The Vichy Regime,* JEWISH VIRTUAL LIBR. (2013), http://www.jewishvirtuallibrary.org/jsource/Holocaust/VichyRegime.html (explaining the Prime Minister of the Vichy regime, Pierre Laval, had openly declared that he wished for a German victory in the war).

52. *Eichmann Trial Record*, *supra* note 5, at 596.

Switzerland, Eichmann refused to permit Michaelis to return to Switzerland. Eichmann states, "For reasons of principle, I am unable to permit [Michaelis to return to Switzerland]."[53]

When Eichmann learned that virtually all of Danish Jewry had avoided apprehension and that the SS in Denmark refused to knock down the doors to Jewish homes when no one answered, he registered a virulent complaint with the German Foreign office; he similarly expressed his unhappiness over the escape of half of Norway's Jews to Sweden.[54] But nowhere is Eichmann's commitment to the cause of Jewish annihilation more evident than the events in Hungary.

The fate of Hungarian Jewry is nothing less than a tragedy imposed on a tragedy. Hungary was an ally of Germany and so, administratively, under control of the Hungarians.[55] As a consequence, from the outbreak of the war in 1939 until early 1944, no organized effort had been made to murder Hungary's Jews.[56] By the spring of 1944, the handwriting on the wall unmistakably pointed to a pending German defeat. The Battle of Stalingrad, at which three hundred thousand German soldiers were taken prisoner and which reversed the direction of troop movement from Germany's advance eastward to a Soviet advance westward, had taken place fifteen months earlier.[57] By early 1944, The Red Army had driven the Germans out of most of the Soviet Union and was marching westward across Eastern Europe toward Germany itself.[58] The Allies had defeated the Germans in North Africa, Italy had collapsed, and the German Army in Italy was retreating northwards.[59] On the western front, the Allied invasion of Normandy was imminent, portending an eastward advance toward Germany.[60] Further, bombers based in England were regularly pounding Germany, impairing, but not eliminating, the industrial base that

53. *Id.* at 631.

54. *Id.* at 643–50.

55. RAUL HILBERG, THE DESTRUCTION OF THE EUROPEAN JEWS 546 (1985); *see also Eichmann Trial Record*, *supra* note 5, at 928.

56. *See Eichmann Trial Record*, *supra* note 5, at 928; HILBERG, *supra* note 55, at 796.

57. *See generally On this Day – 1943: Germans Surrender at Stalingrad,* BBC (2008), http://news.bbc.co.uk/onthisday/hi/dates/stories/february/2/newsid_3573000/3573003.stm (for a summary of the Battle of Stalingrad).

58. Alan Taylor, *World War II: The Fall of Nazi Germany,* ATLANTIC pt. 17 (Oct. 9, 2011) *available at* http://www.theatlantic.com/infocus/2011/10/world-war-ii-the-fall-of-nazi-germany/100166/#.

59. *Id.*

60. *Id.*

underlay Germany's war effort. It was at this point that Eichmann was sent to Budapest to dispose of Hungary's 750,000 Jews.[61]

And dispose he did. In a matter of months, half of Hungary's Jews were sent to Auschwitz where almost all were killed. When it was questionable whether the crematoria at Auschwitz could handle the new load, Eichmann visited Auschwitz and saw to it that twelve thousand bodies could be cremated in a day as opposed to ten thousand, which had been the prior maximum.[62] Eichmann was as motivated to get Jews to Auschwitz as he was to the disposal of their murdered bodies. At a later point in the deportation process the Regent of Hungary directed that trains to Auschwitz be stopped and that an existing train laden with Jews for killing be turned around.[63] When it returned to the transition camp, Eichmann had the Jews placed on trucks and taken to Auschwitz.[64] In that manner he circumvented the directive of the Hungarian Regent designed to end deportations.[65]

Indeed, when Himmler himself, in the fall of 1944, directed that gassings at Auschwitz stop—not out of a newly found sympathy for Jews, but simply because he knew that Germany's time was running out—Eichmann arranged for a march for tens of thousands of Jews to the Austrian border under brutally cold November-December conditions, resulting in thousands of deaths along the way.[66] Himmler himself reprimanded Eichmann for this march.[67] At that point, the advancing Soviet army brought an end to the carnage.

In the end, however, nothing better illustrates Eichmann's strident devotion to the killing of every last Jew than evidence which the prosecution called "the gravest we are able to submit against the accused"—his successful effort to override Hitler himself.[68]

To obtain the assent of the Hungarian Regent to the deportation of Hungarian Jews in general, Hitler had agreed with the Regent that eighty-seven hundred Jewish families could be saved, be given transit visas to Switzerland and then be permitted to go to Palestine.[69] This

61. HILBERG, *supra* note 55, at 796, 823.
62. *See Eichmann Trial Record*, *supra* note 5, at 943.
63. *Id.* at 731.
64. *Id.*
65. *Id.*
66. *See id.* at 732, 1785–90.
67. *Id.* at 730.
68. *Id.* at 108 (referring to the Veesenmeyer telegram).
69. *Id.* at 1087–88.

numbered about forty thousand Jews.[70] When Eichmann became aware of this understanding between Hitler and the Hungarian Regent, he immediately tried to undermine it. All of this was reported in a telegram that the German Ambassador to Hungary, Edmund Veesenmeyer, sent to Berlin.[71] He wrote that about forty thousand "souls" and one thousand children were to be given visas for Switzerland.[72] He then notes that Eichmann does not agree to their transit to Switzerland and "under any circumstances to the emigration of Hungarian Jews to Palestine. The Jews who are under consideration constitute, without exception, valuable human material from a biological point of view."[73] Veesenmayer notes that Eichmann asked for reconsideration of the decision to let the Jews reach Switzerland and then Palestine. Eichmann also asked that if such reconsideration were not granted, additional deportations from Budapest should be arranged quickly and prior to the arrival of visas to Switzerland.[74] Eichmann succeeded; Hitler's agreement with the Regent was never implemented: the Jews were not saved.[75]

Not one person can be directly responsible for killing six million people. Therefore, it is extremely difficult to identify the primary culprit. Hitler directed that European Jewry be annihilated; Himmler and Goering implemented his direction by in turn directing subordinates to do so, and those subordinates furthered the process, either by themselves or through others.[76] Clearly principal responsibility lies with those at the upper levels of this hierarchy. But at some point there was need for a "hands-on" director, someone whose full attention was devoted to insuring the implementation of the killing process. No one fit this description better than Eichmann.

The prosecution, without defense opposition, was able to prove almost the entirety of its case. Perhaps Arendt was too influenced by the Eichmann in the dock—or in the glass booth in this case—and thus *saw* more clown than monster. The trial, however, was not about the captured Eichmann of 1961 forced to confront his words and his deeds.

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70. *Id.*

71. *Id.* at 1087.

72. VEESENMAYER TELEGRAM [VEESENMAYER CABLE] (Jul. 25, 1944) (Ger.) (on file with Loyola of Los Angeles International and Comparative Law Review).

73. *See Eichmann Trial Record*, *supra* note 5, at 1088.

74. *Id.*

75. *Id.*

76. *"Final Solution": Overview*, U.S. HOLOCAUST MEM'L MUSEUM, http://www.ushmm.org/wlc/en/article.php?ModuleId=10005151 (last visited Feb. 4, 2013).

It was about the Eichmann of 1941–1945 who was not forced to confront anything. Instead he *implemented*, with relish, determination, and frightening thoroughness, Hitler's plan for the annihilation of European Jewry. There was nothing "clownish" about that Eichmann and certainly a great deal of "monster."[77]

Finally, a word on the fairness of the trial. Arendt, who acknowledged that Israel was the correct place to try Eichmann, makes the point that defense witnesses were excluded since, had they come to Israel, they would have been exposed to prosecution under the same law under which Eichmann was prosecuted.[78] The prosecution explicitly failed to promise such witnesses immunity. She suggests that the prosecution's refusal to immunize Eichmann's defense witnesses was unfair to Eichmann.[79] On closer analysis, it is clear that the Israeli prosecutors did far more than is conventionally done to accommodate a criminal defendant.

First, perhaps Arendt was not aware that the scenario she describes is common in criminal practice. While the prosecution has the power to confer immunity on witnesses, the defense does not. Consequently, it is not unusual for the defense to be impaired in calling witnesses. Such potential witnesses refuse to testify because they fear that if they testify and acknowledge facts that might be incriminating their testimony will be used against them in a subsequent prosecution. To single out Israel for following a practice standard in the Anglo-American legal system is unwarranted.

Second, Israel went out of its way to accommodate the defense. Ordinarily, once the prosecution refuses to immunize potential defense witnesses, the matter is over. It was not over in Eichmann's case. Rather than just refusing immunity to any of Eichmann's potential witnesses, the prosecution assented to their deposition in German courts, depositions that were evidentiary and could then be used at the trial in

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77. Arendt also questions the prosecution's effort to hold Eichmann responsible for the "crimes in the east," observing that his principal responsibilities were in Germany, Czechoslovakia, Austria, and later Hungary. ARENDT, *supra* note 36, at 212–19. The problem is that she approaches the trial as an exposition under the rules governing a historian writing history. These are not, however, the rules of the trial where the broader concept of agency, triggered by the charges of collective action, govern. Furthermore, Arendt is simply wrong on the facts. Rudolph Hoss, commandant of Auschwitz from 1940 until late 1943, both in his trial and at the main trial at Nuremberg, testified how Eichmann, pursuant to the instructions of Heinrich Himmler, head of the SS, was instrumental in the running of the Auschwitz death camp. *See also Eichmann Trial Record*, *supra* note 5, at 256–57.

78. ARENDT, *supra* note 36, at 220–21.

79. *Id.*

Jerusalem.[80] Numerous depositions were taken in Germany; someone from the prosecution staff attended and Dieter Wechtenbruch, a Munich attorney and assistant to Servatius, appeared on behalf of Eichmann.[81] This accommodation is far more than the general prosecutorial inaction when confronted with defense claims that its witnesses refuse to testify for the defense out of fear of prosecution.

There is an even more fundamental flaw in the notion that the Israeli prosecutor's refusal to grant defense witness immunity was causal in impairing Eichmann's defense. As has been noted, several depositions were taken in German courts. Had a defense witness testified to facts in Germany implicating him or her in the Holocaust, what was to stop Israel from charging that person and asking for his or her extradition? Or what was to stop the German government from using the information provided in the deposition as the basis for a prosecution under German law? A large number of Germans were prosecuted in Germany before and after the Eichmann trial for crimes relating to the Holocaust.[82] Thus, anyone testifying to incriminating facts in the depositions faced exactly the same risk as he or she would have faced if the testimony were provided in Israel itself.

Lastly, there is a larger irony in this unfair criticism of the prosecution. The depositions that were taken in Germany contained a great deal of information helpful to the prosecution and inconsistent with the notion that Eichmann's role was as minimal as he said, and as Arendt believed. For example, Eichmann wanted to call Dr. Franz Six. Six occupied numerous positions in the Nazi hierarchy, perhaps the most notorious as a commander in the infamous *Einsatzgruppen*.[83] He had been convicted in the *Einsatzgruppen* trial in 1948 and was sentenced to twenty years in prison.[84] The sentence was subsequently reduced and he was released in the early 1950s.[85] Six, designated as a defense witness by Eichmann, had the following to say when questioned in Germany:

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80. *See, e.g., Eichmann Trial Record*, *supra* note 5, at 1906–08 (transcript of Hans Jüttner's deposition in Germany submitted as part of the official trial transcript in Israel).

81. *See id.* at 1906 (showing Dieter Wechtenbruch as "present" at the deposition).

82. *Trials of War Criminals*, SHOAH RESOURCE CENTER, http://www1.yadvashem.org/odot_pdf/Microsoft%20Word%20-%205887.pdf (last visited Feb. 2, 2013).

83. Richard Breitman, *Interagency Working Group: Historical Analysis of Twenty Name Files from CIA Records*, NAT'L ARCHIVES (Apr. 2001), http://www.archives.gov/iwg/declassified-records/rg-263-cia-records/rg-263-report.html.

84. *Id.*

85. *Id.*

> Had I wished to obtain an exemption . . . for a Jew, I would not have gone to Eichmann, as he was an exponent for the other side. . . . .
> I believed that, when in doubt, Eichmann always acted in accordance with Party doctrine in its most extreme form.

Six went on to confirm that it was possible to be transferred to other operations in the war; Six had been transferred.[86] Finally, and most importantly, Six perceived that Eichmann had "wider powers than other Section Heads" and there was a "general impression" that "Eichmann was not only under Mueller's orders, but that he was somewhat on the same level as Mueller."[87]

The Eichmann trial stands out as a commitment to justice and a service to history. It dealt fairly with Eichmann, and contributed enormously to an exposure of the Holocaust and to its horrors. Much has been done in the period since the trial to institutionalize a response to genocide. That genocide continues cannot be laid at the doorstep of those involved in the Eichmann case. They did their part.

86. *Eichmann Trial Record*, *supra* note 5, at 1836. Eichmann had testified he tried to obtain a transfer but that was impossible.

87. *Id.*