

Victim Participation and Social Impact: Contemporary Lessons of the Eichmann Trial

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Six decades after the trial of Adolf Eichmann, its legacy is still evolving. Some aspects of the case, deeply controversial at the time, have become settled precedent. In particular, innovative legal grounds for Israeli jurisdiction, widely faulted outside Israel as proceedings got underway,¹ are now accepted precepts of international law. Thus a half century after the trial, a leading expert in international criminal law concluded that jurisdictional and substantive law pioneered in Israel have by and large “stood the test of time.”² In his view, “The impact of the *Eichmann* decisions on the development of international criminal law cannot be overstated.”³

Other aspects of the case, including the prominent role of Holocaust survivors, illuminate questions that have only grown in importance over time. Recent decades have seen extensive practice in the fields of transitional and international justice, casting into sharp relief the challenges and dilemmas surrounding efforts to provide justice for victims of grievous atrocities. Among them (and one focus of this Article) is how to ensure survivors’ meaningful participation in criminal trials without imperiling their welfare or breaching core principles of procedural fairness. As contemporary jurists, survivors and

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1. See, e.g., ROBERT K. WOETZEL, THE NUREMBERG TRIALS IN INTERNATIONAL LAW WITH A POSTLUDE ON THE EICHMANN CASE 255–72 (1962).

2. William Schabas, *The Contribution of the Eichmann Trial to International Law*, 26 LEIDEN J. INT’L L. 667, 699 (2013).

3. *Id.*; see also AMNESTY INT’L, EICHMANN SUPREME COURT JUDGMENT: 50 YEARS ON, ITS SIGNIFICANCE TODAY (2012) (applauding myriad aspects of the Israeli Supreme Court’s judgment in the *Eichmann* case while faulting its treatment of Eichmann’s unlawful abduction and the trial court’s decision to sentence Eichmann to death).

advocates seek to address this and other challenges, the *Eichmann* precedent is well worth considered attention.

I. TRANSITIONAL JUSTICE AND THE EICHMANN TRIAL

Before I elaborate, it may be useful to clarify whether or how the *Eichmann* case may even be relevant to the field of transitional justice, which did not emerge until some three decades after Israeli agents abducted Eichmann from Argentina. The question arises because the *Eichmann* prosecution does not fall within common conceptions of a transitional justice trial.⁴

A. ANCHORING A POLITICAL TRANSITION

While there is no generally-accepted definition, a leading non-governmental organization (NGO), the International Center for Transitional Justice (ICTJ), suggests *transitional justice* refers to “the ways countries emerging from periods of conflict and repression address large-scale or systematic human rights violations so numerous and so serious that the normal justice system will not be able to provide an adequate response.”⁵ In this conception the *primary* sites of transitional justice are countries in which grave human rights abuses recently took place and are now seeking to redress those violations under the leadership of a successor government.⁶ A paradigmatic example is Argentina,

4. Recent years have seen robust debate about the scope of transitional justice, featuring critical analyses of the limits, both temporal and substantive, of early and dominant conceptions. See, e.g., Zinaida Miller, *Temporal Governance: The Times of Transitional Justice*, 21 INT'L CRIM. L. REV. 848 (2021). Section I.A of this Article evokes the relatively narrow conception used by leading non-governmental organizations and United Nations mandate-holders and soft-law instruments to explain why many would not consider the *Eichmann* trial an instance of transitional justice.

5. International Center for Transitional Justice, *What is Transitional Justice?*, <https://www.ictj.org/about/transitional-justice> (last visited Feb. 20, 2022) [hereinafter ICTJ]; see also JEMIMA GARCÍA-GODOS & CHANDRA LEKHA SRIRAM, *Introduction to TRANSITIONAL JUSTICE AND PEACEBUILDING ON THE GROUND: VICTIMS AND EX-COMBATANTS 2* (Chandra Lekha Sriram et al. eds., 2013) (“Transitional justice is a broad set of practices that emerged from efforts by countries in transition from authoritarianism and conflict to address past abuses”); Laurel E. Fletcher & Harvey M. Weinstein, *Violence and Social Repair: Rethinking the Contribution of Justice to Reconciliation*, 24 HUM. RTS. Q. 573, 574 (2002) (using the term *transitional justice* “to describe the processes by which a state seeks to redress the violations of a prior regime”).

6. Ruti Teitel has defined transitional justice more broadly as “the

whose democratically-elected government undertook measures of redress, including a landmark trial of former Junta leaders, after the collapse in 1983 of a brutal military dictatorship.⁷

In Argentina and elsewhere, some (though not all) core justifications for trials and other measures of transitional justice make sense only when undertaken in and by countries where a previous government was responsible for mass atrocities whose principal victims were that State's citizens.⁸ In this context, exemplary trials have served an expressive function⁹—a form of moral messaging peculiar to its setting—that distinguishes them from ordinary trials in a fully consolidated and well-functioning democracy. While not their sole justification, “transitional trials” have been undertaken to enable a society to “ritually [re]affirm its guiding principles”¹⁰ *by acting upon them* in the aftermath of its descent into grievous violence, while signaling a new government's resolve to protect all of its citizens from the harms many endured at the hands of its predecessor(s).¹¹

While the *Eichmann* trial was assuredly designed to serve expressive aims, the Israeli government's intended messages

conception of justice associated with periods of political change, characterized by legal responses to confront the wrongdoings of repressive predecessor regimes.” Ruti G. Teitel, *Transitional Justice Genealogy*, 16 HARV. HUM. RTS. J. 69, 69 (2003).

7. See KATHRYN SIKKINK, *THE JUSTICE CASCADE: HOW HUMAN RIGHTS PROSECUTIONS ARE CHANGING THE WORLD* 60–83 (2011).

8. During the early years of the field, the goals of transitional justice were often framed in terms of consolidating a democratic transition—a paradigm that hardly fits the context in which Israel prosecuted Eichmann. See, e.g., Jaime Malamud-Goti, *Trying Violators of Human Rights: The Dilemma of Transitional Democratic Governments*, in *STATE CRIMES: PUNISHMENT OR PARDON* 71, 71–72 (Justice & Society Program of The Aspen Inst. ed., 1989).

9. See DIANE ORENTLICHER, *SOME KIND OF JUSTICE: THE ICTY'S IMPACT IN BOSNIA AND SERBIA* 98–99 (2018).

10. Martti Koskeniemi, *Between Impunity and Show Trials*, 6 MAX PLANCK U.N.Y.B. 1, 10 (2002).

11. We hear these aims in the words of Jaime Malamud-Goti, a chief architect of the prosecutions of military officers undertaken in the 1980's by the democratically-elected government of Raúl Alfonsín. Explaining the goals that government sought to advance, Malamud-Goti writes: “Criminal trials can provide a unique means by which to assert democratic values” and “return[] citizens to full membership in society.” Jaime Malamud-Goti, *Transitional Governments in the Breach: Why Punish State Criminals?*, 12 HUM. RTS. Q. 1, 11–12 (1990). Evoking a similar rationale, ICTJ claims transitional justice “signals the way forward for a renewed commitment to make sure ordinary citizens are safe *in their own countries*—safe from the abuses of *their own authorities* and effectively protected from violations by others.” ICTJ, *supra* note 5 (emphasis added).

were largely different than those of governments like that of post-dictatorship Argentina. Historian Tom Segev describes the principal reasons then-Prime Minister David Ben-Gurion thought it important to try Eichmann:

One was to remind the countries of the world that the Holocaust obligated them to support the only Jewish state on earth. The second was to impress the lessons of the Holocaust on the people of Israel, especially the younger generation.¹²

Integral to both didactic aims, the government sought to show that Jews could find safety from virulent anti-Semitism only in Israel.¹³ In this respect, the *Eichmann* prosecution would serve the young country's State-legitimizing goals rather than the expressive functions typically associated with transitional trials, such as signaling a successor government's resolve to protect citizens from the harms many endured at the hands of a previous regime in the same State. Even so, as I elaborate in the next subsection, the case provides an instructive precedent for contemporary atrocity trials, illuminating both their didactic potential and attendant risks.

B. PROVIDING RECOGNITION AND REDRESS

Though often fundamental, the previously-noted aims of transitional trials do not exhaust goals often ascribed to transitional justice. Measures widely associated with this field of practice also have a reparatory dimension that "is always in some sense backward looking"¹⁴ and whose central concern is answering the needs of victims.

As Pablo de Greiff has noted, "one of the first demands of victims is to obtain recognition of the fact that they have been harmed."¹⁵ The recognition they seek entails acknowledgement

12. TOM SEGEV, *THE SEVENTH MILLION: THE ISRAELIS AND THE HOLOCAUST* 327 (1991). For further discussion of the Israeli government's didactic aims, see *infra* notes 58–60, 66 and accompanying text.

13. See HANNAH ARENDT, *EICHMANN IN JERUSALEM: A REPORT ON THE BANALITY OF EVIL* 8 (1994) ("The trial was supposed to show [Israelis] what it meant to live among non-Jews, to convince them that only in Israel could a Jew be safe.").

14. RUTI G. TEITEL, *TRANSITIONAL JUSTICE* 119 (2000).

15. Rep. of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence, Pablo de Greiff, U.N. Doc.

that they were *wronged* (not just catastrophically unlucky) in the sense that their human rights were violated.¹⁶

Non-criminal forms of transitional justice, such as official apologies accompanied by reparations, may seem particularly well-suited to satisfy victims' demand for recognition. Even so, criminal prosecutions often provide a precious measure of redress through formal recognition of the wrongs suffered by victims of atrocious crimes.

It is uniquely important that victims receive this type of recognition from the government of the State actually responsible for the atrocities they survived. Although distinct from the forward-looking goals of transitional justice touched on earlier, recognition of victims by their own government reinforces those aims: By affirming that all of its citizens are rights-holders entitled to government protection, a successor government simultaneously acknowledges the harms suffered by victims and makes a commitment to the future.

Still, trials undertaken by another State or before an international court can also meet many victims' felt need for justice. Survivors of atrocities committed in Bosnia-Herzegovina in the 1990s evoked this potential when they explained why they valued the work of the International Criminal Tribunal for the former Yugoslavia (ICTY), which was established by the UN Security Council in 1993¹⁷ and based in The Hague. In the words of one Bosnian survivor, when the ICTY passes judgment on those responsible for horrific atrocities, it is as if "the whole world" is saying "these people committed that and that and we are here to say, it's not good to do that. You cannot do that and go around unpunished."¹⁸

Of course victims are hardly monolithic, and we should take care that we not attribute the goals of some to all "imagined victims."¹⁹ Still, in myriad contexts both the establishment of criminal tribunals and specific human rights trials have answered the urgent demands of many survivors. Indeed landmark trials have often been undertaken in no small part

A/HRC/21/46, ¶ 29 (2012).

16. *See id.*

17. S.C. Res. 827 (May 25, 1993).

18. ORENTLICHER, *supra* note 9, at 97 (quoting Nidžara Ahmetašević).

19. The phrase comes from Laurel E. Fletcher, *Refracted Justice: The Imagined Victim and the International Criminal Court*, in *CONTESTED JUSTICE: THE POLITICS AND PRACTICE OF INTERNATIONAL CRIMINAL COURT INTERVENTIONS* 302 (Christian M. De Vos et al. eds., 2016) [hereinafter Fletcher, *Refracted Justice*].

because of their mobilization.

Yet victims' experiences with such trials have often raised troubling concerns, some of which were particularly pronounced in the early years of the ICTY and other tribunals established in the same period.²⁰ Victims' formal participation in the ICTY and the International Criminal Tribunal for Rwanda ("ICTR"), which was created in 1994,²¹ was largely limited to their role as witnesses²² and only a small fraction of survivors of atrocity crimes were called to testify. Those who did were often frustrated by their inability, in the constrained setting of criminal trials, to tell *their* stories in the nuanced terms of their own experiences.²³ At a time of heightened concern with crimes of sexual violence and other gender-based crimes, moreover, victims were often deeply disappointed in these tribunals' inadequate attention to such offenses.²⁴

These frustrations fueled a global campaign to ensure victims a more meaningful and satisfying role in other international courts, including through input into key prosecution choices. As a result, the laws governing the International Criminal Court (ICC) and the Extraordinary Chambers in the Courts of Cambodia (ECCC) (along with those of other international and hybrid courts) provided for significantly enhanced participation of victims²⁵ as well as for potential reparations.²⁶ While many victims have benefited from these innovations, experience has also illuminated gaps between

20. See ERIC STOVER, *THE WITNESSES: WAR CRIMES AND THE PROMISE OF JUSTICE IN THE HAGUE* 98–103 (2005); RACHEL KILLEAN, *VICTIMS, ATROCITY AND INTERNATIONAL CRIMINAL JUSTICE* 24 (2018).

21. S.C. Res. 855 (Nov. 8, 1994).

22. See Brianne McGonigle Leyh, *Victim-Oriented Measures at International Criminal Institutions: Participation and Its Pitfalls*, 12 INT'L CRIM. L. REV. 375, 384 (2012).

23. See KILLEAN, *supra* note 20, at 24.

24. A global movement to address crimes of sexual violence along with other atrocities committed during the 1990s conflicts in the former Yugoslavia provided powerful impetus for the very creation of the ICTY. See ORENTLICHER, *supra* note 9, at 22; Grace Harbour, *International Concern Regarding Conflict-related Sexual Violence in the Lead-up to the ICTY's Establishment*, in *PROSECUTING CONFLICT-RELATED SEXUAL VIOLENCE AT THE ICTY* 19, 19 (Serge Brammertz & Michelle Jarvis eds., 2016). Not surprisingly, then, with its "establishment came great expectations regarding the prosecution of sexual violence crimes committed in the former Yugoslavia." *Id.* at 31.

25. See Leyh, *supra* note 22, at 385.

26. See Rome Statute of the International Criminal Court, art. 75, 2187 U.N.T.S. 3; Internal Rules of the Extraordinary Chambers in the Courts of Cambodia R. 23(1), (3) (revised Jan. 16, 2015).

aspiration and experience,²⁷ generating a robust critique of contemporary modes of victim participation before international tribunals and the assumptions behind them.²⁸

In this setting, the *Eichmann* prosecution is well worth the considered attention of those working in the fields of transitional and international justice, many of whom know the case (or at any rate engage with it) principally in terms of its controversies, indelibly associated with Hannah Arendt's contemporaneous critique.²⁹ As the next section recalls, Holocaust survivors' central role in the trial, as well as their less visible and underappreciated roles in the lead-up to *Eichmann's* prosecution, surpass the typical roles of victims in recent atrocity trials. As we shall see, however, the *Eichmann* precedent of victim-centered justice is both an inspiration *and* a cautionary tale.

II. THE EICHMANN TRIAL

A. SURVIVORS' ROLES IN THE LEAD-UP TO TRIAL

Contemporary proponents of victim-centered justice would find much to admire, and indeed aspire to emulate, in the *Eichmann* trial. (Here, it is important to distinguish between the *trial* and the judgments that followed.³⁰) As is well known, the

27. For a relatively positive outcome, see Leyh, *supra* note 22, at 395 (describing the impact of victims' participation as civil parties in a major ECCC case). For a less successful example of victim engagement, see *id.* at 395–96; Susana SáCouto, *Victim Participation at the International Criminal Court and the Extraordinary Chambers in the Courts of Cambodia: A Feminist Project?*, 18 MICH. J. GENDER & L. 297, 337–39 (2012) (both recounting how victims from Uganda were unable to persuade the ICC to widen the Prosecutor's case against Thomas Lubanga Dyilo to include crimes of sexual violence). See generally Fletcher, *Refracted Justice*, *supra* note 19, at 320 (asserting that “real victims” in ICC cases have “little power in an institution celebrated as giving them agency and voice”).

28. See, e.g., John D. Ciorciari & Anne Heindel, *Victim Testimony in International and Hybrid Criminal Courts: Narrative Opportunities, Challenges, and Fair Trial Demands*, 56 VA. J. INT'L L. 265 (2016); Barrie Sander, *The Expressive Limits of International Criminal Justice: Victim Trauma and the Local Culture in the Iron Cage of the Law*, 19 INT'L CRIM. L. REV. 1014 (2019).

29. See, e.g., SIKKINK, *supra* note 7, at 74 (citing Arendt's critique of the theatricality of the *Eichmann* trial); TEITEL, *supra* note 14, at 76 (citing Arendt's account of how the trial triggered “more controversial historical interpretations” than those the Israeli government intended).

30. The judgment of the District Court emphasized the distinction, stating:

testimony of victims “held centre stage” at the trial before Jerusalem’s District Court.³¹ The Israeli prosecution, led by Gideon Hausner, rejected suggestions that it limit its case to documentary evidence buttressed by a relatively small number of witnesses, even though Hausner believed “a fraction of [the archives] would have sufficed to get Eichmann sentenced ten times over.”³² Instead, the prosecution constructed the trial to foreground survivors’ testimony, calling more than 100 to bear witness.

I will come back to this fundamental feature of the trial. First, it is important to recognize that survivors’ contributions to the *Eichmann* case transcended their role as witnesses. More than fifteen years before Eichmann was brought to Jerusalem, Holocaust survivors organized grassroots documentation efforts, developing an invaluable resource for future processes of reckoning. In the mid-1940s survivors in fourteen countries established historical commissions to document survivors’ experiences of the Holocaust.³³ These researchers “conceptualized victimhood and witnessing in proactive terms; testifying and documenting their ordeals moved them beyond inert suffering.”³⁴

A key member of the first documentation commission, Rachel Auerbach, would later assist and shape the *Eichmann* prosecution.³⁵ A survivor of the Warsaw ghetto, Auerbach served as Head of the Testimony Department at Israel’s national Holocaust memorial, Yad Vashem, which had collected testimonies of some 1,700 survivors by the time the prosecution

“[T]he evidence given at this trial by survivors of the catastrophe, who poured out their hearts as they stood in the witness box, will certainly provide valuable material for the research worker and the historian, but as far as this Court is concerned all these things are merely a by-product of the trial.” CrimC (DC Jer) 40/61 Attorney-General v. Eichmann, (1961) IsrDC 45(3), *translated in* 36 INT’L L. REP. 5, ¶ 2 (1968), *aff’d* CrimA 336/61 Attorney-General v. Eichmann, (1962) IsrSC 16 (2033), *translated in* 36 INT’L L. REP. 277 (1968). Even so, the trial judgment wove victims’ testimony into its findings to a greater degree than some scholars suggest. For a fascinating perspective on the District Court’s jurisprudential strategy, see Leora Bilsky, *The Eichmann Trial: Towards a Jurisprudence of Eyewitness Testimony of Atrocities*, 12 J. INT’L CRIM. JUST. 27 (2014).

31. Bilsky, *supra* note 30, at 28.

32. GIDEON HAUSNER, JUSTICE IN JERUSALEM 291 (1966).

33. See Laura Jockusch, *Historiography in Transit: Survivor Historians and the Writing of Holocaust History in the Late 1940s*, 58 LEO BAECK INST. Y.B. 75, 75 (2013) [hereinafter Jockusch, *Historiography in Transit*].

34. *Id.* at 91.

35. See SEGEV, *supra* note 12, at 338–39.

assembled its case.³⁶ Auerbach's role extended well beyond her help, in Hausner's words, in "placing at [the prosecution's] disposal her department's huge collection of [survivor] statements and putting [prosecutors] in touch with prospective witnesses."³⁷ She and her colleagues at Yad Vashem influenced the prosecution's crucial decision to expand the trial beyond crimes that could be directly linked to Adolf Eichmann.³⁸ Its case would instead seek to create a comprehensive narrative of the Holocaust itself, powerfully and memorably told through the voices of survivors.³⁹

While this decision aroused substantial debate (which has hardly abated), the point I want to emphasize here is that there was a notable collaboration between survivors and prosecutors before the trial even began—a relationship that strikingly resonates with contemporary sensibilities. This is not to say Hausner uncritically accepted all of Auerbach's suggestions; far from it.⁴⁰ But the prosecution developed the kind of partnership with Auerbach and other survivors that many victims of recent atrocities would envy.⁴¹

Research on the experience of victim-witnesses suggests that this collaboration itself might have enhanced at least some

36. See Hanna Yablonka, *Preparing the Eichmann Trial: Who Really Did the Job?*, 1 THEORETICAL INQUIRES L. 369, 380 (2000) [hereinafter Yablonka, *Preparing the Eichmann Trial*]. The documentation undertaken by survivors became "the core of the Yad Vashem archives," which Auerbach supplemented with further interviews of survivors. Jockusch, *Historiography in Transit*, *supra* note 33, at 89.

37. HAUSNER, *supra* note 32, at 293. See also DEBORAH E. LIPSTADT, THE EICHMANN TRIAL 52–54 (2011).

38. Yablonka writes that when the prosecution had to determine the scope of its charges, "it was the Israeli Holocaust survivors who brought pressure to bear in favor of expanding the scope of the trial"; Hausner "embraced their view." Yablonka, *Preparing the Eichmann Trial*, *supra* note 36, at 370. See also LIPSTADT, *supra* note 37, at 52 (writing that Hausner "fully shared" the view conceived by Auerbach that the trial should demonstrate the "full extent and unique nature of the destruction of the Jews of Europe").

39. See HANNA YABLONKA, THE STATE OF ISRAEL VS. ADOLF EICHMANN 98 (2004). As Professor Bilsky has written, the prosecutor's "decision to rely heavily on the testimony of Jewish victims reflected a community approach to the historical narrative of the Holocaust." Bilsky, *supra* note 30, at 53.

40. Auerbach found fault in key aspects of Hausner's approach, even though "in general the trial was conducted according to [her] suggestion[s]." SEGEV, *supra* note 12, at 339.

41. As previously noted, in recent decades many victims have been deeply frustrated by their exclusion from key aspects of prosecutions undertaken in their name, including crucial decisions about the prosecution's charges. See *supra* note 24 and accompanying text.

survivors' satisfaction with the *Eichmann* trial. An in-depth study of ICTY witnesses found that those who had meaningful engagement with the prosecutor were more likely to experience satisfaction with their experience than those who did not.⁴²

Contemporary transitional justice scholars would also appreciate the grassroots documentation efforts initiated by Holocaust survivors years before they could imagine Israel prosecuting Eichmann in Jerusalem. To explain, it is helpful briefly to describe recent trends in transitional justice.

For at least two decades, a dominant theme in transitional justice discourse has been the central importance of victim participation in shaping and implementing transitional justice measures.⁴³ A recent article summarizes some of the assumptions behind this trend:

Victims are supposed to have an in-depth understanding of both the violence and the socio-political, cultural and economic context in which it occurred. Their participation will allegedly offset a top-down manner of 'serving justice', which is otherwise unlikely to have a durable positive legacy. And finally, victims themselves stand to gain from the empowering and therapeutic effects of participation.⁴⁴

42. STOVER, *supra* note 20, at 89–90. In notable contrast to survivors' experiences with the *Eichmann* prosecution, many Holocaust survivors felt that the Allied prosecutors in Nuremberg, who focused above all on Nazi aggression, had not adequately represented their experience. Following the trial before the International Military Tribunal (IMT), many survivors in Germany "felt marginalized and voiceless, and they worried that their fate had been subsumed under other crimes." Laura Jockusch, *Prosecuting "Crimes against the Jewish People": The Eichmann Trial and the History of a Legal Concept*, in THE EICHMANN TRIAL RECONSIDERED 75, 79 (Rebecca A. Wittmann ed., 2021) [hereinafter Jockusch, *Prosecuting Crimes against the Jewish People*].

43. See Laurel E. Fletcher & Harvey M. Weinstein, *Transitional Justice and the 'Plight' of Victimhood*, in RESEARCH HANDBOOK ON TRANSITIONAL JUSTICE 244 (Cheryl Lawther et al. eds., 2017); Rep. of the independent expert to update the Set of Principles to combat impunity, Diane Orentlicher, U.N. Doc. E/CN.4/2005/102, ¶¶ 7, 9 (2005), available at <https://digitallibrary.un.org/record/543366?ln=en>; Independent study on best practices, including recommendations, to assist states in strengthening their domestic capacity to combat all aspects of impunity, by Professor Diane Orentlicher, U.N. Doc. E/CN.4/2004/88, ¶ 11 (2004), available at [http://www.unhcr.ch/Huridocda/Huridoca.nsf/0/94b45b7493a558cac1256e6e005a6d1d/\\$FILE/G0411355.pdf](http://www.unhcr.ch/Huridocda/Huridoca.nsf/0/94b45b7493a558cac1256e6e005a6d1d/$FILE/G0411355.pdf).

44. Elke Evrard et al., *The Meaning of Participation in Transitional Justice: A Conceptual Proposal for Empirical Analysis*, 15 INT'L J. TRANSITIONAL JUST. 428, 429 (2021).

Yet by focusing on procedural innovations that enhance victims' participation in criminal trials and other institutionalized measures, recent efforts have arguably reinforced the same top-down institutional focus for which they were conceived as correctives.⁴⁵ This matters for many reasons, not least because victims' participation in other, less visible spaces may be more meaningful,⁴⁶ more responsive to their felt needs, and more likely to engender an enduring sense of empowerment.

Survivors' engagement in non-formal, grassroots spaces may also empower them eventually to identify prosecutions as a meaningful goal, and then to mobilize around a genuinely victim-sensitive prosecution strategy. As Claudia Martin and Susana SáCouto have chronicled, this happened among Maya Q'eqchi' women in Guatemala, who had survived sexual violence near a military outpost in Sepur Zarco during their country's civil war. Eventually, these survivors spearheaded a landmark verdict convicting former military personnel of crimes of sexual violence.⁴⁷ But their process of recovery began years earlier, when Guatemalan NGOs began providing psychosocial support to indigenous women affected by the civil war in Guatemala.⁴⁸ The approach they pursued helped survivors play a central role in shaping the justice they needed, and eventually to play a meaningful role in trial proceedings. As Martin and SáCouto explain, "the strategy that [NGOs] articulated of combining psychosocial support, political empowerment, communications campaigns and a solid legal strategy that put the women at the centre of the trial proceedings was essential for the ultimate

45. *See id.* at 433.

46. *See* Paul Gready & Simon Robins, *Rethinking Civil Society and Transitional Justice: Lessons from Social Movements and 'New' Civil Society*, 21 INT'L J. HUM. RTS. 956, 957 (2017).

47. SáCouto et al. note that the verdict "was one of the first convictions of former military members for acts of sexual violence against women committed in the context of the country's armed conflict, and one of the first instances of a domestic court anywhere prosecuting – through the application of national and international laws – sexual slavery in the context of armed conflict as an international crime." SUSANA SÁCOUTO, ALYSSON FORD OUOBA, & CLAUDIA MARTIN, DOCUMENTING GOOD PRACTICE ON ACCOUNTABILITY FOR CONFLICT-RELATED SEXUAL VIOLENCE: THE SEPUR ZARCO CASE 2 (War Crimes Research Office & Academy for Human Rights and Humanitarian Law, American University Washington College of Law, & USA United Nations Entity for Gender Equality and the Empowerment of Women, 2022).

48. Claudia Martin & Susana SáCouto, *Access to Justice for Victims of Conflict-related Sexual Violence*, 18 J. INT'L CRIM. JUST. 243, 247 (2020).

success of the case.”⁴⁹

The *Sepur Zarco* case provides a model of victim-centered transitional justice precisely because of the multifaceted ways in which survivors shaped their own priorities in spaces outside the formal institutions of justice, were supported in those spaces, and then achieved a judicial victory that was more deeply satisfying than what victims have experienced in many other atrocity trials. If *Sepur Zarco* reflects state-of-the-art approaches to victim engagement in transitional justice, the multi-layered roles of Holocaust survivors in the lead-up to the *Eichmann* trial should be recognized as an inspiring precursor—one well worth recovering and including in the repertoire of positive models of victim-centered justice.⁵⁰

B. “VICTIMS COMMANDED THE STAGE”⁵¹

In deliberate contrast to the prosecution of major Nazi war criminals in Nuremberg, in which the Holocaust was hardly central, the Israeli government constructed the *Eichmann* prosecution to place the Holocaust and its Jewish victims⁵² at the center—literally as witnesses, figuratively as the

49. *Id.* at 250.

50. I use the word “recovering” because key aspects of the *Eichmann* precedent are not well known outside of Israel. Leading non-Israeli transitional justice scholars have generally cited the case in passing and principally in reference to its controversies, famously framed by Hannah Arendt in particular. *See supra* note 29 and accompanying text. *See also* MARK OSIEL, MASS ATROCITY, COLLECTIVE MEMORY, AND THE LAW 62–63 (1997) (writing that “the *Eichmann* judgment appears in virtually” no “casebook [or] treatise on international law” outside Israel, though I would add that it is not uncommon to find references to Israel’s abduction of *Eichmann* from Argentina in international law casebooks). In recent decades the *Eichmann* case has figured more prominently in the literature on didactic trials. *See, e.g., id.* at 15–18, 60–63, 80–82, 202–03, 235; LAWRENCE DOUGLAS, THE MEMORY OF JUDGMENT: MAKING LAW AND HISTORY IN THE TRIALS OF THE HOLOCAUST 97–182 (2001).

51. Jockusch, *Prosecuting Crimes against the Jewish People*, *supra* note 42, at 87.

52. Although, in Laura Jockusch’s words, the *Eichmann* prosecution “concentrated on the Holocaust as a whole,” *id.* at 76, the charges also touched on non-Jewish victims. For example the prosecution alleged that *Eichmann* committed crimes against humanity because, together with others, he “caused the deportation from their places of residence of tens of thousands of Gypsies [sic], their assembly in places of concentration, and their dispatch to extermination camps in the areas of the German occupation in the East, for the purpose of murdering them.” *The Trial of Adolf Eichmann—Proceedings: The 15 Charges*, Count 11, PBS ONLINE, <http://remember.org/eichmann/charges> (last visited July 19, 2022).

prosecuting authority, and politically as crucial legitimation for the young State of Israel. To the last point, historian Tom Segev recalls that, at the time of Eichmann's trial, then-Prime Minister Ben-Gurion was mindful that most of the world's Jews had *not* come to live in Israel, whose identity as a Jewish State was not yet firmly established and whose future "was not guaranteed."⁵³ In this setting, Ben-Gurion insisted: "It is the particular duty of the State of Israel, the Jewish people's only sovereign entity, to recount [the Holocaust] in its full magnitude and horror."⁵⁴

Hausner extended this theme in his opening statement (a draft of which he had shared with Ben-Gurion and modified to reflect the prime minister's suggestions).⁵⁵ His first words cast Israel as the sovereign of six million Jews who perished in the Holocaust and in whose name he spoke:

As I stand here before you, Judges of Israel, to lead the prosecution of Adolf Eichmann, I do not stand alone. With me, in this place and at this hour, stand six million accusers. But they cannot rise to their feet and point an accusing finger toward the man who sits in the class dock and cry: 'I accuse.' . . . Their blood cries out, but their voices are not heard. Therefore it falls to me to be their spokesman and to unfold in their name the awesome indictment.⁵⁶

Writing half a century later, Holocaust historian Deborah Lipstadt captured the import of Hausner's opening statement this way:

Now, for the first time, the Jewish people, who during the war had looked this way and that for someone to speak on their behalf, had risen, not to implore others to save them but to prosecute. Here was a representative of the Jewish people speaking, not as a supplicant begging for help, but as a government official demanding long-

53. SEGEV, *supra* note 12, at 328.

54. *Id.* at 329. By insisting that it fell to Israel alone to "speak in the name of the Holocaust's victims[.]" Segev writes, Ben-Gurion "made them all into Zionists." *Id.* at 330.

55. See Yablonka, *Preparing the Eichmann Trial*, *supra* note 36, at 389–90; Rebecca Bettina Birn, *Fifty Years After: A Critical Look at the Eichmann Trial*, 44 CASE W. RESV. J. INT'L L. 443, 445 (2011).

56. HAUSNER, *supra* note 32, at 323–24 (quoting his opening statement in the *Eichmann* trial).

delayed justice. Most important, he was not addressing some foreign authority who might or might not deign to take the Jews' fate into consideration.⁵⁷

At a time when Holocaust survivors formed a quarter of Israel's population but were not yet fully integrated into the national community, the trial was designed to build a new public consciousness of the Holocaust and its victims.⁵⁸ Both Hausner and Ben-Gurion were concerned that young Israelis had come of age at a time when a minority of Holocaust survivors were seen as heroic resisters, while many more were disdained either for their collaboration with the Nazis (perceived or actual) or for responding to the Final Solution like "lambs to be led to the slaughter"⁵⁹ In Hausner's words, "There was here a breach between the generations, a possible source of an abhorrence of the nation's yesterday."⁶⁰ Like Ben-Gurion, Hausner also wanted the trial to remind "the world at large, . . . with as much detail as possible, of the gigantic human tragedy" that had befallen the Jewish people.⁶¹

With these didactic aims in mind, Hausner resolved to build the trial around survivors' testimony. Aware that the "whole extent of the Jewish catastrophe surpasses human comprehension," Hausner believed "[i]t was mainly through the testimony of witnesses that the events could be . . . conveyed to the people of Israel and to the world at large" in a sufficiently compelling way that the Holocaust itself would "be apprehended."⁶² More than that, a trial in which survivors bore witness to unimaginable horrors would "reach the hearts of men" in a way Nuremburg had not.⁶³ In the same vein, assistant

57. LIPSTADT, *supra* note 37, at 62 (2011).

58. See LEORA BILSKY, TRANSFORMATIVE JUSTICE: ISRAELI IDENTITY ON TRIAL 97 (2004); Hanna Yablonka, *The Development of Holocaust Consciousness in Israel: The Nuremberg, Kapos, Kastner, and Eichmann Trials*, 8 ISRAEL & THE HOLOCAUST 1, 15–22 (2003) [hereinafter Yablonka, *Development of Holocaust Consciousness*].

59. SEGEV, *supra* note 12, at 328; *see also id.* at 113. As many scholars have noted, before the *Eichmann* trial the concept of the "guilt of the victim," corresponding to the notion that millions of Jews went to their deaths "like sheep to the slaughter," was a central theme in Israeli consciousness of the Holocaust. *See, e.g.*, Yablonka, *Development of Holocaust Consciousness, supra* note 58, at 9–11.

60. HAUSNER, *supra* note 32, at 292.

61. *Id.*

62. *Id.* at 291–92.

63. *Id.* at 291.

prosecutor Gabriel Bach believed there “should be at least one live witness for each country [in which Eichmann organized the Nazis’ machinery of extermination] *who creates the atmosphere*—who tells of the fate of his family and friends . . . Such an experience makes a difference when trying to understand what happened.”⁶⁴

Among the thousands of survivors available to testify, Hausner curated the witnesses he would present at trial with a view to recasting public perceptions of Holocaust victims. He strove to downplay the role of Jewish councils that, controversially, had served as intermediaries with the Nazis, and instead to “underscore the victims’ heroic activism.”⁶⁵

For myriad reasons, then, it would be a mistake to see the central role of survivor-witnesses in Eichmann’s trial as a precursor to contemporary efforts to elevate the role of victims in atrocity trials with a view to enhancing *their experience of justice*. To be sure and by no means incidentally, Hausner’s approach honored the wishes of many survivors. But his decision to structure the trial around survivors’ testimony was driven above all by didactic goals (which, again, aligned with the views of many survivors). As one writer put it, by highlighting the relationship between Holocaust survivors and the State of Israel, the trial would become “a central piece in the Zionist project of nation-building”⁶⁶—a rather different goal than those animating contemporary efforts to enhance victim participation in atrocity trials.

Controversially then and now, many who testified could not link Eichmann to the atrocities they described but nonetheless

64. J. Gabriel Bach, *The Eichmann Trial*, 34 *LOY. L.A. INT’L & COMPAR. L. REV.* 315, 320 (2012) (emphasis added).

65. Shoshanna Felman, *Theaters of Justice: Arendt in Jerusalem, the Eichmann Trial, and the Redefinition of Legal Meaning in the Wake of the Holocaust*, 27 *CRITICAL INQUIRY* 201, 214 n.24 (2001). See also HAUSNER, *supra* note 32, at 350 (recalling that, although the confines of the courtroom “did not permit any substantial unfolding of the supreme bravery of about a million and a half Jews who fought Hitler on all fronts,” their story also had to be mentioned “for the sake of the record”); SEGEV, *supra* note 12, at 348 (writing that Hausner wanted the trial to “emphasize both the inability of the Jews to resist their murderers and their attempts to rebel”); Jockusch, *Prosecuting Crimes against the Jewish People*, *supra* note 42, at 89 (writing that “Hausner sought to create a heroic image of the Jewish tragedy”).

66. Sonali Chakravarti, *More than “Cheap Sentimentality:” Victim Testimony at Nuremberg, the Eichmann Trial, and Truth Commissions*, 15 *CONSTELLATIONS* 223, 226 (2008).

were selected as witnesses to advance the trial's didactic aims.⁶⁷ Even at a time of heightened regard for victims' meaningful participation in atrocity trials, it would be unthinkable today for an international court (and presumably most national courts), to allow such wide scope for legally irrelevant testimony.

And yet: in the view of myriad scholars, the *Eichmann* trial remains almost singular in its expressive *and* reparative achievements. Many believe, in the words of Leora Bilsky, that the testimonies of survivors "were largely responsible for creating the consciousness of the Holocaust in Israel and throughout the world."⁶⁸ Scholars describe the trial's reparative impact in similarly soaring terms. Laura Jockusch writes:

By giving voice to survivors, this trial would change their position in Israeli society, erase the judgmental attitudes under which they had suffered, and teach the Holocaust to a younger generation of Israelis who only had abstract knowledge of the events.⁶⁹

Writing of the trial's impact in "the general world," Deborah Lipstadt concludes "it changed our perception of the victims of genocide."⁷⁰ In short, survivors' role in the courtroom is believed to have transformed their status far beyond *Beth Hamishpath*—the House of Justice in which they bore witness⁷¹—while

67. Arendt sharply criticized the tenuous connection of many witnesses to the prosecution's case, see ARENDT, *supra* note 13, at 224–25, but acknowledged there were times when "one was glad" that the presiding judge "had lost his battle" to set limits of relevancy on witness testimony. *Id.* at 227. Describing the testimony of one witness, she conceded that "when it was over . . . one thought foolishly: Everyone, everyone should have his day in court." *Id.* at 229. Writing more recently, Stephen Landsman has condemned the prosecution for "using the proceedings for the public airing of a vast array of victims' witness narratives, whether connected to the guilt of the accused or not." Stephan Landsman, *The Eichmann Case and the Invention of the Witness-Driven Atrocity Trial*, 51 COLUM. J. TRANSNAT'L L. 69, 71 (2012). By Landsman's count, at least a third of the witnesses who testified for the prosecution "had no connection to Eichmann." *Id.* at 83; *see also id.* at 90 (at least 40 witnesses' "evidence was irrelevant"). *See also* Birn, *supra* note 55, at 466 (stating that the majority of survivor-witnesses summoned by Hausner "had no connection to Eichmann").

68. BILSKY, *supra* note 58, at 105. *See also* Yablonka, *Development of Holocaust Consciousness*, *supra* note 58, at 15 (describing the *Eichmann* trial as the "paramount event in Israel's Holocaust consciousness").

69. Jockusch, *Prosecuting Crimes against the Jewish People*, *supra* note 42, at 87.

70. LIPSTADT, *supra* note 37, at xi.

71. I have generally presented these conclusions as the views of other

shaping global consciousness of the Holocaust.

Notably too, the centrality of survivor-witnesses in Eichmann's trial is thought to have contributed to a shift in West Germans' attitude toward the grievous crimes of National Socialism. After a postwar period often described in terms of Germans' collective amnesia, a series of three trials, beginning with Eichmann's in Jerusalem followed by two in Germany, "thoroughly and forever changed the way Germans could look back at their past."⁷² Of particular relevance here, this transformative impact is attributed above all to the fact that these trials "made the victims visible and their voices heard, a decisive difference to the [International Military Tribunal] and all other follow-up trials at Nuremberg."⁷³

C. AT WHAT COST TO WITNESSES?

In light of its impact on Holocaust survivors in particular, it is tempting to see the *Eichmann* trial as a model of victims' justice. But if we are to learn the full range of the trial's important lessons, we must ask, did the prosecutor's strategy at times subordinate the psychological well-being of witnesses to his didactic aims?

Recent studies have highlighted substantial risks to survivors' mental health posed by testifying in criminal trials. As one study notes, "there is ample evidence" of the potential for courtroom testimony "to re-traumatize victims,"⁷⁴ and this risk "is not easily defused."⁷⁵ Even those who experience an

scholars because I have not undertaken original research into how the *Eichmann* trial affected public attitudes, and the scholarship on which I have relied does not always explicate the bases for its conclusions in this regard.

72. Susanne Karstedt, *The Nuremberg Tribunal and Germany Society: International Justice and Local Judgment in Post-Conflict Reconstruction*, in *THE LEGACY OF NUREMBERG: CIVILISING INFLUENCE OR INSTITUTIONALISED VENGEANCE?* 15, 29 (2007).

73. *Id.* at 29–31 (identifying Eichmann's trial as the beginning of this shift, while attributing a significantly greater impact to the 1963 Auschwitz trial in Frankfurt). While my focus here is on the *Eichmann* trial's impact on public attitudes, Arendt believed it had an "amazing" impact on German prosecutions, stimulating a raft of arrests of other Nazi figures as well as new trials in Germany. Arendt, *supra* note 13, at 14. *But see* Birn, *supra* note 55, at 450–53 (writing that the arrests and prosecutions often attributed to the *Eichmann* trial were already in preparation).

74. Ciorciari & Heindel, *supra* note 28, at 277.

75. *Id.* at 267. *See also* STOVER, *supra* note 20, at 81 (writing that, "[i]f we were ever prompted to design a system for provoking intrusive post-traumatic

immediate sense of catharsis after testifying may feel differently later. Research suggests “that the long-term benefits to victims from testifying about their suffering are variable, uncertain, and frequently overstated.”⁷⁶

Despite these risks, countless victims have chosen to bear witness out of a sense of moral obligation to those who did not survive, as was clearly the case for many witnesses in the *Eichmann* trial. But others apparently testified despite strong reluctance because Hausner “pressured”⁷⁷ them to do so; several reportedly “paid with their health.”⁷⁸

For example Rivka Yosselewska suffered a collapse that prevented her from testifying on the originally-scheduled date, but nonetheless came to court a few days later.⁷⁹ Toward the end of her wrenching testimony, Yosselewska “appeared to lose her grip.”⁸⁰ Her testimony was powerful and memorable; it may have been “the most horrific of all the testimonies at the trial of Adolf Eichmann.”⁸¹ Yet the events to which she testified, evidently at considerable personal cost, bore no direct relevance to Eichmann’s guilt, raising “questions about the claim that victims were empowered in the Eichmann trial.”⁸²

Apparently even more reluctant to testify was Auschwitz survivor Yehiel Dinur, who was still suffering profound trauma when Hausner pressed him to testify.⁸³ After speaking a few sentences on the witness stand, Dinur collapsed and was unable to resume his testimony,⁸⁴ providing “the dramatic high point of

symptoms in victims of war crimes, we could not do better than a court of law”).

76. Ciorciari & Heindel, *supra* note 28, at 277.

77. LIPSTADT, *supra* note 37, at 161 (referring to the witness Yechiel Dinur).

78. YABLONKA, *supra* note 39, at 108.

79. Gideon Hausner recalls that Yosselewska “suffered a heart attack.” HAUSNER, *supra* note 32, at 73. *See also* HAIM GOURI, *FACING THE GLASS BOOTH: THE JERUSALEM TRIAL OF ADOLF EICHMANN* 50 (Michael Swirsky trans., 2004). Other accounts suggest Yosselewska’s heart attack was caused by the stress of testifying. *See, e.g.*, YABLONKA, *supra* note 39, at 108–09. Yablonka writes that Yosselewska volunteered to testify soon after learning of Eichmann’s capture. *Id.* at 111. Even so, at the time of her collapse days before she was to testify, Yosselewska’s family asked the prosecution to excuse her. *See* HAUSNER, *supra* note 32, at 73.

80. Landsman, *supra* note 67, at 94.

81. YABLONKA, *supra* note 39, at 3.

82. Birn, *supra* note 55, at 468.

83. *See* SEGEV, *supra* note 12, at 3–10.

84. *See* Landsman, *supra* note 67, at 93–94 (writing that “[Dinur was] rushed to a hospital in a coma and never returned to testify”).

the trial.”⁸⁵ Hanna Yablonka writes: “It became clear [Dinur] had not simply fainted; he required a lengthy period of hospitalization.”⁸⁶

It appears “no interviews [were conducted after the trial] with survivor witnesses about their experiences,”⁸⁷ and it is difficult to draw general inferences about the long-term impact of testifying on their well-being.⁸⁸ Yet we know the prosecutor placed significant pressure on some reluctant, profoundly fragile survivors to testify about the very circumstances that had traumatized them—and that he did so despite his belief that he already had ample evidence to convict Eichmann.⁸⁹

To be clear, I am not faulting the prosecution for designing the *Eichmann* trial to “galvanize collective interest in the past,”⁹⁰ and recognize the singular power of survivors’ testimony in achieving its didactic goals. As an influential stream of scholarship has urged,⁹¹ exemplary trials undertaken in the aftermath of mass atrocities serve distinct expressive purposes beyond their primary function of determining a defendant’s criminal responsibility. These wider aims may even justify relaxing ordinary tests of relevancy,⁹² provided defendants’ rights are not compromised. But I hope we have learned that victims’ welfare ought never be subordinated to expressive goals, however salutary the intended message.

III. CONCLUDING OBSERVATIONS

Despite the substantial concerns I have noted, the *Eichmann* trial remains a notable instance of reparative and didactic justice. If eminent scholars have aptly described its

85. YABLONKA, *supra* note 39, at 110; *see also* SEGEV, *supra* note 12, at 4.

86. YABLONKA, *supra* note 39, at 110. This observation was based on an interview with Dinur’s daughter.

87. Birn, *supra* note 55, at 468 n.135.

88. Scholars and journalists have, however, provided insights into some witnesses’ lives years after they testified in the *Eichmann* trial. *See, e.g.*, DOUGLAS, *supra* note 50, at 170 (noting that when asked years after testifying in the *Eichmann* trial whether he thought it was “good to talk about the Holocaust,” Michael Podchlewnik responded, “For me it’s not good”); SEGEV, *supra* note 12, at 3–11 (describing Yehiel Dinur’s efforts to recover from extreme trauma).

89. HAUSNER, *supra* note 32, at 291.

90. DOUGLAS, *supra* note 50, at 4.

91. *See, e.g., id.*; OSIEL, *supra* note 50; RICHARD ASHBY WILSON, *WRITING HISTORY IN INTERNATIONAL CRIMINAL TRIALS* (2011).

92. *See* OSIEL, *supra* note 50, at 66.

transformative impact on perceptions of Holocaust survivors and public consciousness of the Holocaust itself, few trials in history have had such a profound impact.

Recent experience suggests how unusual this type of impact is—and thus also cautions us not to overdraw lessons from the *Eichmann* case about the didactic potential of atrocity trials. Such trials may not have, and often have not had, the expressive impact their architects and victims envision; at times, they have had much the opposite effect.

The ill-fated prosecution of Serbia's wartime leader, Slobodan Milošević, before the ICTY exemplifies this risk. Partly in response to victims' hopes that the tribunal would render an authoritative history of the 1990s' conflicts in the former Yugoslavia, the prosecutor's charges against Milošević swept broadly, encompassing the whole arc of the multi-State wars accompanying the breakup of Yugoslavia.⁹³ Milošević, who represented himself at trial and died before its conclusion, transformed the courtroom into a political platform, playing to a receptive nationalist audience in Serbia and the predominantly Serb republic in Bosnia.⁹⁴

Beyond the deeply problematic Milošević case, the ICTY's work did not appreciably advance the moral reckoning many of its supporters had anticipated⁹⁵ (though it is misguided to say the Tribunal "failed" to do so, as is often suggested, for this expectation was never warranted).

There are myriad reasons why the *Eichmann* trial was more effective in transforming public consciousness than many recent

93. See ORENTLICHER, *supra* note 9, at 155.

94. See *id.* at 160–61, 224–25.

95. Human rights advocates and many victims had welcomed the ICTY's creation in part because they believed its work would educate Serbs and others about the full extent of, and responsibility for, the calamitous wars instigated by Milošević and inspire a moral reckoning. Serbian activist Nataša Kandić made the point this way:

If attempts at rewriting history, such as the denial in Germany of the Holocaust, are to be prevented, the courts must do everything possible to bring out the truth. In this context, one of the tasks for the [ICTY] is to put an end to the practice of the successor states of the former Yugoslavia of passing over in silence or denying atrocities, or persistently broadcasting their distorted and biased versions of the past . . .

Nataša Kandić, *The ICTY Trials and Transitional Justice in Former Yugoslavia*, 38 CORNELL INT'L L.J. 789, 789 (2005).

atrocities trials. Although their enumeration is beyond the scope of this Article, they surely include the salutary debates the proceedings stimulated, for which Hannah Arendt's contemporaneous critiques made an invaluable contribution. In this respect the *Eichmann* trial did not so much deliver a moral message that was accepted wholesale by its target audiences as "expand the space available for moral deliberation through law."⁹⁶

For myriad reasons then, those working on the frontlines of transitional and international justice would do well to mine the *Eichmann* precedent for its vital lessons, which have never been more pertinent.

96. Felman, *supra* note 65, at 225 (emphasis omitted).