The Unknown Eichmann Trial: The Story of the Judge

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This essay analyzes the decisive role of the 1961 Eichmann trial and the pivotal judicial perspective of its presiding judge, Supreme Court Justice (later Chief Justice) Moshe Landau. Justice Landau's part in the trial has been neglected in previous studies, and his own perspective on the trial has been—until now—utterly unknown. The article considers new historical materials—Landau's private memoir—in the context of the "objective" legal facts as established in the trial transcripts and videotapes. The analysis focuses on Landau's leadership in an extraordinary courtroom situation, as well as on the path-breaking decisions he made during the proceedings. The trial became the landmark that it was because of the presiding judge's meticulous professionalism and his deep understanding of its potential significance for the state of Israel.[1]

One day in early 1961, Chief Justice of the Israeli Supreme Court Yitzhak Olshan informed fellow justice Moshe Landau that he (Landau) was to be moved down to the Jerusalem District Court. When Landau voiced his surprise, Olshan—who was not known for his sense of humor—added solemnly: "Of course, with your consent." In this way, Landau learned of his appointment as the presiding judge in Israel's historic trial of Adolf Eichmann,[2] or "Criminal Case 40/61: The Attorney General v. Adolf Eichmann."[3]

Moshe Landau was forty-nine years old at the time. One of nine Israeli Supreme Court justices, he was respected, but neither senior nor patently distinguished. Ahead of him in these terms one could count the learned Shimon Agranat, the brilliant Yoel Zussman, or Moshe Zilberg, who was widely considered a genius. The judicial activist Zvi Berenson was Landau's equal in seniority and renown, and another leading light, Haim Cohen, had been appointed to the Supreme Court in 1960.

Landau had to move his office—albeit temporarily—from the Supreme Court to the District Court, which he had left behind eight years earlier. His move took him from the old, uncomfortable, gloomy, and almost hidden Supreme Court building in the "Russian Compound" at the center of Jerusalem to the renovated Beit Ha'am ("the People's Home") building in narrow and noisy Bezalel Street in downtown Jerusalem—a characterless building designated as a major cultural center for the residents of the capital.[4] A team of builders was hastening to complete the renovation so

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as to accommodate the trial of Adolf Eichmann. After many years of working diligently, but without glory, Landau became instantly famous both in Israel and in the world at large.

The trial of Adolf Eichmann was the first in the world—and the only one ever in Israel—to be videotaped. Large parts were broadcast live on television overseas (at the time there was no television service in Israel). Israeli daily newspapers and the state radio channel Kol Israel ("Voice of Israel") covered the trial extensively. Thousands of pages of the trial records have been published in a number of printed volumes, and the entire transcript is now available online both in Hebrew and in English. More than a dozen books have been published on the trial, and many hundreds of articles and books in various languages have been devoted to its analysis.[5] Several cinematic reconstructions—both documentary and feature films—are based on the videotapes.

Many participants in the affair, from Eichmann's abductors to his hangman, wrote books, lectured, or gave interviews. Not Landau. No one has told the story of the Eichmann trial from the perspective of the presiding judge. Several Israeli and foreign observers—writers, journalists, jurists, and cultural critics—have recorded their impressions of Landau. Yet a complete picture of his role has until now been missing. This omission was of Landau's own choosing: for many years, the judge refrained from speaking about the trial. Only in his private memoirs, which he wrote for his daughters and grandchildren thirty years after the trial, does he return to it, dedicating an entire chapter to his memories and observations. He tells his story in the same terse style and neutral tone that he normally used in his legal decisions and articles, yet he manages to convey the shattering impact of the trial.[6]

In May 1960, the young state of Israel stunned the world: it captured Eichmann in Argentina and brought him to Jerusalem to be judged by a Jewish legal tribunal. The trial would provide the worldwide public its first account of the genocide of the Jewish people. On the one hand, many observers condemned Israel for abducting Eichmann and questioned its legal and moral right to judge him.[7] On the other, there was no precedent for the portrayal of the Holocaust in a judicial context, and Israel's action forced the world to think about the catastrophe as a universal, deeply disturbing question. The famous German (anti-Nazi) philosopher Karl Jaspers wrote to his friend and former student Hannah Arendt, who was planning to go to Jerusalem to cover the trial for the *New Yorker*:

> [The trial's] significance is not in its being a legal trial but in its establishing of historical facts and serving as a reminder of those facts for humanity. The hearing of witnesses for history and the collecting of documents on such a scale and with such thoroughness would not be possible for any researcher. That this is being done in the guise of a trial is, granted, unavoidable, but it is shot through with incorrect attitudes, because of everything connected with it. Or will the Israeli judges succeed in shaping the trial in such a way that these tangential factors fall away? . . . I'm nervous about this because I fear harm to Israel. That can be avoided only if the judges can develop that unpredictable,

> rationally not constructible perspective that goes beyond legal thinking, and shows them, in the eyes of the world and beyond any question or doubt, to be thinking men.[8]

The planned trial involved great risks for Israel, for its judicial system, and for the judges themselves. "I understood immediately the grave responsibility and risks entailed in conducting such a trial," Landau writes in his memoirs; "Tremendous inner strength was required in order to withstand the test. The strength I found in myself sprang from the feeling—from an inner sense—that history was placing upon my shoulders a task fraught with significance."[9]

Judge Halevi and the Kastner Affair

The decision to entrust the leadership of Eichmann's trial to a Supreme Court justice, rather than to a district court judge (as the law required), was itself the result of a prior legal trauma in Israel: the trial and murder of Rudolf Kastner (Rezső Kasztner, Israel Kastner). A few years earlier, this case had polarized the Israeli public and engaged it in a heated debate over the behavior of Jewish leaders in the face of the Nazi genocide. The Jerusalem District Court had ruled on it in 1953, and a final judgment by the Supreme Court, reversing the district court verdict, came in 1958.[10]

Kastner was a plaintiff who became, in effect, a defendant. Attorney General Haim Cohen had indicted Mr. Malchiel Gruenwald, an elderly Hungarian Jew, for libel. Gruenwald, an extreme right-wing Zionist Revisionist and self-styled journalist, wrote and distributed political pamphlets. In the early 1950 s, he had distributed one containing accusations against Kastner, then a second-tier Mapai politician (Mapai, headed by Prime Minister David Ben-Gurion, was the leading political party in Israel). The pamphlet asserted that Kastner had cooperated with Eichmann during World War II, and therefore shared responsibility for the murder in Auschwitz of hundreds of thousands of Hungarian Jews.

In 1944, Kastner was head of the Zionist "Rescue and Relief Committee" in Budapest. After Germany occupied Hungary, he negotiated with Eichmann for the release of a number of Jews, though without conveying to the Jewish public what he learned about the Final Solution. Kastner, Gruenwald maintained, knowingly sacrificed the Jewish majority in exchange for Eichmann's consent to free nearly 1,700 "prominent" Jews—among them Kastner's relatives and friends, Zionist leaders, important rabbis, and a few wealthy Jews who bought their lives with money. The famous "Bergen-Belsen train" took the 1,684 people from Bergen-Belsen—their temporary holding site—to safety in neutral Switzerland. Meanwhile, the Nazis killed altogether around 564,000 Hungarian Jews during the Holocaust.

Gruenwald's defense was classic for libel cases: "I spoke the truth." The judge, Dr. Benjamin Halevi, accepted the defense argument, and ruled that Kastner concealed from the Hungarian Jewish community information about their impending deportation to Auschwitz. Jews who might have tried to resist or to escape did not do

so. Kastner's intention, Halevi concluded, was to save those close to him. In his judgment, Halevi metaphorically compared Kastner to Goethe's Faust, adding that "Kastner sold his soul to the devil." The devil was Eichmann.

Halevi's verdict set off a veritable earthquake in the realm of public opinion. From a human point of view, it was a cruel judgment. Politically, it was read as a victory of the right-wing Herut Party over Mapai.[11] Over the years, Herut had blamed the leadership of the *Yishuv* (the Jewish population of Mandatory Palestine) for abandoning European Jews during the Holocaust—just as, according to Halevi's judgment, Kastner had abandoned the majority of Hungarian Jewry. While the attorney general's appeal of the verdict was pending, a right-wing zealot assassinated Kastner. The Supreme Court subsequently overturned Halevi's judgment and granted Kastner a posthumous acquittal. The court stated that, in hiding the terrible facts from the Hungarian Jewish public, Kastner's purpose had been to rescue Jewish life, to the best of his ability, in the very limited terms of what was possible under the horrific circumstances.

Halevi continued to believe that his judgment was the correct one, and that the Supreme Court, the political leadership, and public opinion had done him an injustice. Despite his excellent record, his promotion to the Supreme Court was delayed, and he strongly believed that the reason for this was his ruling in the Kastner case.[12]

According to the Israeli judicial law (*Courts Law*) of that time, Eichmann was to be judged by a panel of three judges of the Jerusalem District Court. The three would be appointed by the court's president, who was none other than Halevi. The government and the heads of the judiciary were aware that Halevi planned to appoint himself as head of the panel. "It was clear," states Landau retrospectively, "that a judge who expressed himself in such a manner towards Eichmann [should be] disqualified from presiding over his trial, because he would be suspected of harboring a prejudice against the defendant."[13]

High Israeli officials, including President of the Supreme Court Yitzhak Olshan, tried without success to persuade Halevi not to head the planned tribunal. Halevi rejected their pleas and warned that he would dismiss any argument on the part of Eichmann's defense attorney that he (Halevi) should disqualify himself from judging Eichmann. He was convinced, and not without basis, that even if their argument was formally sound, his opponents—including Prime Minister Ben-Gurion, whom he viewed as the inspiration behind the move to disqualify him—in fact were afraid that he would re-open the "scandal of the Judenräte [Jewish councils]."[14] Olshan indeed feared that Halevi would attempt to turn the Eichmann trial into an "appeal" of the Supreme Court's ruling in the Kastner case. Landau adds that these concerns were not unfounded; as presiding judge during the actual Eichmann trial, he had to keep control over Halevi and to restrain him from trying to do just that.[15]

Olshan suggested a solution: an amendment to the *Courts Law* stipulating that in trials for crimes punishable by death (under the jurisdiction of a district court), the presiding judge should be a Supreme Court Justice, and should be appointed by the

Chief Justice—at the time Olshan himself. Consequently, the president of the district court (then Halevi) would appoint the panel's two other judges. His colleagues and the government accepted Olshan's proposal, and the law was amended. Olshan then asked Landau to preside, and Landau agreed. "I considered it my duty to accept this position," he recalls.[16] His confidence in his capacity to succeed despite the potential pitfalls is evidenced by his consent, at the beginning of the trial, to have the proceedings videotaped and broadcast in real time on foreign television.[17] Halevi appointed himself and Judge Yitzhak Raveh (of the Tel Aviv District Court). All three judges' mother tongue was German. Thus the cruel dilemma of Jewish leaders during the Holocaust, as well as recriminations against the leadership of the Yishuv in Palestine in the face of the genocide of the Jews, ironically influenced the selection of the judges who would oversee the Eichmann trial.

Judge Landau and the "Judenrat Dilemma"

In Landau's opinion, the Eichmann trial and the Kastner case had to remain separate: the later trial could neither repeat the earlier one, nor return to it. In his eventual ruling, Landau wrote nothing about Kastner, the Hungarian Jewish leadership, or Jewish leadership during the Holocaust more generally. His judgment mentions the "Bergen-Belsen train," but he limits this reference to Eichmann's consent to "allow, in accordance with an order he received from Himmler, about 1,700 Jews to leave Hungary [for] Bergen-Belsen and from there to Switzerland." This statement he based on Eichmann's answers to Judge Halevi's cross-examination.

Landau's own judicial view of the conduct of the Jewish leaders can be found in his ruling in another case three years after the Eichmann trial: Hirsch Barenbladt's appeal to the Supreme Court.[18] This decision diverges sharply from Halevi's ruling in Kastner's case, and is similar in principle to the Supreme Court majority opinion in Kastner's appeal. Landau's judgment in *Barenbladt* demonstrates empathy for people who, during the Holocaust, were trapped in impossible moral binds.

Barenbladt, a conductor in the Israeli Opera in Tel Aviv, had served during World War II as commander of the Jewish police in the ghetto of a Polish town. He ordered his men to assist the Germans in rounding up the town's Jews and in preventing those Jews marked for immediate transport from escaping. He had hoped by his obedience to save himself and his family. He was indicted in the Tel Aviv District Court under the *Nazis and Nazi Collaborators (Punishment) Law*,[19] and was convicted unanimously by a panel of three judges. Supreme Court justices Olshan, Landau, and Haim Cohen subsequently agreed, in three separate opinions, to overturn the conviction and acquit Barenbladt. In his opinion, Landau expressed his emphatic disagreement with the District Court judges:

> I do not agree with the derogatory tone that is used by the judges about the appellant's egotistical motives for joining the Jewish militia and continuing to serve in it. A man cares

most dearly for himself and his family members. The prohibitions of criminal law, including the *Nazis and Nazi Collaborators (Punishment) Law*, were not intended for heroes with outstanding qualities, but for normal human beings with normal weaknesses. The bitter truth is that in the extraordinary reality of that period, concepts of ethics and values underwent a change. But it would be arrogant and hypocritical on our part—on the part of those who were never put in that situation and those who succeeded in escaping therefrom—to use that reality as a justification for criticizing those "little people" who failed to elevate themselves to lofty ethical standards when they were persecuted mercilessly by a regime whose primary purpose was to force them to lose their humanity. And let us not deceive ourselves that if the actions that were committed by our persecuted brothers are judged in a criminal court by standards of pure morality, the terrible heaviness in our heart over the horrible blow to our people will be lightened.[20]

Experiencing the Holocaust "Indirectly"

The Barenbladt opinion represented the "public" Landau. As for the "private" Landau: What did he know about the Holocaust prior to the Eichmann trial? In his memoirs, Landau defines himself as a person who "experienced the Holocaust only indirectly."[21] As a law student in England in 1933, he closely followed Hitler's rise to power, and he recognized the disastrous significance of the Nazis' takeover of Germany. An avid reader of the English-language press, he was acutely aware of what Jews in Germany could not learn from the censored German press. Landau delivered news of the increasing persecution of the Jews to his father, who used these forwarded accounts in a Jewish newspaper he published and edited in Danzig. Following the publication of this news, pressure on Landau's father, mother, and younger brother Michael increased, hastening their departure from Germany; all left by the end of 1933.

Landau's next and last encounter with Nazi Germany came in 1937, when he visited the country with his new wife Leah during their honeymoon trip to Europe. After visiting Paris and London he took her to Danzig to show her where he had grown up and to introduce her to his mother's parents, his beloved Grandpa and Grandma Eisenstädt. On the way, the couple passed through Hitler's Germany. Four years after his immediate family had left Germany, Landau was an eyewitness to what Stephan Zweig called "the most terrible defeat of reason and the wildest triumph of bestiality."[22] In his memoirs, Landau gives a vivid description of his brief experience of this horror:

> We spent one day in Berlin. . . . There was already a compressed and hate-filled atmosphere towards Jews—a dramatic change from the "jovial" Weimar era, when the intelligentsia of Germany's Jews held prominent positions in culture, arts, and the press. The atmosphere in Danzig was even worse. . . . The "Eastern" Jews—who had gathered in the city after the First World War—were beaten in the streets, and the display windows of Jewish businesses were shattered. We saw a procession of SA-men in their brown shirts. . . . They marched together in the streets with their boots, singing "When Jewish blood drips from the knife, then our lives will be twice as good," an opening song for the atrocities that were about to occur. Nevertheless, very few of the Jews comprehended the extent of the terror they were facing.[23]

Nearly all of Landau's relatives succeeded in escaping from the Nazis, most of them at the last possible moment. His grandparents did not escape, however. In November 1941, German authorities put them aboard a train to the Łódź Ghetto, where both of them died.

After the war, Landau's attitude toward Germany was unequivocal: total disengagement from his birthplace and his roots—a personal separation as well as a linguistic one. He did not share the comforting differentiation that many made between Germans and Nazis. He refused to meet with Germans, in particular those from Danzig, and rejected the German financial reparations to which he was entitled. He refused to speak German, even with his mother, who lived with him and his wife and their three daughters.[24]

Why Was Landau Chosen?

Neither Chief Justice Olshan nor Landau himself explains in their memoirs why, of all the Supreme Court justices, Olshan chose Justice Landau to preside over the Eichmann trial. We can only conjecture. There can be no doubt that his fluency in German was a factor. Since he was but one of four native German speakers among the justices, however, this could not have been the only reason.

In all likelihood, one of Olshan's main considerations was Landau's unique talent for managing extremely complex proceedings. His ability to keep track of numerous documents and witnesses and oversee the accuracy of simultaneous translation, all while diligently applying the rules of criminal procedure, was necessary to prevent the trial from becoming a spectacle. Moreover, a consistent reading of the trial transcripts shows that Landau's command of the evidentiary material was impressive, as was his meticulousness in marking and recording the countless documents presented by the prosecution. His ability to locate quickly every detail from among the accumulating materials is striking. His experience in criminal proceedings was especially important as the prosecutor, Gideon Hausner, had no such background.[25]

Another likely consideration in the selection of Landau was his outstanding ability to control a large number of people (attorneys, witnesses, the audience). Many years later, Landau recalled his concerns in the days leading up to the trial that "it would be difficult to prevent the expected outburst of tempers due to the trial's arousal of memories of the Holocaust, which were still fresh in the hearts and minds of many people." He also feared that in the wake of the public's euphoria over Eichmann's capture, the trial would become "a carnival." He resolved to firmly prevent any disturbance in the courtroom, although he "understood perfectly well the intensity of the audience's emotions."[26]

In retrospect, Landau's fear of "the trial's expropriation by the audience" proved unfounded. There were only a few disturbances. Most of the time, the audience listened to the prosecutor, the defense attorney, and the witnesses in shocked silence. During most testimonies the audience sat frozen, and many cried. But Landau could

Members of the audience listen to the proceedings during the trial of Adolf Eichmann, April 1961. USHMM, courtesy of Israel Government Press Office.

not allow himself to sit passively. The trial videotapes show his ceaseless alertness. He responded in lightning-quick fashion to any noise in the courtroom, and even reprimanded the uneasy laughter with which the audience sometimes reacted to Eichmann's absurd answers to Hausner's cross-examination. When there was a noise, he warned: "I will not tolerate disturbances." But at certain moments he was openly empathic. During the painful testimony of Moshe Beisky, then a young judge of the Court of Peace (the lowest court), and later a Supreme Court Justice, someone from the audience started shouting at the defendant. Landau ordered the disrupter removed from the courtroom, and then turned to the audience, saying: "Please sit quietly so the session will continue. Otherwise, it will not continue. Those who cannot tolerate it, please leave."[27] To the so-called "brands plucked from the fire" testifying on the witness stand, Landau spoke gently and tactfully.[28]

The testimony of Eichmann—"a ghost who caught a cold," according to Hannah Arendt's creative description[29]—was annoying and nerve-racking, and through most of it the courtroom was silent. "If only we could hate [the perpetrators] without thinking them despicable," Haim Gouri wrote in his superb book, *Facing the Glass Booth*.[30] On one occasion, it is true, the courtroom exploded into boiling fury. This was when Eichmann announced, with a demure expression, that he was revolted by the prosecution's blaming him for the extermination of Jews. Another time the audience hissed with anger and disbelief as the accused, projecting the quintessence of the pedantic bureaucrat, replied to Hausner's question about why the Nazis had squeezed more than 100 Jews into every freight car leading them to death camps although the official

capacity of a car was only seventy passengers. Eichmann coolly explained that for Jewish passengers the capacity could be increased, because their luggage was not with them, but was stocked in separate cars at the end of the train. "Everyone may think whatever they want," Landau warned the audience, with apparent empathy, "but without giving it expression."

There were also outbursts of appalled, disbelieving laughter in the courtroom; for example, when Eichmann described his interaction with Jewish leaders in Vienna as a relationship "between partners" who were seeking a solution to the "Jewish Question"; or when he explained that his aim in developing the famous "Madagascar Plan"[31] was to give the Jews "a homeland, and solid ground under their feet." This time as well Landau addressed "his" courtroom: "I ask that you do not react. You will be able to discuss this outside later. If you want to hear the testimony, you must be silent."[32]

Almost always, the audience obeyed instantly. The one exception occurred during the testimony of Pinchas Freudiger, a prominent Hungarian Jew who had headed the Judenrat in Hungary. He saved himself and his family by paying an enormous bribe to Kurt Becher, Himmler's representative in Hungary and Eichmann's chief rival and competitor there. During Freudiger's testimony, a man from the audience stood up and shouted: "You collaborated with the Germans and saved your families!" Landau ordered, "Remove this man." The man was removed, but another outburst followed immediately. Landau stopped and dismissed the session. This was the only time when the proceedings were halted due to the audience's behavior. In all other cases, Landau maintained firm control over the courtroom.

Landau's resoluteness and charisma left a deep impression on all those present at the trial: Hannah Arendt, Haim Gouri, Harry Mulisch, and the assembled journalists and the audience, as well as on young people like myself, who listened to the trial proceedings through the daily broadcasts on Israeli radio. Gouri emphasized the presiding judge's forceful manner and described Landau as "meticulous" and "noble."[33] Mulisch calls him "an extraordinary man."[34] Others who followed the trial had similar impressions: "An atmosphere of sacred respect toward the presiding judge prevailed in the courtroom."[35]

The Defendant vis-à-vis the Judge

Adolf Eichmann manifested a rather ridiculous level of deference toward Landau. "German commentators are of the opinion," Haim Gouri reported, "[that] Eichmann underwent a metamorphosis in Israel. He admires the court, he respects the power before him, and at all costs he wants to be seen differently."[36] The German attorney Dieter Wechtenbruch, who during the first parts of the trial assisted Eichmann's lead attorney Dr. Robert Servatius, told reporters that Eichmann "had great confidence in Judge Landau."[37] Eichmann's almost parodic submissiveness toward the judge is also clear in the videotapes.[38]

One surreal manifestation of Eichmann's adoration of Landau occurred when Hausner insisted that Eichmann—one of the chief architects of the extermination of the Jews—had to give an account of his moral attitude toward the genocide. "From your point of view, was someone who was involved in the extermination of the Jews a criminal?" the prosecutor asked. The defendant's somewhat surprising answer was: "From my point of view such a person was pitiful." Hausner continued: "What about Höss?" (He was referring to "little Höss," the commandant of Auschwitz.) "I pitied him," Eichmann responded. Hausner insisted on receiving a straightforward answer to his question: Did the defendant see the extermination of the Jews as a crime? Eichmann continued to avoid answering the question. After a few more rounds like this, Hausner nearly shouted: "This will not help you. This is one question that you have to answer."

Eichmann, deeply hurt, replied: "I will not reveal my deepest feelings here." At this point, Landau intervened and addressed the defendant: "You will continue to answer until I exempt you from answering." Eichmann straightened up, looked at Landau, and responded obediently, "Yes, Your Honor." He went on: "I consider the destruction of the Jewish people as one of the worst crimes." (But not *his* crime, he added, at the end of his long-winded answer, which had so many twists and turns it was difficult to follow. He was not guilty since he naturally had to obey his oath of allegiance to the Führer.)

The judge was not impressed by the admiration of the Nazis' expert on the extermination of the Jews. "It seemed that by his precepts and according to the education he had received as an SS-man, once he was taken captive by the Israelis and put on trial in an Israeli court, these people were now his commanders, and he must obey them," Landau noted retrospectively.[39]

The Testimony That Never Was

Contrary to Eichmann's mixed behavior toward the presiding judge—cold deviousness alternating with mild obedience and acquiescence—the Holocaust writer Ka-Tzetnik (Yehiel Dinur), who coined the phrase describing Auschwitz as "the other planet," was apparently so frightened by Landau's authority that he collapsed on the witness stand and lost consciousness: soon after Dinur took the stand to answer Hausner's questions, it became clear that the witness was talking not to Hausner, but to himself. Landau intervened, and, almost unable to hide his impatience, demanded that Dinur pay attention to the prosecutor. Here is the end of Dinur's testimony as recorded in the trial transcripts:

> Presiding Judge: Mr. Dinur, please listen to the Attorney General.
>
> [Mr. Dinur stands up, descends from the witness stand and collapses on the stage.]
>
> Presiding Judge: I think we have to stop the session. I do not think we will be able to continue.
>
> Attorney General: I did not anticipate this.[40]

The videotaped segment of Dinur's collapse has been broadcast on television numerous times, and it shows Landau's amazement as Ka-Tzetnik unexpectedly tumbles from the witness stand to the stage.

In a book he wrote decades later, Dinur explains that he must have fainted, possibly because subconsciously he visualized the authoritative Judge Landau as an SS officer. An awful fear overcame him, he writes. Had he not realized again and again in his nightmares that "there was no escape from Auschwitz"?[41]

Trial and Theater

In a conversation that took place in his home many years after the trial, Landau agreed to answer a question that I hardly dared to ask: What was his memory of Dinur's collapse? I was not entirely surprised when he replied dryly: "It was a play within a play."

In his ruling, Landau has a different take on the drama of this episode. Noting that "to give expression to the suffering of the millions" is not a proper task for a court of law, he adds: "This is a task for the great writers and poets. Perhaps it is symbolic that even the writer who himself underwent the hell named Auschwitz could not stand the ordeal in the witness box, and collapsed." This was a philosophical interpretation. But Judge Yitzhak Milanov, Landau's confidant, later told me—confirming my own personal impression—that the rationalist and self-controlled Judge Landau secretly suspected that Dinur's collapse was artificial; that Dinur had put himself into a kind of trance.

Indeed, there can be no doubt that the trial had theatrical aspects. The physical circumstances were themselves theatrical: the Eichmann trial was taking place on a theater stage, in a hall designated for concerts and other performances—a hall filled with journalists, diplomats, and representatives of various public bodies, with ushers moving around to keep order. A long line of ordinary people, old and young, *Ashkenazim* (Western and East European Jews) and *Sefardim* (Asiatic and Near Eastern Jews), waited outside Beit Ha'am hoping to obtain tickets. Equally theatrical was the defendant, sitting or standing in his glass booth. That booth, constructed to prevent a possible attempt to assassinate him, would become the symbol of the trial.[42] The projection of the entire trial on a large movie screen in a nearby building, for those who could not gain entrance to the courtroom, added to the atmosphere, as did the tone and the spirit of the trial coverage by Kol Israel radio, the Government Press Office, and Yad Vashem.

Last but not least, Attorney General Hausner's demeanor was dramatic, sometimes bordering on melodrama.[43] Arendt's description of Hausner in her book *Eichmann in Jerusalem* as no more than a servant of "his master Ben-Gurion" was unfair.[44] Yet it must be admitted that Hausner was often theatrical. In stark contrast to the judges, who always addressed the defendant courteously and dryly, he used exaggerated gestures in cross-examining Eichmann, constantly waving his index finger at the defendant, shouting at him, scolding him, and mocking him; for example, he

repeatedly addressed Eichmann as "Mr. Obersturmbannführer" (Lieutenant Colonel, Eichmann's SS rank), and allowed himself outbursts such as "Were you stupid?" "Were you an idiot?" "Were you an Obersturmbannführer or a typing girl?"[45]

Supreme Court President Olshan and Vice President Agranat abhorred and feared theatricality in the courtroom. The first generation of Israeli Supreme Court justices worked hard to cultivate, both at home and abroad, the image of the Israeli legal system as professional and independent. As Landau would reveal in his memoirs, Minister of Justice Pinchas Rosen wanted to appoint Justice Haim Cohen presiding judge of the Eichmann trial,[46] but Chief Justice Olshan objected because of Cohen's well-known tendency to dramatize.[47]

Unlike Cohen, Landau could be trusted to conduct the trial seriously and without showiness. This cultured and elegant judge, who remained an absolute *Yekke* (in Israeli jargon, a fastidious German Jew) despite his twenty-eight years in Israel, would not tolerate even a hint of exaggeration or melodrama. During the preparations for the tribunal, the Ministry of Justice appointed a special spokesman for the trial; Landau immediately sent a message to the minister that this was inappropriate. The Prime Minister's office, for its part, planned to roll out—literally—a red carpet for the judges. Landau noticed the carpet while he visited the Beit Ha'am during the preparations for the trial, and was appalled. He immediately ordered it removed. In the same spirit, he refused (with one notable exception) to meet with members of the media. He chose to communicate with the defendant directly, in German, without waiting for the simultaneous translation to and from the Hebrew—this despite his usual stubborn refusal to speak German.[48] As a view of the videotapes reveals,

Israeli Chief Prosecutor Gideon Hausner at the trial of Adolf Eichmann, July 11, 1961. Dr. Robert Servatius, the lead attorney of Eichman's defense team, is seated in left foreground. USHMM, courtesy of Israel Government Press Office.

the translations for the journalists and the public—who were not normally part of a criminal trial—contributed to the theatricality of the situation.

The concern that the proceedings should not become "a theater" or show trial had more to do with their substance than with their form, however.[49] Prime Minister Ben-Gurion, Foreign Minister Golda Meir, and Attorney General Gideon Hausner, as well as many others, viewed the Eichmann trial as serving didactic purposes: it would mold and deepen Zionist consciousness; instruct Israeli youth in the history of their forebears; teach appropriate historical and national lessons; and serve political purposes.[50] They wanted to put on trial not only Eichmann, but also—as Ben-Gurion put it in a series of articles he published prior to the trial's opening—Nazism and antisemitism as such. The key lesson, as he saw it, was a Zionist one: that "only in Israel can a Jew live in peace and security."[51] They also sought to demonstrate that not only Germany, but all those other nations who had stood aside, bore responsibility for the Holocaust. Foreign Affairs Minister Meir, in particular, demanded that the trial should achieve political goals by exposing the Nazis' relationship with the Arabs, thus providing evidence of the Arabs' attitude toward the State of Israel.[52]

Israel desired to be recognized as a member of the community of cultured nations; it was crucial that the proceedings should not be interpreted as a Soviet-style show trial. In a clearly pro-Israeli article published on the eve of the trial, renowned British historian and researcher of Nazism Hugh Trevor-Roper warned that "the world—even if wrongly—may refuse to believe that Israeli judges are capable of being neutral, and new antisemitism may arise."[53]

Hannah Arendt's Gaze

For all these reasons, the Eichmann trial was freighted with significance for Israel's reputation, for the Israeli judicial system, and particularly for the judge whose task it was to conduct the proceedings. Landau bore a heavy burden of responsibility. He had to ensure that the trial of Adolf Eichmann would be a real trial despite its inevitably theatrical elements, and that the judges would be truly independent. Landau succeeded admirably in accomplishing these goals.

The most literary description of his success came not from a literary critic, but from philosopher and political theorist Hannah Arendt. She reported on it first in letters she wrote to her husband and to Karl Jaspers during the trial, and then in articles published in the *New Yorker* magazine and later assembled in her book *Eichmann in Jerusalem*.

When Arendt arrived in Jerusalem to cover the trial for *The New Yorker*, she was already well-known. Her attitude toward Zionism was complicated and ambivalent, and her attitude toward Israel and its government was increasingly critical. However, unlike many intellectuals—non-Jews and Jews alike—who argued that Israel did not have the right to judge Eichmann, Arendt maintained that it did. After the trial, she expressed no doubt that the death sentence was just and appropriate.[54]

Arendt was the only member of the press, foreign or local, with whom Landau agreed to speak. He met her before the trial opened, on condition that their conversation remain confidential. The discussion took place in Jerusalem at the home of a mutual friend.

Arendt did not impress Landau, and he did not like her. His chilly attitude probably derived from her harsh criticism of the State of Israel and, most likely, from the fact that she was married to Heinrich Blücher, a German non-Jew (and probably worse for Landau, a former member of the Communist Party). Later, the judge had an additional reason to dislike Arendt: her criticism of the trial, and in particular the "alternative judgment" she offered in her book. He felt that her analysis was ignorant in both fact and in law, and that she was, moreover, pretentious.[55]

She, on the other hand, was utterly charmed by Landau, and immediately wrote to Jaspers that he was "an amazing man! Modest, intelligent, very open. . . . Knows America very well; you would like him very much. The best of German Jewry."[56] And to her husband in the United States she wrote: "Presiding Judge Moshe Landau is really and truly marvelous—ironic and sarcastic in his forbearing friendliness."[57] The impression Landau left on this celebrated intellectual, who would ruthlessly criticize many aspects of the trial, speaks volumes about the presiding judge's personality. Her enthusiasm for his approach and for his conduct as a judge continued in her published articles, and was recapitulated in *Eichmann in Jerusalem*: in that work, she draws a sharp dichotomy between "State" and "Law," one in which Law is the bright side of the equation, and "State" is the dark. Specifically in Eichmann's trial, the State was embodied by Ben-Gurion. Attorney General Hausner "serve[d] the State" and did "his best, his very best, to obey the master." By contrast, "Law" was personified by the judges, led by Landau, whose sole master was Justice.[58]

Hausner, she wrote, loved "ostentatiousness." Ben-Gurion permitted Hausner's "grandiose rhetoric" and display of "theatrics." Judge Landau, in her view, stood in total contrast to the prosecutor: "There is no doubt from the very beginning that it is Judge Landau who sets the tone, and that he is doing his best, his very best, to prevent this trial from becoming a show trial under the influence of the prosecutor's love of showmanship. The trial is presided over by someone who serves Justice as faithfully as Mr. Hausner serves the State of Israel."[59]

"**A criminal trial like every criminal trial**"

To avoid the potential pitfalls that it entailed, Landau resolved to conduct the trial "in a restrained manner according to criminal legal procedure, like every other criminal trial."[60] The judges were meticulous in abiding by this most crucial decision, and this greatly benefited the reputation of Israel's judicial system. Yet the prosecutor obviously did not share Landau's approach and sensitivity. In his eyes, the trial was an all-embracing epic, which all of Israel and the entire world were supposed to watch

and hear. The prosecution tried, again and again, to subordinate the legal to the dramatic.

Here is a typical example: Normally, when a party to a trial submits documentary evidence, the lawyer hands the documents to the judges, and the judges mark them and read them either right away or later. This practice did not fit the trial as the prosecution envisioned it. On many occasions the prosecuting attorneys, when submitting a document, read aloud large extracts from it. During the earliest sessions Landau restrained himself, but one afternoon about two weeks after the trial started, he turned to the Attorney General's assistant, Yaakov Bar-Or, who was reading aloud from a document, and demanded that he stop reading and simply hand over the documents to the judges:

> Mr. Bar-Or, you have submitted approximately fifty exhibits to us. Usually the submission of these exhibits as customary in our criminal procedure lasts about one hour. We have spent the entire morning session on the submission of these exhibits. . . . We are concerned that if we continue in this way—and I know that your intentions are well-meaning—we are afraid that if it continues in this fashion, this trial will exceed its proper limits. It is the Court's duty to prevent that.

Bar-Or began to argue, but had to accede.[61]

Another example, which forty years later still upset the judge, was the testimony of Abba Kovner, a poet and a former leader in the Vilna Ghetto underground. As a wartime leader of Jewish resistance against the Nazis, Kovner became an icon of resistance.[62] "The fear that the trial may overstep its boundaries was realistic," Landau remembers: "For example, the poet Abba Kovner gave an emotional speech in lieu of answering the questions he was asked."[63] The trial transcripts and the video footage of Kovner's dramatic testimony aptly illustrate Landau's recollection.

When Kovner finished his speech, Landau addressed the prosecutor:

> Presiding Judge: "Mr. Hausner, we have heard shocking things here, in the language of a poet, but many parts of this evidence were far from the subject of this trial. Out of respect for the witness and out of respect for the matters he is relating, it is absolutely impossible to interrupt such testimony. 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 a testimony such as this."

Hausner was evasive in his response:

> "Your Honors, 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."

At this point Landau was unable to hide his impatience:

> "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 to what it hears from the Court."[64]

This confrontation over the "emotional speech" of a man who in Israel was a hero, a leader, and a spiritual authority—a man who was entitled to deliver his message without interruption—was extreme but not exceptional. In his judgment, Landau rebuked Hausner for his "unwillingness to sacrifice the social and educational value" of the trial. In his memoirs he summarizes his battles with the prosecutor laconically and dryly: "Prosecutor Gideon Hausner had difficulties in keeping to the limits that I had to impose on him."[65] Even many years later, in his conversations with me, the judge repeated his criticism of Hausner's stubborn attempts to stretch those limits.[66]

Landau did not always succeed in conducting the trial as he intended or within the boundaries he attempted to set. Yet, despite the extraordinary circumstances, he did succeed in conducting a legitimate criminal trial. The judges heard defense attorney Dr. Servatius' preliminary arguments claiming that an Israeli court had no jurisdiction and no right to judge his client Adolf Eichmann, and—as expected—they rejected those arguments. The parties made their opening speeches. The prosecution submitted nearly 2,000 documents, some of them very long. Hausner called more than 100 witnesses to the stand. The defense submitted a small number of documents and a small number of written testimonies.[67] Eichmann himself was the only defense witness. The judges handed down some seventy intermediate decisions. The prosecution and the defense made their closing speeches in mid-August 1961, and the judges adjourned to write the decision.

In his *Memoirs*, Landau notes: "I believe that I succeeded in overcoming the risks that the trial entailed. I did not read or hear any negative criticism of the manner in which the trial was conducted." This was excessive modesty. Landau knew well that no one doubted the court's professionalism or independence. The judges were successful in accomplishing their exceedingly difficult task.[68] Reporter and poet Haim Gouri summed it up this way: "The court restrains the cry that is heard between its walls, and with mighty force turns this cry into numbers and facts."[69]

Survivor Testimonies

The numerous documents accumulated by the police and the prosecution prior to the trial were sufficient to convict Eichmann and to substantiate a sentence of death. Most members of the prosecution team were in favor of basing the case on documentary evidence alone. Hausner's vision was different. He took a lesson from the Nuremberg Trial, which reporters had described as "one of those events that do not become an experience," "intolerably annoying." As Rebecca West put it, "the symbol of the Nuremberg trial . . . was a yawn."[70] Hausner anticipated, therefore, that a trial based solely on documents would alienate and distance the public and the media. He envisioned, in contrast, an experience made emotionally powerful through the oral testimony of living witnesses.

He hoped to "transmit meaning," and to provide "a living documentation of the horrible national and human catastrophe." He called to the witness stand men and women who had survived the Holocaust, presenting them in geographical and chronological order, and asking each of them "to narrate a small segment of what he [or she] saw and experienced."[71] None of them was able to say anything specific about Eichmann's deeds.

In Israel in 1961, in line with the Zionist ethos, the words *Shoah* and *gevura* ("Holocaust" and "heroism") were inextricably linked.[72] Hausner thus called to the stand "heroism witnesses"—witnesses who would testify to Jewish heroism during the Holocaust—as well as "Shoah witnesses"—witnesses who would testify to Nazi atrocities and the suffering of the victims. Twenty-one witnesses belonged to the first category: members of Jewish underground movements, Jewish partisans, and Jewish soldiers in the Allied forces. The remaining seventy were "sheer" survivors. One after another they—survivors of ghettos, of Einsatzgruppen atrocities, of concentration camps, of death camps, and of death marches—climbed to the witness stand. In a chain of shocking personal stories, they related their experiences and those of their relatives under the rule of Nazi Germany.

The survivors' presence in the flesh, the heart-rending stories they told, and the simple manner in which they narrated their tragic stories had a tremendous impact on the Israeli public. These witnesses forced many Israelis to confront the Holocaust for the first time. Prior to the Eichmann trial, writes the historian Anita Shapira, a "big silence" had prevailed in Israel. In bearing witness in the courtroom, the survivors broke that silence. The trial thus changed forever the Israeli stereotype of Diaspora Jews as second-class Jews who had failed to resist or to defend themselves, and who, to use Kovner's phrase, had gone "to the death camps like sheep to the slaughter."[73] In retrospect, then, the survivors' testimonies performed a tremendous service by changing Israeli society's perception of itself.

But while Landau was preparing himself for the trial, he grew understandably concerned that the victims' testimonies might overstep the trial's judicial boundaries. In his memoirs, he explains the reason for his apprehension: "It is difficult to imagine how the trial might have developed, had the defense attorney decided to be provocatively aggressive, and cross-examine the witnesses with unnecessary length."[74] Had Eichmann's attorney, Servatius, decided to undermine the witnesses' credibility, cross-examine them, or cast doubt on their memory and their trustworthiness, it is doubtful that the prosecution would have been able to achieve the cumulative and monolithic impression that it did. Assuming that Hausner did not know in advance how the defense was going to act, his plan for the trial was a gamble.

Ironically, the prosecution's plan was saved by the German legal system. Landau explains:

> Dr. Servatius conducted himself according to his legal education, based on German criminal procedures—in which the court examines the defendant and witnesses, and the

> defense attorney's task is more limited than in the English system that we use here: He is permitted to examine the witnesses only through the Court, which ensures that the examination is limited to questions that are in dispute. Dr. Servatius, therefore, generally avoided examining the witnesses regarding the general background of the horrors of the German policy that ended with "the Final Solution." His questions were always focused on minimizing Eichmann's part in it.[75]

It was the good fortune of the prosecution, of the court, and of history that the witnesses were heard consecutively and almost without interference or disturbance.

As Landau listened to the survivors, his face revealed his anguish. Listening day after day to the devastating accounts of atrocities required immense mental and emotional effort. Many years later Landau would write:

> This was a very difficult experience for everyone who was present, including the three judges who had to listen to the testimonies of the "brands plucked from the fire". . . . In one session, when a film that had been taken in the Bergen-Belsen camp after its liberation was screened, and when the film showed hundreds of naked corpses being shoveled by a bulldozer into pits that served as mass graves, my colleague and friend, the late Judge Raveh, burst into tears, and I had to stop the session. The judges needed tremendous mental strength to withstand the ordeal . . . and yet at the same time to maintain the trial.[76]

When Landau passed away in May 2011, fifty years after the trial, Haim Gouri eulogized him by invoking his unforgettable humanity and charisma as presiding judge: "I saw Justice Moshe Landau facing heartbreak and crying. I sensed the full measure of his stature when he looked at the Holocaust victims as individuals, and saw the suffering of the individual."[77] Landau's sense of mission at the historic trial guided him and helped him to withstand the ordeal: he felt a responsibility "to demonstrate to the people in Israel and in the world at large that here, our free state sits in justice and has a right to pronounce judgment on the persecutors of our people. . . . I drew strength whenever I looked at the state emblem under which we sat in judgment."[78]

Decision No. 13: Allowing the "Parade of Victims"

Why did the judge allow the "parade of victims"? In the methodological preface to his judgment, Landau expressed his unequivocal disagreement with Hausner's vision, that in criminal trials, "proving guilt and imposing a sentence . . . are not the only objective[s]."[79] Contrary to Hausner's approach, the judgment states: "The goal of every criminal trial is to decide whether the accused is guilty, and if he is convicted—to determine his punishment. Anything that is required for these goals should be examined in the trial. Anything that is irrelevant to them should be left out of the proceedings."[80]

Did the survivors' testimonies fit into this framework? The question arose explicitly some three weeks after the trial opened, during the twenty-third session. On the previous day, the prosecution had called seven survivors from prewar Polish territories to the stand. One after the other they told appalling stories of beatings, humiliation,

murder, mass executions, selections, forced labor, and deportation to concentration and extermination camps. None of them had encountered Eichmann, and so they could not testify directly about his actions. The seventh witness was Dr. Leon Weliczker Wells, an American citizen and a reputable scientist. When the war broke out he was 16 years old and lived with his family in Lvov. At the end of the war, he was the only survivor of his large family.

Throughout these testimonies, Dr. Servatius sat silently. When Landau asked at the end of each testimony whether he wanted to cross-examine the witness, Servatius answered "no." However, at the beginning of the next session, he stood up and submitted to the court a written application to discontinue Wells' testimony, arguing that the testimony was not relevant to the question of Eichmann's guilt:

> The testimonies—Servatius said—have, perhaps, great significance from the point of view of their importance in a historical process. It is not relevant in the judicial process since they have no connection to the defendant's responsibility. . . . These matters [the atrocities and murders] have already been proven here by documents and other witnesses. I am, therefore, of the opinion that there is a certain repetition here.[81]

Servatius' argument was that Eichmann did not deny the Nazis' horrific crimes against the Jewish people—crimes that were specified in the indictment. Therefore, these matters did not need to be proven. Eichmann's defense was that he himself was not responsible for the crimes, and that on the matter of his personal guilt, survivors of the ghettos and camps could contribute nothing. Their stories were useful for "historical research," but were totally irrelevant to the legal investigation of the defendant's guilt.

Intermediate Decision No. 13 of the Court rejected Servatius' application. The decision reads:

> We think that the testimony of the witness Wells is relevant to the subject of the trial. The question that has to be determined is the personal responsibility of the defendant for the acts set out in the indictment.
>
> The Prosecution must prove, first, that all these acts were committed; and second, that they are the responsibility of the defendant. According to established criminal procedures, matters may not be eliminated from the area of dispute by an agreement of the parties.[82]

In other words, since the indictment attributed to Eichmann, alone and together with others, responsibility for all of Nazi Germany's crimes against the Jews, from the ostracism of the Jews in Germany and the deportation of Austrian Jews prior to the war, through Treblinka, Auschwitz, and the death marches; and since Eichmann's response to each one of the counts was a denial ("Not guilty in the sense of the indictment"), the prosecution had to prove that all of these actions were carried out, and for this purpose Dr. Wells' testimony was relevant, as were the testimonies of other survivors.

Even if Decision No. 13 was legally correct, in substance Servatius was right. And if any doubt remained that the accounts of the "background witnesses" were not needed to determine Eichmann's guilt, the doubt would be removed in the judgment. Eichmann's conviction, the judgment emphasized, was based on documents: Nazi administrative documents, as well as testimonies of senior Nazis (mainly in the Nuremberg trials), the transcripts of Eichmann's police interrogation, and statements Eichmann had made on several occasions during and after the war. No part of the conviction was based on survivors' oral testimonies. In his judgment Landau says explicitly: "The testimonies given in this trial by Holocaust survivors will certainly be . . . extremely valuable material for the researcher. However, as far as this Court is concerned, these are no more than side effects of the trial."

To the clear-minded jurist that Landau was, it was undoubtedly obvious that by allowing the "parade of witnesses," he deviated from his own assertion that "anything that is unrelated to determining the defendant's guilt—and if found guilty to deciding his punishment—should be excluded from the proceedings." Yet he allowed the trial's stage—in both meanings of "stage"—to be used for extra-legal purposes. That is, he allowed the trial to transgress the strict limits of criminal law, and become, in part, the type of event that the prosecutor and the Israeli government had envisioned.

Why, then, was Landau inconsistent? What were his considerations when he agreed to let the court and the world listen to survivors' testimonies? As he left no explanation, it is up to us to try to think through—and articulate—the answer to this question.

On a simple level, no great trial can be entirely consistent. Intuitively, it was unthinkable that a Jew—even a conservative, rationalist, and purist judge—would decide that the trial of Eichmann could not "draw an appropriate picture of the crimes" (Landau's phrase in his judgment). Such a picture could be drawn only by the victims—not by administrative documents drafted by the organizers and the performers of the persecutions, humiliations, tortures, and murders, and not by written statements and admissions of the architects and perpetrators of the crimes. Documents were necessary to prove Eichmann's criminal responsibility, but they could not convey the horror of the "Final Solution." To deny the deeper truth—that Eichmann's criminal trial was indeed more than just a trial—would have been short-sighted and foolish. Even while he was working hard to maintain the legal framework, Landau recognized that history was also at stake.

I believe that there was a further, equally powerful reason for Landau's deviation from the strict legal line that he emphasized in his judgment: he recognized the human and moral obligation to give the victims a voice. The survivors had a need and a right to testify on a legal stage, facing their persecutor, and the court had a duty to enable them "to open their closed hearts on the witness stand" (Landau's words in his judgment). Intuitively, Landau knew that the former inmates of ghettos and camps felt an obligation to tell the world what happened—to bear witness. His understanding

can be heard in his voice as he apologized to more than one witness for having to deny his or her plea to tell "just one more story."

Intermediate Decision No. 13, therefore, exposed a duality—or perhaps a conflict—in Landau's thinking. On the one hand, as a judge he was required to conduct the trial according to strict legal principles, regardless of the trial's subject. On the other hand, as one of the early Supreme Court justices, Landau was among the engineers of an enormously difficult and fragile project: that of building the new Jewish homeland. Here, in the Eichmann trial, he had the obligation and the opportunity to lead and shape an event that would influence the future spirit of the Jewish state. Landau understood that, alongside the legal proceedings taking place in the courtroom, a public event of immeasurable significance was taking place as well.

Landau's solution to the conflict was to allow the judicial event and the public event to take place side by side. He took care not to let the public event shatter the legal framework, or to let the criminal trial deteriorate into a theatrical show trial. His genius as a judge lay in his ability to keep the two dimensions of the trial—the legal and the extra-legal—separate and distinct from one another.

Victims and Heroes: The Transformation of the Meaning of the Holocaust

For the Israelis, Tom Segev maintains, "the horror stories that burst out from the depths of the great silence gave birth to a process of identification with the suffering of the murdered and those who survived."[83] On the other hand, Hannah Arendt derided what she mockingly referred to as "the right of the witnesses to be irrelevant."[84] Her criticism was more philosophical than legal, and more political than philosophical. It stemmed from her hostility to theatricality, from dislike of Hausner, her hostility to nationalism, and her complex and ambivalent attitude toward Zionism. For her, the survivors' testimonies resembled a "mass meeting" in which "one speaker after another does his best to arouse the crowd." She declared summarily that "the procession of the witnesses . . . smacked . . . of propaganda."[85] But even she surrendered, deeply moved, to the impression made on her by the testimony of Zindel Grynszpan, one of some 17,000 Polish-born Jews expelled from Germany in October 1938. When the Polish government refused to admit them, these Jews were kept in a legal limbo in "relocation" camps at the Polish-German border.[86] In the wake of Grynszpan's story she could not help but write: "One thought foolishly: Everyone, everyone should have his day in court."[87]

On one matter, the cosmopolitan political theorist and the Israeli judge had the same view: Both were severely critical of the prosecutor's plan to present to the judges, the audience, and the general public more than twenty lengthy testimonies to Jewish heroism. Landau's consent to hear the survivors extended to those who could expose the deeds of the perpetrators, not to those who presented the victims' response. Hausner's incessant attempts to put the heroes at the center of the trial caused considerable friction

between the bench and the bar, as the exchange between the judge and the prosecutor over the testimony of Abba Kovner demonstrated.[88]

The fact that Landau limited (as far as he was able) the stories of the heroes had a significance that, in my opinion, has not received the recognition it deserves. Landau's decision to allow survivors to narrate the Jewish catastrophe, but at the same time to restrict and limit narratives of Jewish heroism, turned out to be a major contribution to a gradual cultural transformation that took place in Israeli society as a consequence of the trial. The Eichmann trial was a turning point in the development of Israeli Jews' identity: it transformed their perception of the meaning of the Holocaust, and more generally, their perception of the meaning of being Jewish. The trial initiated a process that would lead the Israelis to end their "negation of the Diaspora" and eventually to let go of the Israeli understanding of Zionism as a virile and heroic answer to the shamefulness of Jewish existence in Diaspora. The Eichmann trial thus led to a deeper perception of Jewishness as continuity, and of the Holocaust as the destruction of the Jewish nation. Landau felt that the national catastrophe should be allowed to penetrate into Israeli collective consciousness, and that it demanded above all a collective mourning—one that had yet to take place.[89] He understood these needs intuitively, and his decision to emphasize the victims and not the resistance fighters was a major factor in triggering the transformation in Israelis' self-perception.

"Crises of Witnessing"

Landau explained in his written judgment that the survivors' testimonies could not serve as the basis for legal conclusions concerning the guilt of the accused. Yet he goes back to these testimonies to point out that they revealed a new and startling insight. Perhaps only at the trial's end, Landau realized that the meaning of the Holocaust consists also in the impossibility for Holocaust victims to fully narrate their traumatic experiences. That impossibility was exemplified, Landau writes in his judgment, not only by the writer Ka-Tzetnik, who collapsed on the witness stand, but also by another witness, Judge Moshe Beisky. During his testimony, Beisky said that there were things he was unable to tell, to understand, or to explain.

An acute observer and a highly attuned listener, Landau understood before all others—historians, psychoanalysts, philosophers, and artists—what literary critics in recent decades have labeled the "crisis of witnessing."[90] He identifies this new meta-legal meaning by underscoring the limits of legal testimonies. In the judgment, alongside his fact-finding and the legal analysis, he notes the impossibility of giving legal meaning to the depth of the trauma:

> To describe the Holocaust in the East, documents were submitted. But the bulk of the evidence consisted of testimonies of "brands plucked from the fire," . . . They spoke simply, and the seal of truth was on their lips. But there is no doubt that even they could

not find the words to describe their suffering in all its depth. As one of them, Judge Beisky, said in an attempt to describe his feelings when he was forced to watch the hanging of a young boy in the presence of thousands of Jewish prisoners: "I can no longer—and I admit it—after eighteen years, I cannot describe this terror. This feeling of terror does not exist any longer today when I stand before Your Honors, and I do not think that it is possible to transmit the conditions of those days in a courtroom. It is not that I believe that people will not understand, but I cannot do it, and I myself experienced it, in my own flesh."

The Judgment and the Sentence

The trial opened on April 11, 1961. After seventy-five sessions, the prosecution finished its case and the defense started its own, including Eichmann's testimony. This lasted until the 107th session; in the last two sessions, the three judges examined the defendant. On August 14, 1961, the closing arguments of the prosecution and of the defense were completed.

The judgment was read aloud in the courtroom on December 15, 1961, over several hours, with the judges taking turns reading it. It convicted Eichmann of crimes against the Jewish people, crimes against humanity, and war crimes.[91] It fills 268 densely printed pages, of which Landau wrote 185. He wrote the preface, a methodological and philosophical introduction. The next part was Halevi's, and it is an extensive and excellent legal rebuttal of the arguments against the Israeli Court's authority to judge Eichmann. The remainder—the main part, which was also written by Landau—describes the various stages of the Holocaust and Eichmann's actions at each stage, analyzes Eichmann's criminal intent, and rejects his defense arguments.

After the judgment was read, Hausner and Servatius summed up their arguments regarding the punishment. Hausner demanded the death sentence ("this

Defendant Adolf Eichmann listens as presiding judge Moshe Landau sentences him to death, December 15, 1961. USHMM, courtesy of Israel Government Press Office.

man deserves to die"). Servatius argued that Eichmann should not be sentenced to death because, in Germany, the death penalty had been abolished. Then the judges pronounced the sentence: the defendant's crimes demanded that he be punished by "the most severe punishment that the law allows"—death. The explanation of the sentence was brief, about two pages. The judges wrote: "The objective of the crimes against the Jewish People of which the defendant was found guilty was to annihilate an entire people. In this respect, they differ from criminal acts against persons as individuals. But at the sentencing stage, consideration must be given above all to the harm inflicted on the victims of the Holocaust as individuals." Finally, Eichmann spoke. No one was surprised when he declared that his hope for justice had been frustrated.

Landau's Legal Credo: The Judgment's Overture

After four months of proceedings, and another four months of waiting for the verdict, the judgment was anticlimactic for many. Landau's legal-philosophical preface to the judgment states clearly what the judges would refrain from doing. First, they would not attempt to write a history of the Holocaust, because: "We are not required and we are not able to take upon ourselves the job of historians."[92] Second, they would not tackle larger questions, such as: How could this catastrophe happen in broad daylight, and why was it committed specifically by Germany of all the peoples? What are the psychological and social reasons for antisemitism? Could the Nazis have carried out their plot without the assistance they received from other peoples amongst whom the Jews lived? Could the Holocaust have been prevented, at least partially, if the Allies had demonstrated more will to help the persecuted Jews? Did the world's Jews do everything in their power to respond and call for help for their brothers? And, What is the lesson that Israel and the nations must learn from all this, and what should every person learn about his relations with his fellow man? "No one has authorized us," Landau wrote, "to judge big issues that lie outside the legal realm, and our views about them have no greater weight than the views of any person who devotes to them time and thought." He continued: "The path of the Court was and is clear. It should not be tempted to try to wander to foreign provinces that are outside its sphere. The judicial process has ways of its own, laid down by the law and procedure, and they must be kept meticulously, since they are in themselves of considerable social and educational significance."

The final text of the court's opinion constitutes a clear, comprehensive, rigorously substantiated, and masterfully structured judgment: it leaves no doubt that Eichmann's conviction rests on solid evidence. Yet it is a matter-of-fact text, devoid of philosophical reflections. Other than in the preface, it contains not a single quotable sentence. Few people read it in its entirety. Given the time and effort that he devoted to its writing, its reception by the public and the media must have been a disappointment to Landau.

The Judgment: Eichmann's Deeds (*Actus Reus*)

The judgment describes Eichmann's actions (the *actus reus* of his crimes) step by step. On the basis of hundreds of documents, it rejects Eichmann's claim that he was but a small cog in the machinery of extermination, an "ordinary clerk" who merely carried out the decisions of his superiors (Heydrich, Kaltenbrunner, Müller). This claim was an outright lie, the judges determined. In truth, "the defendant was involved in all of the extermination activities":

> Even if we view each sector and each step and area of the implementation of the Final Solution separately, there was, in fact, not even a single sector, step, or area where the defendant did not act in one way or another, with varying degrees of intensity, along the whole front of the extermination. . . . His position was very influential. . . . The entirety of the evidence contradicts the defendant's repeated line of reasoning—that he did not take any initiative, did not have any influence.

Recent research based on the analysis of newly discovered documents and tapes that were not available at the time of the trial corroborates the substance of the Eichmann trial judgment.[93] Yet, despite the growing body of evidence, we must remind ourselves even today of the judgment's well-reasoned and detailed analysis.[94] The myth that Eichmann was no more than a nondescript bureaucrat—a "cog in the machine"—continues to prevail.

The Judgment: Eichmann's Criminal Intent (*Mens Rea*)

For Landau, the heart of the judgment had to do with Eichmann's insistence that he did not harbor criminal intent (*mens rea*). Eichmann claimed, as is well known, that he had no desire to exterminate the Jews, and that he had acted as he did, and committed the horrible crimes he committed, because, as a military and SS officer, he was obliged to uphold his oath of obedience to the Führer and to the Reich.

Following Eichmann's direct testimony and the prosecution's cross-examination, the three judges questioned the defendant. As expected, Halevi's questions revolved around the deportation of the Hungarian Jews to Auschwitz, but Landau's fear that his colleague would try to turn Eichmann's trial into "an appeal" of the Supreme Court judgment in Kastner's case did not materialize. Judge Raveh's examination of Eichmann was, more or less, a philosophical debate between the judge and the Nazi defendant: How could Eichmann claim, in his police interrogation, that he had lived according to Kant's categorical imperative? In a later conversation with Landau I was unable to restrain my curiosity, and asked about his reaction at the time to that macabre comedy. He looked at me and replied with a rhetorical question: "What do you think?"

I also asked Landau what his goal was in examining Eichmann. He answered that he wanted to remove any shred of doubt that Eichmann had been an antisemite, and that his insistent denial of his antisemitism had been sheer falsehood. In fact, Landau's examination may not have been indispensable to the judges' ruling. At this

stage of the trial, Eichmann's criminal intent was clear. As the judgment states, based on the evidence, Eichmann was unmistakably "a Jew-hater who strove to exterminate the Jews"; "he was filled with joy when sending Jews to their death"; "he acted vigorously to advance the Final Solution"; and "he carried out his activities out of an internal conviction and not under the force of orders." Landau wrote: "His attempt to argue that he—the Specialist for Jewish Affairs in the Head Office for Reich Security—he, of all people, was . . . the one National Socialist who did not hate Jews . . . is unbelievable. Had a man of his kind, a man who stood in the center of the war against the Jews, shown the slightest deviation from the antisemitic orthodoxy that was demanded from every member of the Party, however low, he could not have remained in his position even one day."[95]

Arendt's Alternative Judgment

As we have seen, Hannah Arendt greatly admired Landau and praised him as the embodiment of justice.[96] Yet his judgment disappointed her. In her book she sketches an alternative "judgment." In it she, too, convicts Eichmann and sentences him to death, but she does so on different grounds: because he had supported and carried out "a policy of not wanting to share the earth with the Jewish People and the people of a number of other nations," Eichmann had no right to share the earth with humanity.[97]

Arendt's criticism of the judgment consists of three parts. First, she says, the judges were ethnocentric in their approach. They focused on the Jewish victims and failed to comprehend the true, universal nature of Nazi crimes. They interpreted the Nazis' murderousness as the continuation of an old Jew-hatred; as the culmination of an ongoing and ancient antisemitism. They failed to understand that Nazism was a new and unprecedented phenomenon. The lesson from the Holocaust is a lesson for all humanity. The body against whom the Nazis' crimes were committed was the Jewish People, but the victim was humanity.[98]

This attack on the official judgment was mistaken both in fact and in law. The judges (unlike the prosecutor and the political leadership) did not see the Holocaust as the culmination of "a centuries-long pogrom," nor did they see the Nazi crimes as a uniquely Jewish matter. Landau's list of larger questions that the judges would not attempt to answer demonstrates his universal outlook, as do his memoirs. But unlike Arendt, who attributed Nazi bestiality to the political patterns of totalitarianism, Landau saw it as something deep-rooted in German nature.[99]

Arendt's legal error lay in her disregard for positive law. This was a criminal trial: the judges' task was to judge Eichmann according to the indictment, which charged him with crimes against the Jewish People, as well as with crimes against humanity, war crimes, and murder, all brought under the *Nazis and Nazi Collaborators (Punishment) Law*. Even if they had wanted to, the judges were not authorized to convict Eichmann solely of crimes against humanity, as Arendt claimed they should have.

In a broader sense, Arendt demanded that the Jerusalem Court fulfill a non-legal role, deciding philosophical and political issues. Yet, Arendt herself was critical of Ben-Gurion and Hausner's ambition to use the trial to achieve extra-legal (Zionist and political) objectives.[100]

Arendt's second criticism of the judgment is also flawed. It was wrong, she argues, to conclude that Eichmann was an antisemite.[101] The judges, she maintains, did not see that his testimony was accurate: he was not an antisemite. They "preferred to conclude from occasional lies that he was a liar."[102]

It is ironic that, over the years, Arendt's argument has acquired the status of accepted truth. She did not even attempt to base her argument that Eichmann was not an antisemite on factual evidence.[103] Her argument was theoretical—and wrong; it derived from her "banality of evil" thesis, and its apparent purpose was to serve that thesis.[104] As should be clear to anyone who takes the time to read the trial transcripts and the Court's analysis, the judgment was correct: Eichmann was a fanatical antisemite. The evidentiary material presented at the trial clearly points in that direction, and later historical research strongly supports the judges' conclusion.[105]

Arendt's third criticism of the judgment is that the judges missed the greatest moral and even legal challenge of the whole case: that of understanding Eichmann not as a monstrous criminal, but rather as a symptom of twentieth-century totalitarianism. Their mistake, she maintains, was that they judged Eichmann by conventional concepts of criminality, and were blind to the figure of the new and unprecedented "banal" criminal. They failed to see the true horror, which lay precisely in the new phenomenon of impersonal mass murder, without motive, without hate. "Because they were too good, and perhaps too conscious of the very foundation of their profession," Arendt writes, the judges "refused to admit that an average 'normal' person, neither feeble-minded nor indoctrinated nor cynical, could be perfectly incapable of telling right from wrong."[106]

According to Arendt's paradoxical thesis of the banality of evil, Eichmann was an empty shell, made of shallow slogans, incapable of human empathy. Arendt defines this as a state of "thoughtlessness": a mental emptiness.[107] His only motive had been personal ambition: "Except for an extraordinary diligence in looking out for his personal advantages, he had no motives at all."[108] In her epilogue, added to the book in its second edition, Arendt states simply: "He merely, to put it colloquially, never realized what he was doing."[109]

The weakness of this argument is not necessarily in Arendt's theory, but in that she applies her theory to the man Adolf Eichmann.[110] Taken as a whole, the available evidence strongly suggests that Eichmann was a liar, hated Jews, and obsessively desired to exterminate them; thus he was not "banal" (in Arendt's sense), and her argument that "he simply did not realize what he was doing" is mistaken. Arendt might be right when she says, "they were all like that," but Landau addresses this in the court's ruling: "We do not mean that the defendant's viciousness was exceptional

within the regime that had promoted him. He was the loyal disciple of a regime that was wholly evil and malicious."

Arendt's sweeping, brilliant, hasty, and mistaken analysis of the figure of Adolf Eichmann nevertheless does not diminish the importance of her concept of "the banality of evil" or her warnings against bureaucratic evil. Her "new criminal" theory existed long before the Eichmann trial; in retrospect, it seems she may have used the trial as an opportunity—or an excuse—to voice her theory.

Arendt's critique exemplifies the substantial difference between philosophy and law; between the "judgment" of an intellectual who sees no need to be bound by facts or provisions of law, and that of a consummate jurist, which is based on evidence and involves a detailed and precise analysis of proven facts. It is precisely the difference between a first-rate thinker whose portrait of Eichmann has become a symbol and an icon of an important theory, and has had a lasting cultural influence, and a first-rate judge, whose portrait of Eichmann was realistic and accurate, but not fascinating. A judge may not base his or her conclusion on a brilliant theory that stands in stark contradiction to the evidence. Despite the facts, however, the ethical lesson that has commonly been drawn from the Eichmann trial comes from Arendt's daring theory; in collective memory, Eichmann remains the "banal criminal" whom Arendt invented.

The Struggle over the Meaning of the Holocaust: Landau's Legacy

In terms of its timing (1961), the Eichmann trial took place precisely in the gap between history and memory.[111] It came both too early and too late: too early with respect to historical research; too late, on the other hand, with respect to the witnesses' ability to reconstruct events at a distance of sixteen and sometimes as many as twenty years. At that time, serious research on the Holocaust had barely begun to develop.[112] The trial was a foundational and constitutive event: it became a driving force in the development of Holocaust research, and more generally, it brought the history of the Holocaust to public awareness.

The legacy of the trial has been attributed most often to Gideon Hausner, who (under the supervision of Ben-Gurion) shaped and organized the prosecution's vision, and introduced it with an unforgettable opening speech. After the trial, Hausner wrote a book explaining his understanding of what he saw as his leading role in it. He also shared his perspective on the trial at numerous ceremonies and other events. In contrast, Landau took pains to minimize his role at the Eichmann trial. He refused to speak about it. His contribution therefore has remained unrecognized and underresearched.

In reality, however, the presiding judge was central in establishing the character of the trial. His role and contribution were utterly decisive. Displaying enormous foresight, he took the unprecedented step of allowing filming in the courtroom, and after the trial led the effort to create an archive of trial documents. Thanks to his leadership,

the trial became a foundational event that continues to have resonance both in Israel and in the world at large.

In Ben-Gurion and Hausner's vision, the trial was a symbol both of the catastrophe and of triumph over the catastrophe. The point of the trial for them, it seems, was to achieve historical justice—a type of justice that became possible from the moment that the Jews established their sovereign state. This vision was essentially indifferent to the fate of the individual defendant Adolf Eichmann. His concrete punishment was of little importance; at stake was the exposure of Nazi guilt, and the opportunity to call attention to the history of European antisemitism. That history, Hausner argued, would prove unequivocally the need for a sovereign Jewish state with the military power to protect the Jews and punish their enemies.

Landau, too, was an ardent Zionist. For him, as for Ben-Gurion, the trial was a symbol of catastrophe and redemption. But in Landau's vision, the redemptive power was not political and military power *per se*, but the fact that as a state, Israel had a legal system that made it possible "to sit in justice over the murderers of our People."[113] Moreover, he was not indifferent to the guilt of the man Adolf Eichmann, and to the duty laid upon the court to judge him individually. First and foremost, Landau believed, the trial had to be a legitimate one. In a free state, the professional and independent judicial system plays its own educational role—one that does not involve promoting political and ideological lessons of the type that Ben-Gurion and Hausner sought to teach through the trial. In Landau's vision, the most important mission of the trial was to demonstrate that the rule of law prevailed in Israel.

As we have seen, Hausner sought in addition to draw a comprehensive picture of the Jewish tragedy. This picture would be completed by survivors, whose oral testimonies would provide a concrete, human dimension to the ungraspable, abstract features of the genocide. But, in keeping with Ben-Gurion's (and his own) Zionist credo, and with their shared educational goal, he wished also to demonstrate that the State of Israel was the sole solution to the problem of the Holocaust. To this end, he contrasted the perceived passivity and helplessness of the European Jews to the heroic actions of the Zionists, who in some cases rose up and fought against the murderers, and who later took their fate into their own hands and helped to establish the State of Israel. For this reason, Hausner sought to emphasize episodes of Jewish heroism during the catastrophe.

By allowing witnesses to tell their tragic stories, Landau appeared to accept Hausner's view that the trial should draw an inclusive picture of the Holocaust. But he systematically limited the numerous tales of Jewish heroism. He did so not only because these stories were irrelevant to the judicial proceedings, but also because he clearly saw that the Holocaust was not a narrative of heroism; it was a story of catastrophe, of the destruction of a nation, and of individual tragedies of inconceivable dimensions. He understood the need for both collective and personal mourning. Moreover, he clearly felt an obligation not to disguise the mourning with heroic tales or self-

congratulation. Such tales served to create an ideological refuge from reality—that is, from the Holocaust as it actually had been.

The Aftermath

Landau never mentioned the trial in his articles and public lectures, nor did he refer to it in his later legal decisions.[114] For decades he refused to discuss the trial or be interviewed about his role in it. Indeed, from the point of view of his biography, the most compelling and most telling fact is his refusal to use the trial for any personal benefit or gain. In this, Landau was unique among the actors of the Eichmann affair, all of whom—Gideon Hausner, the prosecutor; Isser Harel, the head of the Israeli secret service, who was responsible for Eichmann's capture; Gabriel Bach, a member of the prosecution team and later a Supreme Court justice; and many others—wrote books about their roles in the trial.

His decision to avoid the spotlight, as well as the years he invested in the difficult and little-recognized work of editing the trial materials—an effort he viewed as a "debt of honor that the country owe[d] to the victims of the Holocaust" and to history—sheds a bright light on his personality. He understood that his role in the Eichmann trial made him a symbol of something greater than himself, yet he did not seek credit for this. The trial belonged to the public and to the victims. It was—and is, henceforth—the property of history.

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Notes

1. This essay is a translated and edited version of a chapter from the author's biographical study, *Moshe Landoi, Shofet* (Tel Aviv: Yedioth Ahronoth Publishing House, Books in the Attic series, 2012.)

2. Criminal Case (Jerusalem) 40/61, "Attorney General v. Adolf Eichmann," *Piskey-Din Me'hosi'im* (rulings of the District Court, PDM) 45 (1965): 3.

3. Many years later, Landau still remembered his initial surprise: he reported this story to his younger friend, Justice Yitzhak Milanov, who in turn narrated it to me.

4. During the British Mandate period, the building served as an officers' club. It was there, incidentally, that Landau's wedding to Leah Duchan had taken place.

5. Among the works covering the trial: Hannah Arendt, *Eichmann in Jerusalem: A Report on the Banality of Evil* (New York: Penguin Books, 1963; rev. ed., 1964). Page numbers will refer to the 1964 edition. Notably, the book was translated into Hebrew only in 2000. Haim Gouri,

Mul ta ha-zekhukhit: Mishpaṭ Yerushalayim (Facing the Glass Booth) (Tel Aviv: Hakibutz Hameuhad, 1962; reissued 2001). Citations from this book are to the 2001 Hebrew-language edition. Gouri covered the trial for the newspaper *La-Merchav*, and his notes became the basis for his book. See also the English-language translation by Michael Swirsky, *Facing the Glass Booth: The Jerusalem Trial of Adolf Eichmann* (Detroit: Wayne State University Press, 2004); Harry Mulisch, *Criminal Case 40/61, The Trial of Adolf Eichmann: An Eyewitness Account* (Philadelphia: University of Pennsylvania Press, 2005); Gideon Hausner, *Justice in Jerusalem* (New York: Harper & Row, 1966); Leora Bilsky, ed., *Judgment in the Shadow of the Holocaust* (*Theoretical Inquiries in Law* 1, no. 2) (Tel Aviv: Cegla Institute for Comparative and Private International Law, the Buchmann Faculty of Law, Tel Aviv University, 2000); Hannah Yablonka, *Medinat Yiśra'el neged Adolf Aikhman* (The State of Israel v. Adolf Eichmann) (Tel Aviv: Yedioth Ahronoth, 2001). Lawrence Douglas, *The Memory of Judgment: Making Law and History in the Trials of the Holocaust* (New Haven, CT: Yale University Press, 2001); Deborah Lipstadt, *The Eichmann Trial* (New York: Schocken Nextbook, 2011); David Cesarani, *Eichmann: His Life and Crimes* (London: Heinemann, 2004; Vintage Books, 2005) (published one year later in the United States under the modified title *Becoming Eichmann: Rethinking the Life, Crimes, and Trial of a "Desk Murderer"* (Cambridge, MA: Da Capo Press, 2007); Lord Russell of Liverpool, *The Trial of Adolf Eichmann* (London: Heinemann, 1962); Mosche Pearlman, *The Capture and Trial of Adolf Eichmann* (London: Weidenfeld & Nicolson, 1963); Bruce L. Brager, ed., *The Trial of Adolf Eichmann: The Holocaust on Trial* (San Diego, CA: Lucent Books, 1998); Pnina Lahav, *Judgment in Jerusalem: Chief Justice Simon Agranat and the Zionist Century* (Berkeley: University of California Press, 1997); Shoshana Felman, *The Juridical Unconscious: Trials and Traumas in the Twentieth Century* (Cambridge, MA: Harvard University Press, 2002); Bettina Stangneth, *Eichmann Before Jerusalem: The Unexamined Life of a Mass Murderer* (New York: Alfred A. Knopf, 2014).

6. Landau wrote his memoirs in Hebrew. All citations from this typescript text are my translation from the Hebrew. Hereinafter "Memoirs."

7. Most American Jewish organizations objected to Ben-Gurion's insistence that Israel judge Eichmann (see Lipstadt, *Eichmann Trial*, chapter 2).

8. Karl Jaspers, letter of December 12, 1960, reproduced in Hannah Arendt and Karl Jaspers, *Correspondence 1926–1969*, ed. Lotte Kohler and Hans Saner (New York: Harcourt Brace, A Harvest Book, 1992), 411.

9. Landau, "Memoirs," 51.

10. Criminal case (Jerusalem) 124/53, "Attorney General v. Malchiel Grunevaldt," PSM 44 (1965): 3; Criminal appeal 232/55, "Attorney General v. Malchiel Grunevaldt," *Piskey-Din Isra'elim* (rulings of Israel Supreme Court, PDI) 12 (1958): 2017.

11. The Herut party was headed by Menachem Begin, who many years later became prime minister.

12. Yablonka, *Medinat Yiśra'el*, 150.

13. "Memoirs," 51.

14. The Nazi authorities established the Jewish councils (pl. *Judenräte*, sing. *Judenrat*) in the ghettos (mainly in Eastern Europe). The functions of the Judenräte were to oversee Jewish communal life and to fulfill Nazi orders.

15. "Memoirs," 51.

16. Ibid., 52.

17. The decision was published in PSM 27 (1961): 169. The videotapes of the trial, deposited in the State Archive, were neglected for some thirty years, and many were badly damaged. After this lapse of time, the government granted Steven Spielberg's request to take possession of the tapes. However, independent filmmaker Eyal Sivan blocked this transfer by appealing to the Supreme Court. Sivan wanted to use the tapes for his own film about Eichmann and the trial. The videotapes were lent to Sivan, who restored them and used some of them in his film *The Specialist* (1999). In 2005, the Steven Spielberg Jewish Film Archive asserted that large parts of Sivan's film—which was presented as a documentary—are doctored. See Goel Pinto's article in *Haaretz*, January 31, 2005.

18. Criminal appeal 77/64, "Hirsch Barendbladt v. Attorney General," PDI 18, no. 2 (1964), 771.

19. This law was also the basis of the indictment against Eichmann. The law was in fact enacted in order to punish Jews who collaborated with the Nazis. Idith Zertal, *Israel's Holocaust and the Politics of Nationhood* (Cambridge, UK: Cambridge University Press, 2005), chapter 1.

20. "Hirsch Barendbladt v. Attorney General," 785.

21. "Memoirs," 55.

22. Stefan Zweig, *Haolam Shel Etmol* (Translation of *Die Welt von Gestern* [1943]) (Tel Aviv: Zemora Bitan, 1982), 8.

23. "Memoirs," 33.

24. Landau believed that almost all Danzig Germans had been Nazis. One of the Germans he therefore refused to meet was Günter Grass, a Danzig native, who at the time was thought of as the epitome of anti-Nazism. As we now know from Grass's autobiography, there is more to the story.

25. Gideon Hausner belonged to the Progressive Party, the party of the Israeli minister of justice, Pinchas Rosen. Prior to his appointment as attorney general, Hausner headed a modest law firm in Jerusalem. The firm specialized in matters of civil law, and for the most part was not involved in criminal trials or witness examination. Hausner was assisted by experts in criminal law on the prosecution team: Tel Aviv District Attorney Yaakov Bar-Or; Gavriel Bach, who would later serve as the state attorney and then as a supreme court justice; and Tzvi Terlo, who later was the director general of the Ministry of Justice and vice president of the National Labor Court. Hausner's lack of experience resulted in overly lengthy and often unfocused cross-examinations of Eichmann.

26. "Memoirs," 52.

27. My translation from the videotapes.

28. Some writers claim that Landau was impatient with the survivors' testimonies and tried to curtail them (Douglas, *Memory of Justice*, 135, 138; and Lipstadt, *Eichmann Trial*, 79, 85). A careful reading of the trial transcripts leads me to conclude that Landau did not express impatience with these witnesses and did not often interfere in their testimonies except to clarify points of fact or to instruct a witness to answer the questions that he or she was asked by a

prosecuting attorney. Landau did, however, try to curtail the "heroic testimonies"—those by which the prosecution aimed to highlight Jewish heroism.

29. Arendt to her husband, Heinrich Blücher, letter of April 15, 1961 in *Within Four Walls: The Correspondence between Hannah Arendt and Heinrich Blücher, 1936–1968*, ed. Lotte Kohler (New York: Harcourt, 2000), 355. Eichmann's "cold" impressed other journalists who observed the trial. See Mulisch, *Criminal Case 40/61*, 37; and Gouri, *Mul ta ha-zekhukhit*, 35

30. Gouri, *Mul ta ha-zekhukhit*, 265.

31. The "Madagascar Plan," which the Nazis had considered prior to their decision to exterminate the Jews, was a proposal to exile a million Jews each year to the island of Madagascar, over the course of four years. For background on the plan, see Eric T. Jennings, "Writing Madagascar Back into the Madagascar Plan," *Holocaust and Genocide Studies* 21, no. 2 (2007): 187–217.

32. Session no. 77, 22/6/1961 transcript (in Hebrew), p. 1182. See also Gouri, *Mul ta ha-zekhukhit*, 147

33. Gouri, *Mul ta ha-zekhukhit*, 123, 257.

34. Mulisch, *Criminal Case 40/61*, 129

35. Yablonka, *Medinat Yiśra'el*, 55.

36. Gouri, *Mul ta ha-zekhukhit*, 157.

37. Arendt, *Eichmann in Jerusalem*, 155. See also Mulisch, *Criminal Case 40/61*, 120.

38. See also *Mulisch*, *Criminal Case 40/61*, 120, 126.

39. "Memoirs," 53.

40. Videotape of Dinur's testimony and collapse is available online at https://www.youtube.com/watch?v=lfgJk4BFez4, beginning at minute 23:52 and ending at 26:16. Accessed February 18, 2015.

41. Yehiel Dinur (Ka-Tzetnik), *Tzofan E.D.M.A* (Tel Aviv: Hakibutz ha-Meuhad, 1987), 57. English edition: *Shivitti: A Vision* (San Francisco: Harper and Row, 1989), 40.

42. At one point during his cross-examination by Hausner, Eichmann was allowed out of the glass booth to point out a precise location on a map of Europe that hung on the wall, and was standing for a few moments side by side with Hausner, unprotected.

43. See Mulisch, *Criminal Case 40/61*, 50.

44. Arendt, *Eichmann in Jerusalem*, 5

45. For an evenhanded description of Hausner's performance, see Lipstadt, *Eichmann Trial*, 122–24. Landau respected Hausner, but even thirty-five years after the trial he was critical of Hausner's theatricality. This he mentioned to me personally.

46. Cohen had been appointed to the Supreme Court one year earlier, after serving as attorney general.

47. "Memoirs," 52.

48. Hannah Arendt emphasized Landau's direct use of German as "a proof, if a proof was needed," of Landau's independence from public opinion. She also guessed that it was due to the poor quality of the translation to and from German. See *Eichmann in Jerusalem*, 4. Her last guess is reasonable. There may have been an additional explanation: Landau did not want Eichmann to have time to invent lies.

49. Peter Novick, *The Holocaust in American Life* (New York: Houghton Mifflin, 1999).

50. Tom Segev, *Ha-Million Ha-Shvi'i* (Tel Aviv: Keter, 1991), 333. This work appeared in English-language translation as *The Seventh Million* (New York: Hill & Wang, 1993; Macmillan/Picador, 2000); Idith Zertal, *Ha Uma veha Mavet* (Jerusalem: Devir, 2002), 142, 150–55. This work appeared in English-language translation as *Israel's Holocaust and the Politics of Nationhood* (New York and Cambridge, UK: Cambridge University Press, 2005).

51. Ben-Gurion's articles were published in *Davar*, the Mapai party's daily newspaper. See also Lipstadt, *Eichmann Trial*, chapter 2.

52. Yablonka, *Medinat Yiśra'el*, 99.

53. The article, translated into Hebrew, was published in the newspaper *Davar* on the day the trial began (April 11, 1961).

54. On the American Jewish establishment's objections to Israel's judging of Eichmann, see Lipstadt, *Eichmann Trial*, chapter 2; and Pnina Lahav, "The Eichmann Trial, the Jewish Question and the American-Jewish Intelligentsia," *Boston University Law Review* 71 (1992): 555.

55. He disclosed these thoughts to me in conversation. See my section on "Arendt's Alternative Judgment."

56. Letter 287 (April 24, 1961), *Arendt-Jaspers Correspondence*, 437.

57. Letter of April 15, 1961, *Arendt-Blücher correspondence*, 355.

58. Arendt, *Eichmann in Jerusalem*, 5–7.

59. Ibid., 5.

60. "Memoirs," 52. Douglas argues that Landau's decision to adhere to the rules of criminal procedure was "formalistic," or symptomatic of an excessively "rule-based vision of legality" (113), as opposed to the vision of "narrative jurisprudence" that Hausner, in Douglas's interpretation, supported and propounded during the trial. The reason for the judge's "formalism," Douglas argues, is that "any act of judging . . . implicitly involves a gesture of self-legitimation" (113); every court as such is itself on trial ("being judged while judging"). To substantiate and illustrate this general theory of "the court on trial," Douglas draws an example from the US Supreme Court: because the American Supreme Court is nominated, not elected, it needs to constantly perform the "self-legitimation" of its "counter-majoritarian" status (Douglas, *Memory of Justice*, 113–14). Douglas is right in his assertion that the Eichmann court was itself "on trial." Yet, unlike in the United States, the problem of "counter-majoritarianism" did not exist in Israel in the 1960s: the "trial of the court" in the case of the Eichmann court was not about self-legitimation, but about the court's independence from the state. I would also argue that Landau's decision to adhere to the legal rules of criminal procedure was not evidence of "formalism." It was rather *legal positivism*, which sprang from Landau's deep conviction that

the power of courts was inherently limited, and that this power derived precisely from its limitation. This approach was especially necessary in this extraordinary trial, so as to prevent the dangers of distortion that the trial entailed. Moreover, I would argue that had Landau been truly "formalistic," he would not have allowed many of the survivors' testimonies (see below).

61. Court Session no. 19.

62. Later Kovner's conduct during the Holocaust became the subject of controversy; he was accused of betraying the leader of the resistance in the Vilna Ghetto.

63. "Memoirs," 53.

64. Court session no. 27.

65. "Memoirs," 53.

66. The friction between the prosecution and the court stands at the center of Lawrence Douglas's innovative interpretation of the Eichmann trial. Douglas's point of departure is his wish to dispute and challenge Arendt's criticism of Hausner's (and Ben Gurion's) aims and methods. In his interpretation, Hausner's approach to the trial consisted in applying modern theories of "narrative jurisprudence" and "didactic legality," in contrast to Landau's more conventional "formalistic" approach, by which Douglas means Landau's strict adherence to the legal rules of criminal procedure. Douglas maintains that Hausner challenged the court "by attempting to transform the trial into a didactic spectacle." Hausner thus "appeared as the great defender of narrative and memory, against the court's rigid dedication to traditional trial form" (Douglas, *Memory of Justice*, 150). Douglas concludes that the outcome was a successful equilibrium between the two approaches. Douglas's suggestion that "narrative jurisprudence" can be a straightforward legal practice, a methodology in the conduct of actual proceedings, is an interesting theory, but I believe it misreads the role of the presiding judge, and a close study of the transcripts of the Eichmann trial in their entirety does not substantiate this claim. Contrary to Douglas's description, Hausner did not in all cases "permit the witnesses to speak for minutes on end between brief questions" (134), and Landau did not in all cases "desire to curtail narrative" (135). What he did curtail (as I will show) was the tendency of the prosecution to emphasize acts of heroism on the part of Jews. This—rather than a conflict between an old-fashioned legal formalism and a progressive "narrative" legal didacticism—explains a substantial part of the "struggle" between the prosecution and the court. See also endnote 60 above.

67. Israel refused to guarantee immunity to former Nazis who were called upon to testify, and so Servatius had to reconcile himself to delivering their written affidavits.

68. Based on a reductive misreading of Arendt, some critics argue that the trial was from its inception meant to be (and was, in parts) a show trial. I do not share this view. I agree with the assessments of Douglas, *Memory of Judgment* (174), and Yablonka *Medinat Yiśra'el* (154–55, 267), that the trial was legitimate.

69. Gouri, *Mul ta ha-zekhukhit*, 244.

70. Rebecca West, "Extraordinary Exile," *The New Yorker* (September 7, 1946): 36–37.

71. Hausner, *Justice in Jerusalem*, 291–92. In his decision to expand the picture, Hausner was influenced by Rachel Auerbach's vision of the trial as a "unique opportunity" to demonstrate "the full extent and unique nature of the destruction of the Jews." Auerbach, a survivor of the

Warsaw Ghetto and a contributor to the Ringelblum Archive, was working at Yad Vashem at the time of the trial. See Lipstadt, *Eichmann Trial*, 52.

72. The original Hebrew name of the memorial day established in Israel in 1959, was, characteristically, "Holocaust and Heroism Remembrance Day."

73. Anita Shapira, "The Holocaust: Private Memory and Public Memory" in *Yehudim hadashim, Yehudim yeshanim* (Tel Aviv: Am-Oved, 1997), 325.

74. "Memoirs," 53.

75. Ibid.

76. Ibid.

77. Haim Gouri, "Ha Sofet shera'aa at sevel ha yahid," *YNet*, May 1, 2011, available at http ://www.ynet.co.il/articles/0,7340,L-4063036,00.html, accessed February 18, 2015 (my translation).

78. "Memoirs," 54.

79. Hausner, *Justice in Jerusalem*, 291–92.

80. Criminal case (Jerusalem) 40/61, Attorney General v. Adolf Eichmann, PDM vol 45 (1965), 3, p. 16.

81. Transcript, beginning of session 23.

82. Decision no. 13 (May 2, 1961). The English-language translation of the decision can be found in the trial transcript available at http://www.nizkor.org/hweb/people/e/eichmann-adolf/transcripts/Sessions/Session-023-01.html (accessed on February 25, 2015). The judgment repeated this decision in a slightly different formulation.

83. Segev, *The Seventh Million*, 217.

84. Arendt, quoting the *Yad Vashem Bulletin* in *Eichmann in Jerusalem*, 225.

85. Ibid., 226. It is important to remember that Arendt did not hear the bulk of the survivors' testimonies. During much of the trial, she was not in Israel (or the United States).

86. Ibid., 227–30.

87. Ibid., 229. Grynszpan's son Herschel, who was living in Paris at the time, reacted to the news of his family's situation by assassinating a German embassy official. This assassination was used as an excuse for Kristallnacht.

88. See Hausner, *Justice in Jerusalem*, 333.

89. The "heroism ethos" lingered until the 1970s.

90. See Shoshana Felman and Dori Laub, *Testimony: Crises of Witnessing in Literature, Psychoanalysis, and History* (New York: Routledge, 1991).

91. Eichmann's conviction for crimes against humanity has not received due notice in scholarship on the trial.

92. In recent decades legal scholars have displayed a marked interest in the topic of "judges as historians." In my opinion, judges are not necessarily good historians.

93. Cesarani, *Eichmann: His Life and Crimes*; Stangneth, *Eichmann Before Jerusalem*.

94. David Cesarani notes that "the judges did a very fine job." (*Eichmann: His Life and Crimes*, 6). In the British historian's view (which on this point concurs with Arendt's), the judges' professional performance "saved" the trial—that is, prevented it from becoming a show trial.

95. See endnote 92.

96. Arendt, *Eichmann in Jerusalem*, 5–6.

97. Arendt, *Eichmann in Jerusalem*, 279. For a lucid and evenhanded review of Arendt and her critics, see Lipstadt, *Eichmann Trial*, chapter 6. Lipstadt herself is sharply critical of Arendt, arguing that Arendt "was guilty of precisely the same wrong that she derisively ascribed to Eichmann. She, the great political philosopher . . . did not 'think.'" Lipstadt's main criticism is that Arendt "ignored the bedrock of the Holocaust: the long tortured (torturing) history of antisemitism" (183–85). Arendt's thinking on the link between antisemitism and totalitarianism was extremely complex and highly theoretical. See her *Origins of Totalitarianism*, Part 1. See also Lipstadt, *Eichmann Trial*, 180–87.

98. Arendt, *Eichmann in Jerusalem*, 269–70.

99. In his memoirs, he refused to make distinctions between the Nazis and the Germans—distinctions that for Arendt remained crucial.

100. The argument that Arendt's concept of the trial was "formalistic" (Lipstadt, *Eichmann Trial*, 151; Douglas, *Memory of Justice*, 111) ignores her demand that the judges transgress the legal framework within which they had to judge. Arendt was legally "formalistic" only in regard to Hausner and the survivors' testimonies.

101. Arendt, *Eichmann in Jerusalem*, 26.

102. Ibid.

103. Interestingly, Arendt was not the only one who believed Eichmann. See Mulisch, *Criminal Case 40/61*, 124. Gouri seems to attribute this mistake to Hausner's lengthy and awkward cross-examination of Eichmann. For another view, see Lipstadt, *Eichmann Trial*.

104. See also Cesarani, *Eichmann: His Life and Crimes*, 11–15.

105. For later historical research, see in particular David Cesarani, *Eichmann: His Life and Crimes*, and Bettina Stangneth, *Eichmann Before Jerusalem*. For earlier research see Jenö Lévai, "The Deportation from Hungary from the Perspective of the Eichmann Trial," in *Eichmann en hongrie* (Toronto: Pannonia Books, 1961). For a summary of Eichmann's testimony concerning his attitude to the Jews, see Lipstadt, *Eichmann Trial*, 122–38.

106. Arendt, *Eichmann in Jerusalem*, 26.

107. It is not uncommon to equate Arendt's thesis of the banal criminal with that of the bureaucratic criminal. But her thesis is more complicated and philosophical; "thinking" is a major concept in Arendt's concept.

108. Ibid., 287.

109. Ibid.

110. See also Lipstadt, *Eichmann Trial*, 169.

111. I use here the conceptual distinction between "memory" and "history" as established by the French historian and philosopher of history Pierre Nora, in the seven-volume collective work he oversaw under the title *Les Lieux de mémoire* (Paris: Gallimard, 1984–1994); translated into English by Mary Seidmen Trouille and published as Pierre Nora and David Jordan, eds., *The Realms of Memory: Rethinking the French Past* (New York: Columbia University Press, 1996–2010). In his preface to the first volume, Nora establishes his conceptual polarization of "mémoire/histoire." He writes: "far from being synonyms, [memory and history] are diametrically opposed to one another. Memory is life." That is, it is a lived experience, always in the present, "a perpetually actual phenomenon." History, in contrast, is an always distanced, mediated representation of the past, and as such is "always problematic and incomplete." See "Entre Mémoire et Histoire: La problématique des lieux," preface to the first volume of *Les Lieux de Mémoire*.

112. Raul Hilberg's pioneering monumental work *The Destruction of the European Jews* was almost totally unknown at the time of the trial. It was first published in 1961 by Quadrangle, a small publishing house. The fact that Yad Vashem, the Israeli center for Holocaust research, avoided publishing a Hebrew-language translation until 2012 was closely tied to political interpretations of the Holocaust with which Hilberg's views conflicted. Beyond any historiographical disputes, real or imagined, Yad Vashem's decision can be seen as part of the endeavor to present the Holocaust as a justification for the establishment of the State of Israel, and to avoid (as far as possible) the debate over the behavior of the Jewish leaderships during the Holocaust.

113. "Memoirs," 53.

114. There was one exception: in a single Supreme Court case, Landau mentioned his decision to allow videotaping of the Eichmann trial.