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## BOOK REVIEW

### *THE EICHMANN TRIAL*

Gregory S. Gordon\*

In 1960, the Israeli government abducted key Holocaust organizer Adolf Eichmann from Argentina and put him on trial in Jerusalem the following year.<sup>1</sup> On the proceeding's fiftieth anniversary, renowned Holocaust historian Deborah Lipstadt's *The Eichmann Trial*<sup>2</sup> offers a timely update to the only other book to focus primarily on the trial itself—Hannah Arendt's controversial *Eichmann in Jerusalem: A Report on the Banality of Evil*.<sup>3</sup> As its famous subtitle suggests, Arendt's book has more of a philosophical, as opposed to a legal, focus. Lipstadt's work more than makes up for that. For a book that offers an excellent general introduction to the 1961 inquest, *The Eichmann Trial* also provides terrific insights into some of its complex legal issues.

For instance, Lipstadt's discussion of jurisdiction considers both its traditional *ex post facto* aspects—whether crimes against humanity, for example, could be charged when it was not an established offense during 1941–1945—as well as its more unique temporal/geographic facets—whether Israel was entitled to try Adolf Eichmann when the state did not even exist until after the war.<sup>4</sup> Similarly, given that Eichmann was kidnapped from Argentina by Israeli Mossad agents, were the Israeli proceedings against him proper from an international law perspective?<sup>5</sup>

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<sup>1</sup> See Lisa J. Del Pizzo, Note, *Not Guilty—But Not Innocent: An Analysis of the Acquittal of John Demjanjuk and Its Impact on the Future of Nazi War Crimes Trials*, 18 B.C. INT'L & COMP. L. REV. 137, 150 (1995).

<sup>2</sup> DEBORAH E. LIPSTADT, *THE EICHMANN TRIAL* 25, 59 (2011).

<sup>3</sup> See HANNAH ARENDT, *EICHMANN IN JERUSALEM: A REPORT ON THE BANALITY OF EVIL* (1963). David Cesarani's 2006 book *Becoming Eichmann: Rethinking the Life, Crimes, and Trial of a "Desk Murderer"* deals with the Eichmann trial in one of its chapters, but that is not the book's main focus. See DAVID CESARANI, *BECOMING EICHMANN: RETHINKING THE LIFE, CRIMES, AND TRIAL OF A "DESK MURDERER"* 237–323 (2006).

<sup>4</sup> LIPSTADT, *supra* note 2, at 25, 59.

<sup>5</sup> *Id.* at 21–25.

Lipstadt analyzes these issues with reference to both the arguments made at trial and the presiding judges' written decision.<sup>6</sup> The *ex post facto* issue had already been resolved at Nuremberg—crimes against humanity could be charged notwithstanding its recent vintage, as the international community recognized the Final Solution as inherently wrong and crimes against humanity best captured the nature of the offense.<sup>7</sup> Lipstadt quotes the District Court that convicted Eichmann: “The Holocaust was not a ‘new crime which had not hitherto been known,’ but was a criminal act according to the laws of all civilized nations. . . . Eichmann and his compatriots knew their acts were wrong. Otherwise, why would they have tried to ‘efface the traces’ of them?”<sup>8</sup>

Regarding the temporal/geographic problem posed by Israel's post-war establishment, on one hand, Eichmann's trial was a proper exercise of universal jurisdiction (although being applied to a human rights prosecution for the first time in history<sup>9</sup>) and “reinforced the notion that there is universal jurisdiction over genocide.”<sup>10</sup> On the other hand, as to the role of the Jewish state in particular, Lipstadt again references the decision of the District Court:

The aim of the Final Solution was the destruction of the “entire Jewish people.” To argue that there was “no connection” between Jews in Israel and Jews murdered by the Nazis “is like cutting away the roots and branches of a tree and saying to its trunk: I have not hurt you.”<sup>11</sup>

And while Eichmann might have been abducted from Argentina, “courts had consistently ruled that *how* an accused is brought before a court does not negate its right to try him,” and, in any event “the abduction had no bearing on

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<sup>6</sup> Lipstadt does not consider the opinion of the Israeli Supreme Court, which heard the case on appeal and also opined on these issues, presumably because it affirmed and largely mirrored the District Court's findings. See *Attorney-Gen. of the Gov't of Isr. v. Eichmann*, 36 I.L.R. 18 (Dist. Ct. 1961), *aff'd*, 36 I.L.R. 277 (Sup. Ct. 1962) (1968). The Eichmann trial also raised a legal issue not addressed in Lipstadt's book, namely Eichmann's “Act of State” defense (that a state may not judge acts undertaken on behalf of another sovereign state—the presiding judges held that the Act of State defense for acts condemned as criminal under international law had been abrogated by the Nuremberg Charter and subsequent relevant legal instruments, including the Genocide Convention). See Matthew Lippman, *Genocide: The Trial of Adolf Eichmann and the Quest for Global Justice*, 8 BUFF. HUM. RTS. L. REV. 45, 113–14 (2002).

<sup>7</sup> LIPSTADT, *supra* note 2, at 26.

<sup>8</sup> *Id.* at 141.

<sup>9</sup> See Richard J. Goldstone, *World Peace Through Justice Award Lecture*, 8 WASH. U. GLOBAL STUD. L. REV. 619, 620 (2009) (“Until that time universal jurisdiction applied only to piracy. Without the Nuremberg precedent, Adolph Eichmann would in all probability not have been tried in Jerusalem.”).

<sup>10</sup> LIPSTADT, *supra* note 2, at 189.

<sup>11</sup> *Id.* at 141.

the case because Eichmann had been in Argentina illegally.”<sup>12</sup> More specifically, Eichmann had never applied for asylum in Argentina, lived there under an assumed name, and committed crimes that Argentina itself had condemned.<sup>13</sup>

In addition to grappling with these legal questions, as well as the viability of Eichmann’s superior orders defense, Lipstadt considers an issue that has particular resonance in contemporary war crimes trials: the role played by victims in the proceedings.<sup>14</sup> Lipstadt’s exploration of this issue is perhaps the book’s most important contribution from a legal perspective. Modern war crimes trials have not taken a consistent approach to the role of victims in war crimes proceedings. The Nuremberg and 1990s ad hoc tribunals, for example, had no formal role for victims—their testimony was offered strictly for the purpose of establishing factual predicates to satisfy legal elements.<sup>15</sup> More recently, however, victims have taken on an official juridical role in international atrocity trials, which have attempted to incorporate elements of restorative justice.<sup>16</sup> Both the International Criminal Court (“ICC”) and the Extraordinary Chambers in the Courts of Cambodia (“ECCC”) explicitly contemplate victim participation and testimony.<sup>17</sup>

Lipstadt reveals that the Eichmann trial was a forerunner of the ICC and ECCC in this regard. Israeli prosecutor Gideon Hausner wanted to do more than simply establish the individual criminal liability of Eichmann.<sup>18</sup> He wanted to tell the horrible story of the Holocaust through survivors.<sup>19</sup> Even if they were not direct witnesses to Eichmann’s specific culpable acts, these witnesses would help give the complete overview of the destruction of Europe’s Jewish community, raise international awareness about what happened, and thereby help bring catharsis to themselves and other survivors.<sup>20</sup> As Lipstadt notes: “[Prosecutor] Hausner’s determination that this trial would

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<sup>12</sup> *Id.* at 59.

<sup>13</sup> *Id.* at 12, 16.

<sup>14</sup> *See id.* at 188–203. This statement captures one of Lipstadt’s major conclusions.

<sup>15</sup> *See* Janine Natalia Clark, *Peace, Justice and the International Criminal Court: Limitations and Possibilities*, 9 J. INT’L CRIM. JUST. 521, 529–30 (2011).

<sup>16</sup> *Id.*

<sup>17</sup> Charles P. Trumbull IV, *The Victims of Victim Participation in International Criminal Proceedings*, 29 MICH. J. INT’L L. 777, 779 n.13 (2008) (recognizing the role given to victims by the Extraordinary Chambers in the Courts of Cambodia as affording victims participatory privileges more broad than any existing international tribunal). *Id.* at n.13.

<sup>18</sup> LIPSTADT, *supra* note 2, at xx.

<sup>19</sup> *Id.*

<sup>20</sup> *See id.* at 188–201.

be founded on the human story of the Jewish victims' suffering stands, from a perspective of five decades, as the trial's most significant legacy. . . . Through their testimony, what happened to European Jewry was transformed in the public's consciousness."<sup>21</sup>

*The Eichmann Trial* also helps put the 1961 proceeding into the proper context of Holocaust-related legal history. It is particularly poignant in this regard given Lipstadt's experience as the defendant in Holocaust denier David Irving's 2000 defamation trial (as recounted in her 2005 book *History on Trial: My Day in Court with David Irving*).<sup>22</sup> As the *Daily Telegraph* noted of the Irving proceeding, "This trial has done for the new century what the Nuremberg tribunals or the Eichmann trial did for earlier generations."<sup>23</sup> Lipstadt peppers the manuscript with personal insights drawn from her unique perspective as a participant. Both Eichmann (in helping perpetrate the Holocaust) and Irving (in helping deny it ever happened) were motivated by Jew hatred, Lipstadt observes.<sup>24</sup> She also notes that, although they were not trial witnesses, survivors let Lipstadt know that she was their voice and agent for preserving their memories:

Though I did not represent the survivors, I felt their presence in that courtroom. They filled the public gallery. They gave me lists of the names of their murdered relatives. And when I prevailed, they embraced me, laughed, and cried with me. Though I'd never intended to do so, I ended up fighting for them.<sup>25</sup>

One of the book's many fascinating revelations, however, establishes a more direct link between the Eichmann and Irving proceedings. It turns out that during his trial, Eichmann had written a memoir.<sup>26</sup> After his execution, Israel sealed the manuscript reasoning that Eichmann had already been given extensive opportunity to present his case.<sup>27</sup> Previous requests to unseal it (including by one of Eichmann's sons) had been rejected.<sup>28</sup> But when Lipstadt requested access to the transcript during the Irving trial, permission was granted.<sup>29</sup> The Eichmann and Irving cases were thus directly tied together as

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<sup>21</sup> *Id.* at 192–93.

<sup>22</sup> DEBORAH E. LIPSTADT, *HISTORY ON TRIAL: MY DAY IN COURT WITH DAVID IRVING* (2005).

<sup>23</sup> *Id.* at xvii.

<sup>24</sup> *Id.* at xix.

<sup>25</sup> *Id.* at xxvi.

<sup>26</sup> *Id.* at xvii.

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

<sup>29</sup> *Id.* at xviii.

Lipstadt used portions of the Nazi's memoir to help refute Irving's denial of the Final Solution.<sup>30</sup>

Also interesting from a legal perspective is Lipstadt's exploration of the individual attorneys and their procedural maneuverings and tactics. She reveals that chief prosecutor Gideon Hausner had only recently become Attorney General of Israel when Mossad agents abducted Eichmann in Argentina.<sup>31</sup> A commercial law practitioner, Hausner had no previous criminal trial experience but nevertheless appointed himself lead trial attorney in Eichmann's prosecution.<sup>32</sup> Lipstadt provides an excellent assessment of his performance, noting Hausner's eloquent oratory in the opening statement but his tactical deficiencies and inappropriate emotional displays during cross-examination (somewhat reminiscent of Justice Jackson's inconsistent performance at Nuremberg).<sup>33</sup>

Nevertheless, from a larger historical perspective, Hausner's inexperience may have been an asset given his victim-centered presentation of the case. An experienced criminal practitioner might have focused more exclusively on easily provable, specifically defendant-linked evidence to establish Eichmann's guilt (as prosecutors did for Saddam Hussein in the Dujail trial, for instance),<sup>34</sup> but Hausner had another agenda in mind. Although the judges often berated him for what they perceived as irrelevant digressions, Hausner's probing questions of victims are what seared the proceedings into the public's memory.<sup>35</sup>

At the same time, Lipstadt notes that Hausner tried to pin too much on Eichmann individually.<sup>36</sup> Hausner saw Eichmann as a central figure in all Holocaust operations, but the so-called "desk killer" could not be linked, for

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<sup>30</sup> *Id.* at xix.

<sup>31</sup> LIPSTADT, *supra* note 2, at 37.

<sup>32</sup> *Id.*

<sup>33</sup> *Id.* at 61–63, 117–18; *see also* Jonathan A. Bush, *Nuremberg: The Modern Law of War and Its Limitations*, 93 COLUM. L. REV. 2022, 2050–51 (1993) (reviewing TELFORD TAYLOR, *THE ANATOMY OF THE NUREMBERG TRIALS* (1992)) (describing Jackson's difficulties cross-examining Herman Goering and recounting how Jackson "lost his temper" when the cross-examination was not going well).

<sup>34</sup> *See* Timothy William Waters, *A Kind of Judgment: Searching for Judicial Narratives After Death*, 42 GEO. WASH. INT'L L. REV. 279, 296 n.58 (2010) (noting that Saddam Hussein was executed following "trial on a limited set of charges (pertaining to one massacre of 148 individuals in Dujail in 1982) before he could be tried on a much larger array of charges that would have been critical to any attempt to use the trial process to construct a narrative of his rule").

<sup>35</sup> LIPSTADT, *supra* note 2, at 85, 192–93.

<sup>36</sup> *Id.* at 163.

example, to significant Nazi murder orgies such as Operation Reinhard or Einsatzgruppen mass shootings behind the lines in the Soviet Union.<sup>37</sup> Consistent with Lipstadt's analysis, one commentator has noted:

The Eichmann prosecution's vast two-track approach had a distorting effect on the trial. At least one third of the proof (all that concerning the Einsatzgruppen, Operation Reinhard in Poland, the operation of specific concentration camps and the rise of pre-war German anti-Semitism) had nothing to do with Eichmann at all.<sup>38</sup>

Lipstadt also chronicles Eichmann's difficulties finding appropriate defense counsel. He eventually settled on Robert Servatius, a German jurist who had represented Fritz Saukel, Karl Brandt, and Paul Peiger at Nuremberg.<sup>39</sup> Israeli law had to be amended because foreign lawyers previously had no right of audience before Israeli courts.<sup>40</sup> The new law enabled only those facing a capital charge to be represented by a non-Israeli lawyer.<sup>41</sup> Although he was hired by Eichmann, Servatius's legal fees were paid by the Israeli government.<sup>42</sup> Lipstadt reveals that Servatius acquitted himself admirably on Eichmann's behalf, navigating the defendant through nuanced explanations of his role and tactfully limiting his questions on cross to establishing that witnesses could not link their misfortunes directly to Eichmann.<sup>43</sup>

While the trial itself is the tome's focal point, it is bookended by excellent prefatory and postscript sections. In the former, Lipstadt describes her own recollections of the trial as a child and the relationship between the trial and her legal contest with David Irving.<sup>44</sup> She also recounts the events leading up to the Eichmann trial, including a succinct and insightful biography of the defendant as well as a gripping account of his capture in Argentina.<sup>45</sup>

This portion of the book contains fascinating and surprising information. For example, Lipstadt reveals that, contrary to public perceptions and Simon Wiesenthal's own boasts, the famous Nazi hunter played no direct role in the

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<sup>37</sup> *Id.*

<sup>38</sup> Stephan Landsman, *Those Who Remember the Past May Not Be Condemned To Repeat It*, 100 MICH. L. REV. 1564, 1576 (2002) (book review).

<sup>39</sup> See Joseph Powderly, *The Trials of Eichmann, Barbie and Finta*, in ROUTLEDGE HANDBOOK OF INTERNATIONAL CRIMINAL LAW 36 n.28 (William Schabas & Nadia Bernaz eds., 2011).

<sup>40</sup> LIPSTADT, *supra* note 2, at 37–39.

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

<sup>43</sup> *See id.* at 90–111.

<sup>44</sup> *Id.* at 128.

<sup>45</sup> *Id.* at 140.

capture of Eichmann.<sup>46</sup> Similarly, the Argentines knew about the Israeli operation to abduct Eichmann and simply let it happen (Lipstadt speculates they wanted him off their hands, even though they officially protested the abduction for various political reasons).<sup>47</sup>

This section also reveals the deep rift within the international Jewish community about the best way to bring Eichmann to justice. Outside of Israel, many prominent Jewish voices advocated handing Eichmann over to the Germans for trial or to an international tribunal (even though none existed at that point).<sup>48</sup> As it turns out, the Germans were happy to let the Israelis handle the case, and the Cold War prevented re-creating another Nuremberg-style international tribunal.

The book's post-trial materials are similarly fascinating.<sup>49</sup> The large focus here is on the trial's most famous chronicler, Hannah Arendt, and her previously mentioned book based on her *New Yorker* magazine reportage. Arendt has been widely criticized over the years for her writings in relation to the Eichmann trial.<sup>50</sup> Critics have found fault with her view of Eichmann himself.<sup>51</sup> Despite clear evidence of his virulent anti-Semitism, Lipstadt notes Arendt's portrayal of Eichmann as a mindless bureaucrat, at worst a "clown" with no ideological convictions, who simply followed orders (consistent with her pre-trial views regarding the nature of totalitarianism and her oft-quoted description of "the banality of evil").<sup>52</sup> In this regard, many point out that Arendt attended only parts of the trial and relied largely on transcripts for the substantial portions she missed (including, critically, Eichmann's cross-examination).<sup>53</sup>

Critics also complain about Arendt's treatment of victims.<sup>54</sup> In her book, and in letters penned during the trial, she evinced an antipathy toward non-resisting Holocaust victims based on her perception that non-resistance (and in the case of the *Judenräte* or Jewish Councils, her perception of active

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<sup>46</sup> *Id.* at 10.

<sup>47</sup> *Id.* at 23.

<sup>48</sup> *Id.* at 26.

<sup>49</sup> Although certainly not necessary, in the interests of a complete record, the book might have benefited from a brief description of Eichmann's unsuccessful appeal before the Israeli Supreme Court and his execution on May 31, 1962. *See* Lippman, *supra* note 6, at 105.

<sup>50</sup> LIPSTADT, *supra* note 2, at 148–50.

<sup>51</sup> *Id.*

<sup>52</sup> *See generally* ARENDT, *supra* note 3.

<sup>53</sup> LIPSTADT, *supra* note 2, at 178–81.

<sup>54</sup> *Id.*

cooperation) was tantamount to complicity in Nazi crimes.<sup>55</sup> Others point out that her reporting was compromised by her own arguably anti-Semitic prejudices.<sup>56</sup> A German Jew, Arendt looked down on what she called “*Ostjuden*” (Jews from Eastern Europe). As a result, she ridiculed the performance of Gideon Hausner, whom she described in a letter to German philosopher Karl Jaspers as a “typical Galician Jew . . . constantly making mistakes. Probably one of those people who doesn’t know any language.”<sup>57</sup> She also harbored certain negative feelings about Israel and Jews of Middle Eastern origin. In another letter, she described Israeli crowds as “an Oriental mob, as if one were in Istanbul or some other half-Asiatic country.”<sup>58</sup> She noted that the Israeli police force was giving her “the creeps, [it] speaks only Hebrew and looks Arabic.”<sup>59</sup>

While Lipstadt acknowledges and shares in these criticisms, she also resists caricature treatment of this influential political theorist. Noting that Arendt “spoke with many voices,” Lipstadt points out that Arendt supported Israel’s right to take custody of Eichmann and sit in judgment of his crimes.<sup>60</sup> Lipstadt also reveals that, notwithstanding the impression made on many by her writings during the Eichmann trial, Arendt was a strong supporter of Israel.<sup>61</sup> And though Arendt may have been critical of the Jewish Councils, which helped the Nazis organize the deportations and failed to warn victims of the fate that awaited them, so were many Jews in Israel and other parts of the international Jewish community.<sup>62</sup> Moreover, Arendt was not alone in her belief that the trial was too victim-centered—the Israeli judges clearly shared that view as demonstrated by their on-record criticisms of Hausner’s strategy, in particular his emphasis on what the judges perceived as irrelevant evidence.<sup>63</sup>

Finally, Lipstadt observes that Arendt was right about a central feature of Nazism (indeed, all totalitarian societies) and the Final Solution, in particular: for their success, they require compliant masses who simply obey orders

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<sup>55</sup> *Id.*

<sup>56</sup> *Id.* at 152–53.

<sup>57</sup> *Id.* at 152.

<sup>58</sup> *Id.* at 153.

<sup>59</sup> *Id.*

<sup>60</sup> *Id.* at 180.

<sup>61</sup> *Id.* at 181–83.

<sup>62</sup> *Id.* at 184.

<sup>63</sup> *Id.*

without thinking about the consequences.<sup>64</sup> Indeed, Arendt's views on this have exerted a great influence on the development of political philosophy.<sup>65</sup> That Arendt inaptly used the Eichmann trial as an illustration of her theory does not lessen the theory's power or historical import.

It turns out that Eichmann was not one of these masses. Contrary to his protestations at trial, he was a Nazi leader with strong ideological convictions and in many instances he acted as a creative, independent agent within the Nazi bureaucracy.<sup>66</sup> As Lipstadt notes,

Though he may not have started out as a virulent anti-Semite, he absorbed this ideology early in his career and let it motivate him to such an extent that after the war he described . . . the joy he had felt at moving Hungarian Jews to their death at an unprecedented clip and his pleasure at having the death of millions of Jews on his record.<sup>67</sup>

And his attempts, in concert with his other Nazi cohorts, to conceal his crimes after the fact demonstrate that he knew his actions were illegal.<sup>68</sup>

Certainly, Arendt's perceptions of the Eichmann trial must be taken with the proverbial grain of salt. But Lipstadt's book helps balance conventional wisdom. In that sense, as in many others, *The Eichmann Trial* makes an invaluable contribution to the literature. This remarkably compact but informative tome not only recounts what happened at the trial; it also provides perspective on the legal, historical, and philosophical implications of this seminal event, making it a terrific read for the both the general public and experts. As such, in another half-century's time, Lipstadt's volume may very well stand as the definitive chronicle of an epochal proceeding.

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<sup>64</sup> *Id.* at 185–87.

<sup>65</sup> See *Hannah Arendt*, STAN. ENCYCLOPEDIA PHIL. (July 27, 2006), <http://plato.stanford.edu/entries/arendt> (noting that Arendt provided “a new framework that could enable us to come to terms with the twin horrors of the twentieth century, Nazism and Stalinism”).

<sup>66</sup> LIPSTADT, *supra* note 2, at 169–70.

<sup>67</sup> *Id.* at 169–70.

<sup>68</sup> *Id.*