

Book Review: Rebecca Wittmann. *Beyond Justice: The Auschwitz Trial*

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Recommended Citation

Čengić, Amir (2007) "Book Review: Rebecca Wittmann. *Beyond Justice: The Auschwitz Trial*," *Genocide Studies and Prevention: An International Journal*: Vol. 2: Iss. 2: Article 8.

Available at: <https://scholarcommons.usf.edu/gsp/vol2/iss2/8>

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Book Review

Rebecca Wittmann. *Beyond Justice: The Auschwitz Trial*. Cambridge, MA: Harvard University Press, 2005. Pp. 336, cloth. \$35.00 US.

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“What happens when a nation tries to deal with its own genocidal past, using its own criminal code, in its own state courts?” (2). This is one of the questions that Rebecca Wittmann, professor of history at the University of Toronto, poses at the outset of her book *Beyond Justice: The Auschwitz Trial*. The book deals with the trial of twenty individuals alleged to have been involved in the atrocities that took place in the Auschwitz death camp during World War II.

The trial began in December 1963; it took place in Frankfurt-am-Main, before a German court and under German law. It lasted for more than 180 court days. The 900-page judgment was rendered in August 1965, and all but three defendants were convicted of either murder or aiding and abetting murder (3).

The book is divided into six chapters and includes a number of useful appendices, such as a list of participants and a pre-trial chronology. Chapter 1 deals with the pre-trial history of the case and lays out the general background against which the Auschwitz trial took place. The author describes the state of the German judicial system after the war and the influence of Allied forces on the prosecution of Nazi perpetrators and explains the German Criminal Code and the Code of Criminal Procedure, which were applied by the court. Chapter 2 sets out the course of the pre-trial investigation and portrays the ambitious goal of the German prosecutors to turn the trial into more than an ordinary criminal proceeding, one that would enable the German public to face its past and serve as a lesson for the future. In this chapter Wittmann also describes the prosecution’s trial strategy and provides an introduction to the evidence that was to be offered by the survivors of Auschwitz during the trial. Chapter 3 is an overview of the structure of the indictment; chapter 4 describes the trial proceedings, summarizing the evidence given by survivors, experts, and former SS officers, and provides an outline of German press coverage of the trial. Chapter 5 discusses the final arguments of the parties and the judgment. Chapter 6 looks at responses to the judgment from the press (both West and East German, as well as foreign), the German public, and some of the main actors in the trial. It also includes the author’s concluding remarks.

In the introduction, Wittmann announces her main point of criticism of the trial, which becomes the main theme of the book. The well-presented argument is that the outcome of the Auschwitz trial was a paradox: on the one hand, the trial did succeed in informing the largely ignorant German public of the horrors that had taken place in Auschwitz, but, on the other hand, it provided a skewed understanding of those horrors, because the trial became “a trial of sadists and reprobates,” rather than of the camp system itself, and because the majority of the accused were convicted as aiders and abettors instead of murderers and thus received sentences that did not justly correspond to their crimes (38–39, 101, 271–74). According to Wittmann, this outcome was primarily due to the application of the German penal code, with its narrow

definition of murder; the unwillingness of the trial judges, and the German judiciary in general, to interpret that definition of murder more broadly in Nazi trials; and the imposition of light sentences for Nazi defendants in German courts at the time (16, 44–48, 210–11, 273). In her words, “the West German penal code was not equipped to ‘teach lessons’ about how to prevent or punish genocide” (94); “the main impediment to effective justice in Nazi trials was the law, and its contemporary interpretation in Nazi trials” (190).

Throughout the book, Wittmann builds her case against the German Criminal Code and the German judiciary establishment of the 1960s. Her point is that the requirement of the German penal code that a murder be committed with a specific motive made “the presence of excessive brutality a necessity for the murder charge,” shifting the focus of the trial onto the most brutal perpetrators (101–2). The relevant provision of the German Criminal Code, which is still valid today, provides that

A murderer is whoever kills a human being out of murderous lust, to satisfy his sexual desires, from greed or otherwise base motives, treacherously or cruelly or with means dangerous to the public or in order to make another crime possible or cover it up.¹

According to Wittmann, this meant that in order for the prosecution to secure a conviction of murder, it was not sufficient to show that a defendant had followed an order from the top Nazi leaders to kill innocent people; it was also necessary to prove personal initiative to commit crimes and to offer clear evidence that a defendant was not merely following orders when he committed a crime. The author suggests that this approach even lent a certain legitimacy to the orders issued by the Nazi regime. As a further result of this narrow definition of murder, the author argues, the majority of the Auschwitz guards, who “did not demonstrate excessively violent behavior” but were “hesitant killers who completed their tasks anyway” were convicted as aiders and abettors (101). This meant that “many volunteer SS officers who had killed hundreds of people were beginning to look innocent and a few vicious sadists were becoming the sole legal focus” (142). The author’s view is that not only did this approach place the genocide committed in the gas chambers of Auschwitz in the background, it also fragmented the Holocaust into a series of smaller, unrelated incidents, such that the overall picture of a state-organized genocide was overlooked.

It is interesting that Wittmann points to important distinctions and complexities in law in relation to participation in and commission of crimes. Even today, courts dealing with similar crimes are often faced with doctrinal and evidentiary challenges in relation to varying forms and degrees of participation in crimes on the part of the defendants before them. However, considering the criticism of the definition of murder in Germanic criminal law, it should be noted that although Wittmann mentions the criminal act of manslaughter, she does not explain why the defendants were not charged with this offense, or with a similar and lesser form of murder. Thus, it is surprising to read, at the end of the book, the comment that “the trials that did proceed on charges of genocide and crimes against humanity were flawed too” (274). Wittmann does not clarify the opinion expressed in this remark, which leaves the reader wondering what solution she might have in mind for the problem of the Auschwitz trial, namely that it focused on the most brutal perpetrators and overlooked the systematic nature of the killings.

In this context, it should also be noted that the International Criminal Tribunal for the former Yugoslavia (ICTY) has further developed the legal doctrine of joint criminal enterprise, a form of criminal liability already applied by and derived from the

International Military Tribunal in Nuremberg and other trials conducted by the Allied Powers after World War II. This doctrine provides that an accused can be convicted as a principal perpetrator if he or she shared a common intent to mistreat prisoners and contributed to the furtherance of such a goal. Charges under joint criminal enterprise are very suitable for concentration-camp cases, and it is this form of criminal liability that has been applied in ICTY cases concerning detention camps. Such an approach would certainly have been appropriate for the purposes of the prosecutors in the Auschwitz trial, and it would have remedied many of the concerns raised by the author. It is not clear whether the Frankfurt court had this legal tool at its disposal at the time, although it was used by the British and American Military Commissions, which operated under different bodies of law, twenty years before.

Wittmann raises another interesting question: To what extent should courts be involved in writing history? Through her disapproval of the Auschwitz trial court's decision not to go beyond determining the culpability of each accused and not to make findings on the historical events that allowed the creation of Auschwitz, she seems to suggest that the courts should have a bigger role in the writing of history. The court in the Auschwitz trial, according to Wittmann, did miss an opportunity to deal more comprehensively with the overall events in Auschwitz. The court should have been able to do more in this regard without disturbing its constitutional and principal task of examining the guilt or innocence of the defendants appearing before it. But it is Wittmann who has missed an opportunity to elaborate why criminal courts should be writing history. From a legal point of view, criminal courts are best equipped to judge individual criminal responsibility in accordance with the law, and not to write history. It is certainly not this reviewer's opinion that courts have no role whatsoever in this arena; the Nuremberg and Tokyo Tribunals and the contemporary international criminal courts are all good examples of courts making considerable contributions to history, and Wittmann's criticism of the Frankfurt court is a valuable contribution to this debate.

Wittmann is not only critical of the Auschwitz trial. She has extensively explored the press coverage of the trial and some debates following the trial (174–90 and chap. 6), and she concludes that the trial “illuminated the crimes of Auschwitz for a public that was almost completely and often deliberately ignorant of them” (271). The trial did indeed confront the German people with the details, as well as the magnitude, of the crimes committed in their name at Auschwitz.

Wittmann's book should be of interest to legal scholars, historians, philosophers, and others interested in studying cases involving the gravest crimes. The book is more than just a reminder of a very black page in history and an important trial: Wittmann raises significant contemporary questions about how nations should deal with their own genocidal past. This is of particular significance because, for example, courts in the former Yugoslavia are now increasingly trying war crimes and genocide cases under their national criminal codes. It is also worth noting that the new International Criminal Court relies on the ability and willingness of states parties to prosecute war crimes, genocide, and crimes against humanity committed in their own territory (the complementarity principle). One crucial distinction between these examples and the Auschwitz trial, however, is the involvement of international lawyers in these trials and the recent development of international criminal law.

Note

1. *Strafgesetzbuch* [German Criminal Code], art. 211(2). An English translation is provided by the German Federal Ministry of Justice at <http://www.iuscomp.org/gla/statutes/StGB.htm>. Wittmann offers another, very similar, translation of the same text on page 44.