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The Supreme National Tribunal of Poland and the History of International Criminal Law

Mark A. Drumbl*

38.1. Introduction

The Supreme National Tribunal of Poland (Najwyższy Trybunał Narodowy, the 'Tribunal') operated from 1946 to 1948. It implemented the 1943 Moscow Declaration. This instrument provided for the repatriation of Nazi war criminals to the countries where they allegedly committed atrocities to stand trial and, if convicted, to be sentenced on the basis of national laws. The Tribunal presided over seven high-profile cases that implicated 49 individual defendants targeted as major perpetrators.

This chapter discusses two of the Tribunal's trials: that of Rudolf Höss, *Kommandant* of Auschwitz (Oświęcim), described as the site of the largest mass murder in history,[1] and Amon Göth, commander of the

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[1] The Höss proceedings are reported and summarised in Trial of Obersturmbannfuhrer Rudolf Franz Ferdinand Hoess ("Höss case") (http://www.legal-tools.org/en/go-to-database/record/9e87ed/). "Rudolf Höss has killed more people than any man in history, and Auschwitz (Oświęcim) was the greatest charnel house of all time"; Joseph Tenenbaum, "Auschwitz in Retrospect: The Self-Portrait of Rudolf Höss, Commander of Auschwitz", in *Jewish Social Studies*, 1953, vol. 15, nos. 3/4, p. 219 noting: "The sprawling Camp Auschwitz extended for over 40 square kilometers, with 60 affiliated labor camps […] At its peak, Auschwitz contained 140,000 prisoners".

Kraków-Płaszów labour camp.[2] The chapter then pivots from these trials to a more general examination of the Tribunal as an inflection point for contemporary international criminal law. Elsewhere I have written about the Tribunal's first trial, involving Arthur Greiser (the notorious Governor of the Warthegau). As with Höss and Göth, Greiser was convicted and executed. The Greiser case in fact constitutes the first conviction of an influential Nazi German official for the crime of waging aggressive war (predating the judgment and sentence of the International Military Tribunal ('IMT' or 'Nuremberg Tribunal').[3]

The trials conducted by the Tribunal in Poland had didactic as well as punitive goals. They aspired to educate the world about Poland's suffering during the Nazi occupation. Accordingly, the Tribunal's trial narrative tended to project the Final Solution as crimes against the Polish peoples and the Slavic nations, as well as against Europe's Jewish population. Poland clamoured – unsuccessfully – for special status at the IMT.[4] The Tribunal was a response to the Allies' having rebuffed this request. Polish prosecutors felt the IMT judgment did not engage sufficiently with the suffering of the Polish people at the hands of the Nazis; the work of the Tribunal was intended to remedy this deficit. Each of the Tribunal's seven cases was selected with a separate expressive purpose in mind. In contrast to the IMT (oriented to crimes against the peace), the Höss and Göth cases aimed squarely at the Holocaust and

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2 The Göth proceedings are reported and summarised in Trial of Hauptsturmfuhrer Amon Leopold Goeth ("Göth case") (http://www.legal-tools.org/en/doc/7ac212/).

3 Mark A. Drumbl, "Germans are the Lords and Poles are the Servants': The Trial of Arthur Greiser in Poland, 1946", in *Washington & Lee Legal Studies Paper No. 2011-20*, 2011, Social Science Research Network. Each of the Höss, Göth and Greiser cases is summarised in English in the *Law Reports of Trials of War Criminals*, a compiled anthology of notes and reports of selected post-Second World War proceedings assembled by the United Nations War Crimes Commission ('UNWCC'). These summaries are found in the Legal Tools Database and this chapter cites to them extensively and authoritatively. The *Law Reports* do not verbatim reproduce the judgment, but summarise the indictment, trial and the judgment (on occasion directly excerpting the Tribunal's language) while also providing analysis of key legal issues and factual background. Göth case, see *supra* note 2; Höss case, see *supra* note 1. The Greiser proceedings are reported and summarised in Trial of Gauleiter Artur Greiser ("Greiser case") (http://www.legal-tools.org/doc/e963c2/). The United Nations War Crimes Commission, *Law Reports of Trials of War Criminals*, vol. VII ("Law Reports"), His Majesty's Stationery Office, London, 1948.

4 Alexander V. Prusin, "Poland's Nuremberg: The Seven Court Cases of the Supreme National Tribunal, 1946–1948", in *Holocaust and Genocide Studies*, 2010, vol. 24, no. 1, p. 2.

related crimes against civilians. The Tribunal also intended to expose the ineffectiveness of the pre-war Polish government.

Notwithstanding these didactic aspirations, outside Poland comparatively little has been written about the Tribunal. This dearth of attention traces to several factors: the influence of the Anglosphere in international criminal law and resultant linguistic barriers, the hagiography of Nuremberg's IMT and American Military Tribunal ('AMT'), the Cold War divide, and Poland's own complex relationship with the crimes of the Holocaust which includes Polish persecution of Jews and Polish resistance to such persecution. One of the few English-language scholarly articles on the Tribunal is entitled "Poland's Nuremberg", thereby attesting to the iconicity of Nuremberg in the international legal imagination, notwithstanding the fact that the Tribunal issued its first two judgments before – and continued its work well after – the release of the IMT judgment.[5] The neglect of the Tribunal's work in international scholarship might also boil down to the more mundane fact that Tribunal judgments were not widely disseminated to a global audience.

Regardless, the paucity of discussion about the Tribunal disappoints in light of the nature of its work, its relevance to Poland and its myriad jurisprudential contributions. While the Tribunal was informed by the IMT and international instruments, it also cultivated its own voice and its own agenda which at times departed from the IMT's. This chapter seeks to recover the Tribunal's place within the history of international criminal law. In this regard it also seeks to highlight the role of East Europeans in the construction of post-war justice, including eventually within the United Nations War Crimes Commission ('UNWCC').[6] This role is often neglected, stereotyped or downplayed.

Inadvertently, however, the Tribunal also warns of the shadow-side of international criminalisation. The Tribunal's foundational legal decrees

5 *Ibid*.

6 See the chapter by Patrycja Grzebyk, "The Role of the Supreme National Tribunal of Poland in the Development of Principles of International Criminal Law", *HOICL*, vol. 2, 2014, p. 603: "In fact it was the Polish and the Czechoslovakian governments in exile that initiated the organisation of the international conference at St James's Palace, London in January 1942, where the Inter-Allied Declaration condemning German atrocities in occupied territories and a proposal for the creation of a United Nations Commission for the Investigation of War Crimes were adopted".

– deployed to assert jurisdiction over Nazis in the name of human rights – also inflated the punitive reach of Polish Communist authorities against other domestic "traitors" seen as inimical to the state and, thereby, channelled the violation of human rights in the post-war period. These foundational legal decrees generated the Tribunal as well as separate summary courts that served *inter alia* social control purposes. Dual juridical tracks thereby arose. Special legislation to punish war criminals, often presented as heroic, may – once domesticated – come to serve illiberal agendas, in this case against dissenters from Communist autocracy. These dual aspects of international criminal law – namely, as simultaneous conduits for justice and for repression – are surprising only if one accepts the pervasive *mystique* of international criminal law as messiah plagued only by lack of adequate enforcement. Janus-like duality is, after all, routinely imputed to municipal criminal law.

What is more, in this instance a third track also emerges from the domestication process. These very same foundational instruments also enabled the prosecution in Polish courts of some Poles who massacred Jews during (and following) the German occupation and Poles who collaborated with the Nazis.[7] These cases brought to light occasional Polish complicity and initiation of anti-Jewish pogroms while also condemning this violence through Polish judicial institutions. Many Polish Jews – seen to be Communists – were persecuted by anti-Communist forces. These cases thereby coarsened the narrative circulated by the Tribunal – namely, that of Poles as collective victims – by underscoring instances of Poles as individual perpetrators acting with agency and independence in murdering Jews.[8] These trials therefore contribute to the historiography of Polish-Jewish relations in a manner that complexifies Polish projections of victimhood.[9] The Tribunal, in any

[7] Krzysztof Persak, "Not Only Jedwabne", in *Tygodnik Powszechny*, 2002.

[8] See, for example, The Verdict of Circuit Court in Lomza, 16–17 May 1949 (involving the Jedwabne massacre of 1941).

[9] Monika Rice, "The 'Gross' Effect: Polish-Jewish Historiography in Poland after *Neighbors*", in *The American Association for Polish-Jewish Studies*, January 2014:

> Could it be possible that revealing that not all the nation fought uniformly against the Germans and that, indeed, whole segments of the society – the peasants, for example – benefitted from collaborating with Nazi decrees – would ultimately lead Poles to question their self-satisfaction concerning their behaviour during the War?

event, did not elaborate upon crimes committed by Poles against Jews. Its focus was on German crimes. Assessment of Polish criminality would have fit uneasily with the Tribunal's overarching purpose.

38.2. The Tribunal: Background, Political Context and Denouement

A Polish Decree of 22 January 1946 delineated the Tribunal's jurisdiction and powers.[10] Subsequent decrees were adopted *inter alia* on 17 October 1946 [11] and 11 April 1947. The 17 October Decree extended the jurisdiction of the Tribunal to all war criminals rendered to Poland for trial and over alleged war crimes regardless of their place of commission. Earlier decrees from 1944 and 1945 elucidated the Tribunal's substantive law of application. Particularly noteworthy in this regard is a Decree of 31 August 1944 (*Sierpniówka*), promulgated by the Polish Committee of National Liberation (*Polski Komitet Wyzwolenia Narodowego*), concerning the punishment of "fascist-hitlerite criminals" and "traitors to the Polish nation".[12] This Decree was adopted shortly after the liberation of some Polish territories yet before the emergence of the fully-fledged Communist state. All told, the substantive law applied by the Tribunal took the form of a hodgepodge of special decrees, pre-existing Polish municipal law, newly created enactments and the London Agreement – understandable, to be sure, in light of the absence of comprehensive law

In addition to Jan Gross, whose work has attracted considerable controversy, Rice also identifies other historians working on this subject matter.

10 Andrzej Rzepliński observes that as early as 1940 the exiled Polish government (in London) approved of "hood courts" attached to commanders of the Polish underground anti-German resistance; Andrzej Rzepliński, "Prosecution of Nazi Crimes in Poland 1939–2004", Paper Presented in the First International Expert Meeting on War Crimes, Genocide, and Crimes Against Humanity, International Criminal Police Organization, Interpol General Secretariat, Lyon, 2004, p. 1. These "hood courts" conducted secret proceedings, passed summary sentences and could punish only by the death penalty. Their law of application was "the violation of international agreements on warfare and occupation"; *ibid.*

11 This Decree abolished the Special Criminal Courts for trials of alleged war criminals.

12 The Decree of 31 August 1944 (as modified, amended and jurisdictionally expanded) was eventually consolidated in a Schedule to the Proclamation of the Minister of Justice dated 11 December 1946. One subsequent Decree, from 13 June 1946, was ominously introduced as "concerning crimes particularly dangerous in the period of the reconstruction of the State". Law Reports, Annex, p. 90, see *supra* note 3. According to Rzepliński (writing in 2004), the main provision of this decree (Article 1[1]) still remains in force in Poland, although as of 1 September 1998 the death penalty had been replaced by life imprisonment. Rzepliński, 2004, pp. 1, 5–6, see *supra* note 10.

regarding war crimes, crimes against humanity and crimes against the peace available at the time.[13] Prosecutions were overseen by the Chief Commission for the Examination of German Crimes in Poland.[14] Although the Tribunal's seat was in Warsaw, it conducted some of its trials in other cities in Poland. While Tribunal verdicts were final, the President of the National Council (and, subsequently, the President of Poland) had a right to issue a pardon or commute any sentence.

The Decree of 31 August 1944 listed offences and identified modes of liability. It also provided penalties, which were the death penalty (for certain crimes) and imprisonment up to 15 years or for life (for other crimes). Convicts also forfeited their public and civic rights and were subject to the full confiscation of their property.[15] While the confiscated property was intended to be returned to the original private party owner who had been dispossessed, such claims proved difficult to establish and, frankly, the state had limited interest in supporting them.[16] This meant the property remained with the Polish state. In fact, state takings as criminal punishment – along with the evacuation of German or *Volksdeutsche* populations throughout Eastern Europe – "caused much economic wealth to fall in the hands of the sequestering state".[17] On this latter note, convictions of deemed traitors or collaborators under the Decree supported the Polish government's push towards nationalisation (often without compensation) in the liberated country.[18]

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13 In the Höss case, the prosecution additionally alleged that crimes committed against Soviet prisoners of war violated the Geneva Convention relative to prisoners of war. Law Reports, p. 18, see *supra* note 3.

14 Rzepliński notes that the Commission was established by governmental decree of 10 November 1945.

15 A series of specific decrees and laws from 1944 to 1946 extended the confiscation and restitution regime quite broadly. For details, see Samuel Herman, "War Damage and Nationalization in Eastern Europe", in *Law and Contemporary Problems*, 1951, vol. 16, no. 3, pp. 508–9.

16 In the end, in Poland "of the bulk of properties seized, confiscated, or acquired under forced transfers by the Nazi occupiers, little, in fact, was returned to the previous owners on the pre-1939 basis"; *ibid.*, p. 509.

17 *Ibid*., p. 507.

18 *Ibid*., p. 486, noting that throughout Eastern Europe "war damage" moves away from "war claims" and merges with the fundamental political considerations of the economies of reconstruction.

The creation of the Tribunal as a special enforcement mechanism underscored the extraordinary nature of the defendants' criminality. Although concerns arose over bias, victor's justice, retroactivity and emaciated due process,[19] the work of the Tribunal has nonetheless been lauded.[20] Alexander Prusin, for example, renders a favourable assessment of the quality of the Tribunal's work when placed within its historical and temporal context:

> In sharp contrast to the numerous political trials carried out in the country during the same period, in which thousands of individuals accused of "hampering socialist reconstruction" were sentenced to death or long prison terms, the [Tribunal's] proceedings applied conventional legal and moral standards comparable to those used in Western courts and investigated each case comprehensively on its own merits.[21]

Prusin underscores that personnel associated with all branches of the Tribunal had "impressive" professional credentials and, more importantly, were able to conduct their work unmolested by governmental meddling.[22] It is, moreover, important not to overstate the legalism of "Western" courts at the time. These courts also impinged upon non-retroactivity principles in the name of the self-evident greater good of convicting Nazis.

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19 Matthew Lippman, "Prosecutions of Nazi War Criminals Before Post-World War II Domestic Tribunals", in *University of Miami International and Comparative Law Review*, 1999–2000, vol. 8, p. 11.

20 In Greiser's case, see, for example, Catherine Epstein, *Model Nazi: Arthur Greiser and the Occupation of Western Poland*, Oxford University Press, Oxford, 2010, noting that, despite the fact that "[b]y western standards [Greiser] hardly had a fair proceeding", overall, "the court arrived at a fair estimation of Greiser's crimes". For Epstein, "[d]espite the flaws of the proceedings, Greiser's trial served both justice and history reasonably well", p. 329.

21 Prusin, 2010, p. 17, at abstract, see *supra* note 4. Prusin recognises certain process defects, nevertheless, such as the fact that the prosecution had greater resources than the defence, along with more time to present and prepare the case. The fact that more serious perpetrators receive richer due process – even if the outcomes may be largely preordained – is not an unusual phenomenon in international criminal law. In Rwanda, for example, persons indicted by the International Criminal Tribunal for Rwanda ('ICTR') benefit from higher levels of due process and superior conditions of confinement than lower-level defendants prosecuted domestically in Rwanda itself.

22 *Ibid*., p. 5.

The favourable assessment of the Tribunal's work when it came to high-profile Nazis, however, belies the ulterior deployment of its foundational instruments. The Decree of 31 August 1944, for instance, has been characterised as an "infamous" piece of legislation "promulgated by the Communist proxy regime and used mainly as a political and legal tool of repression" that facilitated post-war prosecutions, harassment and torture of persons deemed anti-Communist.[23] This Decree, it has been argued, was used to target anti-Communists on the pretext they were Nazi sympathisers. When it came to this group of defendants, "the intention of the authors of the August Decree was to limit, if not outright preclude, the possibility of a fair investigation and a fair trial".[24] Nonetheless, the work of courts operating under the Decree also served as a basis – decades later – for scholars to mine the much more complex historiography of Polish-Jewish relations, thereby establishing a variety of instances of Polish involvement in the persecution of Jews and, notably, Jews taken to be Communists.

The Tribunal delivered its first judgment on 7 July 1946. It convicted Arthur Greiser of membership in a criminal organisation, aggressive war and exceeding the rights accorded to the occupying power under international law (in other words, war crimes and crimes against humanity). While the heart of the Greiser case was the charge of aggressive war, the judgment also unpacked the avid Germanisation he initiated in what historian Wendy Lower calls the "Wild East".[25] The Greiser case narrated the German *Drang nach Osten* (yearning for the East) and the terrors left in its wake. It connected the conquest of the Eastern living space to something even more existential than aggressive war, namely, genocide. The Greiser case, in fact, has been described as the "first ever legal ruling on the crime of genocide" even though the

[23] Marek Jan Chodakiewicz, "The Dialectics of Pain: The Interrogation Methods of the Communist Secret Police in Poland, 1944–1955, Part II", in *Glaukopis*, 2004–2005, vol. 2, no. 3, p. 1, noting also that "[t]he language of the August Decree […] reflected the language of contemporary Communist propaganda".

[24] *Ibid*. p. 2.

[25] For general discussion of Germanisation in the Eastern front (including in the Warthegau), and specifically of the historically ignored role of German women in that process, see Wendy Lower, *Hitler's Furies: German Women in the Nazi Killing Fields*, Houghton Mifflin Harcourt, Boston, 2013; Germanisation also emerged as a theme in the Tribunal's prosecution of Albert Forster, the *Gauleiter* of Danzig-West Prussia and a rival to Greiser. Forster was convicted in 1948 in Gdansk and executed in 1952.

Genocide Convention was not yet in existence at the time.[26] In this regard, the Tribunal blazed a new path – which continued in the Höss and Göth judgments – towards the imposition of penal responsibility for genocide before the crime was even recognised under international law. Although the Polish decrees that governed the trial did not explicitly mention genocide,[27] in the Greiser case the Tribunal referenced the defendant's actions within the framework of crimes against humanity as a "general totalitarian genocidal attack on the rights of small and medium nations to exist, and to have an identity and culture of their own".[28] A linkage was thereby established with the concept of denationisation. The Tribunal noted the genocidal character of the violence and the genocidal nature of the attacks on Polish culture and learning.[29] Raphael Lemkin's neologism was used to explicate the systematic and legislative nature of the violence against the Polish and Jewish populations. The Tribunal contemplated the physical, biological, spiritual and cultural aspects of genocide, including Nazi destruction, confiscation, theft and seizure of cultural property, art and archives (whether publicly or privately held). The Tribunal, therefore, "broadly conceiv[ed] of genocide as encompassing both the cultural and physical extermination of a religious or national group".[30] This understanding persisted in the subsequent Höss and Göth cases.

"While the Greiser indictment did not ignore Holocaust crimes", it nonetheless subsumed the "Final Solution under crimes against the Polish people".[31] Germanisation was seen as destroying the Polish nation and also the Jewish population. This approach also informed the Göth and Höss cases, although less evidently, and these two latter trials exposed the horrors of the concentration camps and the targeting of European Jews. Centralising the narrative of Polish suffering, nonetheless, served

[26] David L. Nersessian, "The Contours of Genocidal Intent: Troubling Jurisprudence from the International Criminal Tribunals", in *Texas International Law Journal*, 2002, vol. 37, p. 253.

[27] Nor did it precisely define war crimes or crimes against humanity.

[28] Law Reports, p. 114, see *supra* note 3.

[29] *Ibid*., p. 112.

[30] Matthew Lippman, "The Convention on the Prevention and Punishment of the Crime of Genocide: Fifty Years Later", in *Arizona Journal of International and Comparative Law*, 1990, vol. 15, p. 448.

[31] Epstein, 2010, p. 317, see *supra* note 20. The focus of the Greiser proceedings on the aggressive war against Poland also intentionally dovetailed with this narrative.

immediate political purposes for Polish post-war authorities. As Andrzej Rzepliński acidly observes:

> The prosecution and punishment of war crimes and crimes against humanity, committed by German military, police and civilian occupation authorities proceeded briskly and […] was seen as one of the instruments of winning a neutral attitude of the general public, who took a clearly anti-Communist stance, particularly so in the face of the ever-increasing Communist terror.[32]

During the Second World War, German occupation encompassed 48 per cent of the area of the pre-war Polish state (inhabited by 22 million Polish citizens) while Soviet occupation in the east encompassed the remaining 52 per cent of the area (13 million Polish citizens).[33] The Soviets perpetrated atrocities as well,[34] yet the singular focus of the Tribunal, and judicial activity generally, on Nazi horrors had the effect of obscuring Soviet crimes. To be sure, public discussion of Soviet crimes was not permitted at the time. Any such discussion would have resulted in severe sanction. It is only in recent years, after the transition from Soviet domination, that attention has gravitated towards accountability for these crimes.

The Tribunal was a specially created institution of primary jurisdiction that dealt with only a small number of notorious defendants. Other trials of Nazis and collaborators were summarily conducted in common district courts which retained residual jurisdiction and also in military courts.[35] The

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[32] Rzepliński, 2004, p. 1, see *supra* note 10; Prusin, 2010, p. 2, see *supra* note 4.

[33] Institute of National Remembrance, Commission for the Prosecution of Crimes against the Polish Nation, Public Education Office, *The Destruction of the Polish Elite: Operation AB-Katyn*, Warsaw, 2009, pp. 22, 25, 81, noting that "repressive operations were preludes to Poland's Germanization on the one hand, and Sovietization on the other".

[34] *Ibid*., foreword. "More than 100,000 people were arrested [by Soviet occupying authorities in 1939–41], and more than 300,000 deported to the east into the depths of the USSR. The memory of the Katyn massacre and almost 22,000 Polish Army officers, policemen and political prisoners murdered by decision of the Political Bureau of the Central Committee of the VKP(b) of 5 March 1940, is still living among Poles".

[35] Rzepliński, 2004, p. 1, see *supra* note 10. "Special Criminal Courts were established on 12 September 1944, each composed of a professional judge and two lay judges, to try Nazi crimes, which were called in Poland, until late 1990s, 'Hitlerite crimes'. Those were summary courts. On 17 October 1946 their powers were taken over by common courts, but they continued to sit as summary courts".

stipulated decrees also applied to these prosecutions,[36] which continued for decades. All told, Rzepliński cites sources that by the end of December 1977 at least 17,919 persons were convicted under the decree, "[a]bout 1/3 [of whom] were Germans, Austrians and the so-called Volksdeutsche".[37] Rzepliński also determines that "[a]bout 95% of all investigations into Nazi crimes and other war crimes concern victims of Polish nationality".[38] A separate prosecutorial office was established in 2000 (following post-Communist transition). This office had a broader mandate. By early 2004 it had "conducted 1295 investigations, including 335 […] in Nazi crime cases, 878 […] in Communist crimes cases, and 82 […] in cases concerning other crimes".[39]

Among the institutions that enforced the 1944 Decree (as subsequently consolidated), the Tribunal was the most transparent, judicious and attentive to due process concerns. Prusin argues that this is because the Tribunal itself was composed of quality personnel coming from the many diverse strands of Polish political life at the time. Hence, it was politically balanced and professionally pedigreed. Yet, to gesture towards the shadow side mentioned earlier, the legislative moves that established the Tribunal also empowered a variety of trials at various levels that served ominous motives and were cloaked in celerity and secrecy. Post-war Polish Communist authorities appeared more concerned with the prosecution of their political opponents than the prosecution of

[36] Law Reports, Annex, p. 97, see *supra* note 3. "As regards war crimes cases, all these courts apply the same substantive law as laid down in the Decree of 31 August, 1944".

[37] Rzepliński, 2004, p. 3, see *supra* note 10. Rzepliński mentions here a Decree of 31 December 1944, although I am uncertain whether this refers to another decree, or is simply a transcription error and the reference is meant to be to the Decree of 31 August 1944. In 1991, prosecutorial responsibilities were expanded to include Stalinist crimes committed in Poland between 1944 and 1956; *ibid.*, p. 3, fn. 12; Prusin, writing in 2010, concludes: "[A]mong the former Soviet satellites, Poland was the most consistent in investigating and prosecuting war crimes: between 1944 and 1985, Polish courts tried more than 20,000 defendants, including 5,450 German nationals. The post-Communist Polish justice system has continued the work of prosecuting war crimes; by February 2004 it had investigated 335 cases". Prusin, 2010, pp. 1–2, footnote omitted, see *supra* note 5,

[38] Rzepliński, 2004, p. 3, see *supra* note 10.

[39] *Ibid*. For extensive discussion of these investigations in the case of Nazi crimes, see *ibid.*, pp. 4–12.

erstwhile Nazi oppressors.[40] At the time, the Communist grip on power was tenuous. Non-Communist parties posed a challenge. The Polish government was willing to give the Tribunal a robust margin of appreciation in its work, and considerable discretion, which enabled it to adhere to a legalist agenda, build public support and impress foreigners.[41] This was not the case, however, for the deployment of the Polish judiciary to prosecute large numbers of persons – also deemed to be enemies of the state – for "hampering socialist reconstruction" at times on the basis of what Marek Chodakiewicz has described as "[f]alse confessions" extracted in some instances by torture.[42] Prusin concluded that the Tribunal

> stood apart from the special penal courts, which operated on the Stalinist model and purged the regime's political opponents in numerous show trials […] [T]he [Tribunal] did not adjudicate a single case pertaining to the "fascistization of the country".[43]

In this regard, the existence of the Tribunal helped distract attention from the collateral use of its foundational decrees as conduits for state coercion.

The Tribunal's work also helped remind the public that "only a unified Polish society, led by the new government in alliance with the USSR, could effectively thwart the 'German menace'".[44] In actuality, however, Polish Communist authorities feared internal dissent rather than any threat from what was then a totally devastated Germany. Hence, the 1944 Decree was applied to "real" Nazi collaborators as well as "alleged" Nazi collaborators, with the ascription of collaborator status being

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40 Prusin, 2010, p. 2, see *supra* note 4. For exposition of the use of torture by the post-war Communist secret police against perceived political opponents, see Chodakiewicz, 2004–2005, see *supra* note 24.

41 *Ibid.*, p. 18, noting that the Tribunal's "reputation reflected well upon the government, supporting its claims about its democratic credentials and its desire to re-establish an orderly and just society".

42 Chodakiewicz, 2004–2005, p. 11, see *supra* note 23.

43 Prusin, 2010, p. 5, see *supra* note 4. See also Chodakiewicz, p. 7, see *supra* note 23: "In contrast to special penal courts, where evidence in many cases consisted only of few eyewitness testimonies, in the [Tribunal] trials documentary materials reflected each defendant's crimes and respective rank in the occupation system".

44 Prusin, 2010, p. 18, see *supra* note 4.

routinely invoked to smear politically incorrect individuals.[45] Undesirable individuals deemed to be political opponents in post-war Poland often were labelled as "fascists" and "Hitlerite collaborators", thereby squaring with the language of the 1944 Decree.[46] Chodakiewicz posits:

> This was a convenient propaganda device commonly employed to dupe the West into believing that the opponents of the Communists were pro-Nazi and that the brutal crushing of the independentist insurrection and the parliamentary opposition in Poland was simply a mop-up operation which fittingly concluded the anti-German struggles of the Second World War. This was also a useful tool to rally the population behind the Communists in meting out justice to alleged Polish "Hitlerites".[47]

The Holocaust also was invoked in this regard to stigmatise political opponents.[48] Chodakiewicz notes that this rhetorical move was intended to "endear the proxy regime to the Jewish community at home and abroad", and was predicated on the requirement that "the Communists effusively play the role of the sole protectors of the Jewish people".[49]

Nonetheless, the Tribunal's political usefulness eventually tapered off. It was disbanded in 1948 despite the fact that it was still preparing future cases against major war criminals.[50] Its jurisdiction was reassigned

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45 Chodakiewicz, 2004–2005, p. 15, see *supra* note 23. Chodakiewicz characterises the 1944 Decree as "promulgated by the Communist proxy regime and used mainly as a political and legal tool of repression against the independentists fighters and politicians"; See also *ibid.*, p. 14, noting the collateral prosecution of dissidents under the Soviet legal system, notably, pursuant to Article 58 of the Soviet Penal Code, and the sentencing thereunder on the basis of being a "traitor", "counter-revolutionary", "Hitlerite collaborator" and "fascist".

46 *Ibid*. See also p. 15: "The language of the August Decree was extremely violent. […] And the Communists dubbed as 'fascists' and 'reactionaries' anybody who disagreed with them".

47 *Ibid*., p. 16, footnote omitted.

48 *Ibid*. "Whoever killed Jews was not just a traitor, but also 'an agent of Hitler'. Anybody who opposed the Communists was also a potential 'Jew-killer', or at least could be accused of such terrible anti-Semitic deeds, and, hence, branded 'a Nazi collaborator'".

49 *Ibid.*, p. 16 and fn. 46.

50 Grzebyk, 2014, p. 613, see *supra* note 6, noting the intention to prosecute those responsible for the destruction of Warsaw and the demolition of the Warsaw ghetto. Grzebyk also posits that another reason the Tribunal was disbanded is because Western states became less likely to extradite an accused to a state now behind the Iron Curtain.

to the regional courts.[51] Prusin reports that some Tribunal members fell into disfavour with the Polish government. Greiser's defence lawyer, who had conducted himself with great integrity as an official of the court, was "subjected to a vicious slander campaign […] [when] the secret police focused attention on [his] 'bourgeois' credentials; ultimately, [h]is apartment was confiscated and he was forced to terminate his law practice".[52] One of the leading prosecutors (who participated in the Göth case, among others) fared worse. He was "charged under the terms of the August Decree with the 'fascistization of the country' and sentenced to five years' imprisonment".[53] While the Tribunal's work ended in 1948, prosecutions of political opponents conducted under the auspices of the initial 1944 Decree continued thereafter. These foundational instruments were not repealed.

One response to the dual use of the Polish decrees, then, might be to suggest that criminal law domesticated immediately following the crucible of atrocity should contain a sunset provision such that its role in transitional justice remains truly transitional. The drawbacks to this approach involve difficulties in presenting an appropriate time for the sunset; also lost is the potentiality of the law to shape-shift back into a force for good. In the Polish case, after all, the foundations laid by the 1944 Decree as concatenated also helped facilitate the investigation, in the post-Communist era, of crimes committed by the secret police between 1944 and 1956. In some instances, these investigations implicated the very "Stalinist" torturers that had turned to the 1944 Decree to torment perceived opponents.

38.3. The Göth Case

Amon Leopold Göth was commandant of the forced labour camp at Płaszów-Kraków between 11 February 1943 and 13 September 1944. He also was a member of the Nazi Party (Nationalsozialistische Deutsche Arbeiterpartei, 'NSDAP')[54] and the Waffen-SS (Armed Protective Squadron) – two criminal organisations. In addition to having "personally

[51] Prusin comments that the termination of the Tribunal "signaled that the Communists had assumed total control over the country". Prusin, 2010, p. 19, see *supra* note 4.

[52] *Ibid*.

[53] *Ibid*.

[54] Göth became a member of the Nazi Party in Austria in 1932.

issued orders to deprive of freedom, ill-treat and exterminate individuals and whole groups of people", he also was accused of having himself "murdered, injured and ill-treated Jews and Poles as well as people of other nationalities".[55] Göth was the Tribunal's second trial. Many decades later, Göth was portrayed by Ralph Fiennes in Steven Spielberg's film *Schindler's List* as "an irrational, sadistic monster who took pleasure in personally inflicting torture".[56]

Göth, an Austrian national born in Vienna on 11 December 1908, faced multiple charges in his indictment.[57] First, in his capacity as commandant of the Płaszów forced labour camp, he was accused of causing the death of "about 8,000 inmates by ordering a large number of them to be exterminated".[58] Göth "governed [this] camp in a calculated brutal manner, and for the slightest of complaint, he fired at prisoners, selected by him, himself, or he ordered others to do this, or conducted public hangings".[59] Second, as SS-*Sturmführer* he was accused of having carried out the "final closing down of the Cracow ghetto", a liquidation action that began on 13 March 1943 and which "deprived of freedom about 10,000 people who had been interned in the camp at Płaszów, and caused the death of about 2,000".[60] The Kraków ghetto was set up on 21 March 1941 and initially contained 68,000 residents;[61] purges occurred previous to the final liquidation; and the notes on the Göth case provide considerable details on the events that preceded the establishment of this ghetto and the progressive restrictions imposed on Jewish residents, including Göth's role in ordering and himself shooting many people. Third, Göth was charged with demolishing the Tarnów ghetto, also in Kraków district, as a result of which "an unknown number of people perished".[62] Fourth, Göth was accused of closing down the forced labour

55 Law Reports, p. 1, see *supra* note 3.

56 Laurence Rees, "Rudolf Höss – Commandant of Auschwitz", BBC, 17 February 2011.

57 The indictment against Göth was filed with the Tribunal on 30 July 1946 – two months before the pronouncement of the Nuremberg judgment.

58 Law Reports, p. 1, see *supra* note 3.

59 "The Trial of Amon Göth: The Indictment Part 1", Holocaust Education and Archive Research Team, 2010.

60 Law Reports, p. 1, see *supra* note 3.

61 *Ibid.,* p. 2.

62 *Ibid*., p. 1. In the reported background to the case, the following details are presented:

camp at Szebnie "by ordering the inmates to be murdered on the spot or deported to other camps, thus causing the deaths of several thousand persons".[63] Finally, in addition to this litany of criminality, Göth was accused of extensive property infractions. Of note, furthermore, is the general part of the indictment that charged Göth with membership in two criminal organisations, to wit, the Nazi Party and the Waffen-SS.

Göth was arrested by the SS police in Kraków on 13 September 1944. His arrest effectively ended his career. Göth fraudulently misappropriated considerable inmate property for personal use, rather than confiscating it for official Reich purposes. He thereby amassed a fortune. Göth's cruelties were so excessive that they flouted SS regulations regarding how a labour camp was to operate. He was so violent and rash with his own staff (he killed SS men) that they and his superiors became concerned.[64] Göth's arrest by the SS demonstrates the Nazi tendency not to favour sadists or persons who zealously killed for their own personal enrichment.

Göth lorded over the Płaszów camp and ostentatiously discarded any pretence of rules or regulations:

> Göth lived a very high style of life, in a luxury villa, where drinking parties were never ending, to which his friends from Kraków were invited. He had his permanent orchestra, consisting of prisoners and servants, whose members he was

> During the last week of June, 1942, in the course of the liquidation of the Tarnow ghetto about 6,000 Jews were removed to Belzec death camp and nearly the same number murdered on the spot. At the beginning of September, 1943, the ghetto was completely liquidated in this way. It was then, for instance, that the accused Amon Göth himself shot between thirty and ninety women and children and sent about 10,000 Jews to Auschwitz by rail, organizing the transport in such a way that only 400 Jews arrived there alive, the remainder having perished on the way.

Ibid., p. 2.

63 *Ibid.*, p. 1.

64 "The interrogating judge wanted to know, right down to the smallest detail, everything concerning the increasing financial personal level of Göth […] The SS judge Trauers had with him detailed information that prisoners in Płaszów, were not treated in accordance with the set SS standards of a concentration camp [… and] several of [Göth's] SS subordinate officers […] felt they were brutally treated by him". Holocaust Education and Archive Research Team, see *supra* note 59. See also *ibid.*: "The accusations laid against Göth, paradoxically included the fact that he treated the prisoners brutally, well beyond the SS regulations as laid down by the SS high command".

> killing at the slightest excuse, or simply when being drunk. He had two dogs, one called Ralf and the other called Rolf, both trained to attack and savage people. Many people have lost their lives, following being attacked by these dogs, on command of Göth.[65]

Witnesses at his trial reported the villa – known as the "Red House" – being the site of "orgies". Göth was reportedly always drunk; he had a series of mistresses, who at times intervened to stop him from killing or further beating detainees; he ordered forced prostitution at the camp.[66] Although arrested by the SS, Göth was never prosecuted or investigated by the SS police – apparently because of the "collapsing fortunes of Germany" at the time.[67] He in fact escaped from prison at the end of the war, but was captured by the Americans and subsequently extradited to Poland by the Allies. The witnesses before the Tribunal delivered extensive testimony about Göth's conduct in the labour camps, including the following gratuitous barbarities:

> – When the children were being taken out of the camp, Göth ordered nursery songs to be played in the camp by the orchestra […] at a time when the mothers of these children, forced to stand on the parade ground, had to look on, and witness the transportation of their children to their deaths.[68]
>
> – There were frequent cases when the accused, having not slept at night, as he spent the night at some orgy, went out at 6 in the morning when the prisoners were assembling into their work groups, and there started shooting them without any reason or warning […] [W]hen he appeared there drunk […] he approached the first person in line and shot him, because his coat is too long, the second one because he has a ominous look, and that he does not like it, and so on.[69]

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65 *Ibid*.

66 *Ibid*. "Chairman: What does the witness know about the "Merry House"? Witness: The accused ordered the selection from among the female prisoners, of several Polish girls, who were accommodated separately, in a special barrack, where only SS men had access to, and also the Ukrainians, to satisfy their sexual needs".

67 *Ibid.*

68 *Ibid.*

69 *Ibid.*

> – The whip would be passed to another SS man there, it was impossible being hit so many times, to count properly, people were making mistakes and the beatings were starting afresh. And so the beatings went on and on, the tables were covered in blood as every hit, meant a fresh cut in someone's flesh. As anyone went off the table, he was virtually one bloody mass of cut flesh. Everyone getting off the table was ordered to report, standing to attention, "I report humbly that I have received my sentence".[70]

Unlike the Greiser trial, which focused on the victimisation of Poles, the Göth trial jointly highlighted the extermination of the Jewish population and the suffering of Poles.[71] The Prosecution placed Göth's conduct squarely within the context of the progressive persecution of European Jews orchestrated by the Nazi regime, which began with the imposition of personal and economic restrictions on the Jewish population.[72] The culmination of these atrocious efforts, to be sure, was the systematic concentration of the Jewish population "in a small number of towns in order to achieve complete control over them and to facilitate their removal to death camps"[73] and, then, the crushing operation of those death camps. As noted in the UNWCC report of the Göth proceedings:

> Against this background appeared the person of the accused Amon Göth, whose life career from the early years was inseparably bound with the Nazi movement, and who was responsible for the atrocities committed as part of a general pattern of the German policy aiming at complete extermination of the Jewish population in Europe.[74]

At the time, one important contribution of the Göth trial was to clarify that the pogroms against the Jewish community served no military objective and, hence, constituted something other than the war effort. Decades later, when Rwandan defendants argued that the massacre of all

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70 *Ibid.*

71 First Prosecution attorney, Mieczyslaw Siewierski, for example, submitted that the "full might of these cruel German measures were directed against the Jewish population"; *ibid.* Siewierski was the prosecutor ultimately charged and sentenced by the Communist authorities to five years' imprisonment putatively on account of "fascistization".

72 Law Reports, p. 2, see *supra* note 3.

73 *Ibid*., p. 3.

74 *Ibid*., p. 4.

Tutsi (men, women and children) was undertaken in self-defence against an active military threat, a similar distinction was drawn between genocide and the war effort.

Göth pleaded not guilty. He was represented by two Tribunal-appointed attorneys. His trial was held at Kraków on 27–31 August and 2–5 September 1946.

The evidence against Göth was overwhelming. It included witnesses (mostly former detainees of the ghettos and camps), expert evidence as to the Nazi policies and also expert legal testimony regarding the content of international criminal law.[75] Göth was found guilty of the charged crimes, a "large number [of which] has been committed on the accused's own initiative"; he was also convicted of ordering crimes.[76] For a high level perpetrator, Göth's convictions for homicide and himself personally killing, shooting, maiming and torturing were notable in that they indicate his disposition as an unstable sadist, in contrast to the disposition of other leading Nazis, such as Höss, reputed for mass murder by detached, meticulous and punctilious performance of their administrative and bureaucratic duties.[77]

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[75] *Ibid.*

[76] *Ibid.,* p. 10. Göth's convictions for directly and personally murdering and torturing massive numbers of prisoners were based on extensive witness testimony. "Göth very often fired through the windows into the barracks, killing prisoners, with his own hands, beating prisoners with his whip, until they were unconscious, as well as systematically sentencing people to be whipped, across a bare back 25 or 50 times, in front of groups of people. Hanging by the arms, detention in bunkers, ravaging by dogs, these were the methods in daily use and application of the accused". Holocaust Education and Archive Research Team, see *supra* note 59.

[77] See, for example, Rees, 2011, see *supra* note 56: "There is no record of [Höss] ever hitting – let alone killing – anyone". Also: "According to Whitney Harris, the American prosecutor who interrogated him at the Nuremberg trials, Rudolph Höss appeared 'normal', 'like a grocery clerk'. And former prisoners who encountered him at Auschwitz confirmed this view, adding that Höss always appeared calm and collected". On the other hand, as detailed in his memoirs, in 1923 Höss was imprisoned for six years (sentenced to 10) in Germany for having, after a night of heavy drinking, murdered a man determined to be a traitor by the paramilitary right-wing *Freikorps* (German Free Corps) movement of which Höss was a member. Groups such as the *Freikorps* were responsible for sowing considerable unrest during the Weimar Republic and also for a number of political assassinations. The Tribunal also acquitted Greiser of the charge of personally committing murders or acts of cruelty or infliction of bodily harm. *Law Reports*, p. 104, see *supra* note 3.

The Tribunal rejected Göth's defences (superior orders, military necessity and jurisdictional submissions regarding the applicability of the declared law) and sentenced him to death.[78] The Tribunal additionally "pronounced the loss of public and civic rights, and forfeiture of all [his] property".[79] The President of the State National Council did not grant Göth's appeal for mercy. Remorseless to the end, Göth was executed, by hanging, in Płaszów on 13 September 1946 – roughly within a week of his conviction but two years (to the date) following his arrest by the SS. His body was cremated; his ashes thrown into the Vistula River.[80]

Two aspects of the Göth proceedings are jurisprudentially noteworthy. First, the charges relating to membership in criminal organisations (the Nazi Party and the Waffen-SS), and, second, the explicit evocation of the term genocide in the proceedings and judgment.

At the time Göth's indictment was lodged with the Tribunal, the Nuremberg judgment had not yet been issued. The Polish war crimes legislation, moreover, lacked provisions that related to membership of criminal organisations (these provisions were promulgated for the first time in a Decree of 10 December 1946 that formed part of the multilayered corpus that grounded the Tribunal's activities). The report on the Göth case emphasises that the Polish Prosecution pursued a broad interpretation of the Nazi Party's criminal character.[81] Whereas the Prosecutor implicated the criminal activities of the Nazi party as intending "through violence, aggressive wars and other crimes, at world domination and establishment of the national-socialist regimes", the Nuremberg tribunal declared the Nazi Party and the Waffen-SS to be criminal within the scope of the Nuremberg Charter, that is, "in war crimes and crimes against humanity connected with the war".[82] The Polish Tribunal for its

[78] The Decree of 31 August 1944 eliminated superior orders and duress from ousting criminal responsibility. As to military necessity, it is reported that "the Tribunal […] disregarded this plea. The accused […] had committed acts without any military justification and in flagrant violation of the rights of the inhabitants of the occupied territory as protected by the laws and customs of war and, therefore, the defense of military necessity was neither applicable nor admissible". *Law Reports*, p. 10, see *supra* note 3.

[79] *Ibid*., p. 4.

[80] Holocaust Education and Archive Research Team, see *supra* note 59.

[81] Law Reports, p. 5, see *supra* note 3.

[82] *Ibid*., p. 6, noting also that the Nuremberg Charter additionally referenced crimes against peace.

part opined that the Nazi Party was a criminal organisation based on its commission of war crimes and crimes against humanity, and established the facts of Göth's participation therein. This conclusion was largely congruent with that of the Nuremberg Tribunal (released shortly thereafter). That said, insofar as the Polish Tribunal's sentence was pronounced on 5 September 1946, it lacked a "formal legal basis either in municipal or international law on which it could base a penalty for the membership in a criminal organization".[83] However, even if the legal murkiness is put to the side, the report on the Göth case mentions that it is factually unclear whether the nature of Göth's membership in the Nazi Party was such that penal responsibility should ensue therefrom. Insofar as Göth held "no party office of any kind, did not belong to the Leadership Corps of the Nazi party which alone has been declared criminal by the Nuremberg Judgment, and was merely an ordinary member of the party […] [h]is membership as such in this organization was therefore not criminal".[84] On the other hand, according to the report of the case, there was no doubt that the accused's membership in the Waffen-SS was "definitely criminal".[85]

Similar ambiguities regarding criminal organisation and group membership resurfaced in the Höss case. In short, although the criminal membership provisions were designed to expedite convictions by avoiding sequential litigation, individual trials and repetitive pleadings, these provisions actually proved to be rather controversial and, in this regard, consumed the very judicial resources they were intended to economise.[86] Subsequent developments in international criminal law, however, have not fared much better in grappling with the conundrum of

[83] *Ibid*., noting however that "[t]his declaration was in accordance with the trend of legal thought prevailing at that time and with the already tangible developments in the sphere of international criminal law".

[84] *Ibid.*

[85] *Ibid.*

[86] See discussion in the Höss case, *supra* note 1. See also the Tribunal's 1947 judgment in the Fischer and Leist case and its 1948 judgment in the Bühler case (https://www.legal-tools.org/en/doc/7721bd/), both of which substantively discuss membership in criminal groups. As Lippman notes in his commentary on these cases, "[t]he […] Tribunal explained that the rationale for punishing organizational membership was that the crimes committed by groups were more dangerous than those committed by individuals. The Reich's mass atrocities, for example, could not have occurred absent criminal combinations that were cemented by their commitment to a common goal". Lippman, 1999–2000, p. 97, see *supra* note 19.

organisational criminality. Vivid debates continue to erupt today over joint criminal enterprise and other accessorial modes of liability. The IMT and Polish Tribunal, nonetheless, were ground-breakers in attempting to render collective criminality intelligible to a system of criminal law predicated on individual intent, agency and culpability.

The second jurisprudential novelty stemming from the Göth case involves the application of the crime of genocide. As was the case in Greiser, the underlying law (the Decrees as amended and consolidated) punished war crimes and crimes against humanity as understood at the time. Göth was charged with these offences. The Prosecution, however, "went […] a step further on the road of the development of the international criminal law and described these offences also as the crime of *genocide*".[87] In this regard, as in Greiser, the Polish cases edgily advanced the frame of international law. The report of the Göth case discusses Lemkin's coinage of the genocide neologism,[88] suggesting this Polish scholar's transformative contribution. Similarly to the submissions regarding criminal organisations, the Polish Prosecution endeavoured to surpass the scope of the language deployed at the IMT proceedings, which conceived of the term only in the physical and biological sense. Polish prosecutors instead intended to appreciate its economic, social and cultural connotations. Unlike the case with criminal organisation, however, here the Tribunal explicitly accepted the Prosecution's submissions (this move also can be juxtaposed with the Nuremberg judges, who did not deploy the term genocide in their eventual judgment). The judges in the Göth case explicitly determined that the "wholescale extermination of Jews and also of Poles had all the characteristics of genocide in the biological meaning of this term, and embraced in addition the destruction of the cultural life of these nations".[89] In this vein, the

[87] Law Reports, p. 7, see *supra* note 3 (emphasis in original). Grzebyk notes that overall the Tribunal "did not dedicate much space to the analysis of the notion of crimes against humanity". Grzebyk, 2014, p. 623, see *supra* note 6.

[88] Law Reports, p. 7, see *supra* note 3, albeit limiting it to "the destruction of a nation or of an ethnic group".

[89] *Ibid.*, p. 9, judgment cited. See Lippman, 1999–2000, p. 71, *supra* note 19, noting that the concept of genocide as elaborated in the Göth case "encompasses the disintegration of economic, cultural, political, religious, and social institutions, as well as attacks on the personal security, liberty, health, dignity, and lives of individuals. The first phase of genocide, the denationalization or destruction of the national pattern of the oppressed

Göth judgment reinserts the violence against the Polish population as a central concern and posits Poles as the targets of genocidal violence, thereby returning to the narrative circulated in the Greiser case.[90] The Göth judgment, while detailing the industrialisation of genocidal violence against Jews, also – according to the report on the case – wryly noted that this architecture (including the camps) "afforded an excellent opportunity as instruments used for extermination of Poles".[91]

38.4. The Höss Case

The proceedings against *Obersturmbannführer* Rudolf Franz Ferdinand Höss – the notorious first *Kommandant* of the Auschwitz concentration camp – were held in March 1947. The Höss trial post-dated both Greiser and Göth. The Höss case was the Tribunal's fourth. Höss's diary entries were subsequently translated and published in his well-known memoirs, which evoke the mind and mannerisms of an architect of such overwhelming tragedy.[92]

Höss served as Auschwitz *Kommandant* from 1 May 1940 until 1 December 1943; he subsequently served as Head of Department D I (responsible for the concentration camps) of the SS Central Economic and Administrative Office (December 1943–May 1945) and commander of the SS garrison at Auschwitz in the summer of 1944. The Prosecution submitted that after Höss left the post of Auschwitz *Kommandant* he "fulfilled […] the functions of Himmler's special plenipotentiary for

group, typically is accompanied by a second phase that entails the imposition of the national pattern of the dominant group".

90 For the most part, Polish Jews were seen as Jews, while Polish non-Jews were seen as Polish. A level of opacity, however, persisted in the intersectionality of Jewishness and Polish nationality and the resultant group identification.

91 Law Reports, p. 7, see *supra* note 3.

92 Rudolph Höss, *Death Dealer: The Memories of the SS Kommandant at Auschwitz*, Steven Paskuly (ed.), Prometheus Books, Buffalo, 1992. Höss was encouraged to write his memoirs by Jan Sehn, prosecuting attorney for the Polish War Crimes Commission. The memoirs divide into two parts. The first part from 1946 details the development of Auschwitz and is entitled "The Final Solution of the Jewish Question". The second part from 1947 is autobiographical. The memoirs have been published with a foreword by Primo Levi. Also included are Höss's last letters written to his family. Experts generally conclude that Höss's memoirs are accurate and reliable. In part the impetus to draft memoirs derived from Höss's interest in recollecting events for the strategic purpose of his trial. See Paskuly's introduction to Höss's memoirs, p. 19.

extermination of Jews and in that capacity he either sent people to Auschwitz or supervised the extermination on the spot".[93]

At the end of the war Höss went into hiding. He obtained a new identity as a farm labourer in northern Germany. Höss managed to live undetected for eight months, during which time he frequently visited his family which was nearby. He was eventually caught by the British, who tortured him, and then was handed off to the Poles. Höss noted that upon his arrival in Kraków he had to wait at the train station where a crowd spotted Göth as among the group of Germans present; Höss wrote that "[i]f the car had not arrived when it did, we would have been bombarded with stones".[94] Höss also testified at the IMT proceedings: he was called as a defence witness by Ernst Kaltenbrunner (the former head of Reich main security). In a nod to the IMT's iconicity, Höss's cameo appearance as a witness at Nuremberg received as much, if not more, play than his entire trial and conviction before the Tribunal.

While at Auschwitz, Höss "lived with his wife and four children in a house just yards from the crematorium".[95] One of his daughters, now living in the United States, remembers Höss fondly as a father, describing him as "the nicest man in the world […] He was very good to us" and recalling their eating together, playing in the garden at Auschwitz (and the other camps at which he worked) and also reading Hansel and Gretel.[96] Höss spoke and wrote frequently and lovingly of his family, and he was deeply committed to his wife and children. One of his regrets was that

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93 Law Reports, p. 13, see *supra* note 3.

94 Höss, 1992, p. 181, see *supra* note 92.

95 Rees, 2011, see *supra* note 56, noting also that: "During his working days, Höss presided over the murder of more than a million people, but once he came home he lived the life of a solid, middle-class German husband and father". See also Thomas Harding, "Hiding in N. Virginia, a daughter of Auschwitz", in *Washington Post*, 7 September 2013: "[T]he Höss family lived in a two-story gray stucco villa on the edge of Auschwitz – so close you could see the prisoner blocks and old crematorium from the upstairs window […] The family decorated their home with furniture and artwork stolen from prisoners as they were selected for the gas chambers. It was a life of luxury taking place only a few short steps from horror and torment". Höss told a psychologist that his sex life suffered once his wife found out "about what he was doing" at the camp, though he was never particularly passionate; Höss also claimed "he never even felt the desire to masturbate and never did". Gustave. M. Gilbert, *Nuremberg Diary*, New American Library, New York, 1961, p. 238. That said, it seems as if Höss saw this more as a work/life conflict rather than a question, at the time, of morality.

96 Harding, 2013, see *supra* note 95.

working so hard to fulfil his genocidal obligations detracted from the time he could spend with his family – an outlandish lament about his frustrations with his particular work/life balance. Höss was motored by duty and obedience – running the camp was an administrative task. He emphasised diligence rather than zeal among his staff.[97] In his forward to Höss's memoirs, noted author and Holocaust survivor Primo Levi identifies as believable Höss's claim that "he never enjoyed inflicting pain or killing: he was no sadist, he had nothing of the Satanist".[98]

Höss's memoirs, burdened by his bland prose, also burgeon with vulgar details as to how and why he ended up playing a catalytic role in the Nazi death machinery. He notes the unstinting obedience demanded of him by his austere and religious father, a trait that Höss internalised and which informed his membership in and promotions within the Nazi hierarchy. Höss describes himself as a loner. Prior to setting up the Auschwitz death camp,[99] Höss had served at the Sachsenhausen camp (as of 1936) and previous to that at Dachau (where he quickly rose from being a guard in 1934 to *Rapportfuehrer*). He had joined the Nazi Party in 1922 and the SS in 1934. Like Greiser, Höss has been described as a "model" Nazi and SS man.[100]

The proceedings against Höss, starting with the indictment, exposed horrific details of the Auschwitz death camp, described in the report on the case as occupying "the most prominent position among the nine greatest concentration camps established by Nazi Germany".[101] In this regard, the Höss proceedings served an expressive function alongside the

[97] Lower reports that Höss's reaction to the appointment of Johanna Langefeld, the first female superintendant of Birkenau (a large women's camp), was negative owing to his sense that Langefeld was "too assertive". Lower, 2013, p. 109, see *supra* note 25.

[98] Levi's foreword, in Höss, 1992, p. 4, see *supra* note 92. Elsewhere, however, Levi discusses how elements of the book are deceitful.

[99] Arriving in Auschwitz in May 1940, Höss "now felt ready to take on his biggest challenge, creating a new concentration camp from a handful of vermin-infested barracks. His experience at Dachau and Sachsenhausen offered a clear blueprint". Rees, 2011, see *supra* note 56. See also Tenenbaum, 1953, p. 211, *supra* note 1: "Himmler gave Höss the job of building and supervising the new camp, and Höss lost no time in taking over his new duties as Commandant of the Concentration Camp Auschwitz". Auschwitz was chosen as a site because of its transportation facilities and its relative isolation.

[100] Rees, 2011, see *supra* note 56; see also, Tenenbaum, 1953, p. 226, *supra* note 1: "Höss was rather intimate with Eichmann and they met frequently in good fellowship and bouts of conviviality".

[101] Law Reports, p. 12, see *supra* note 3.

British Belsen trial, which involved many Auschwitz guards, and subsequent Auschwitz trials held in Frankfurt, West Germany, in the 1960s. In particular, the Höss trial detailed the grisly medical experiments performed at the camp. The Höss trial also laid some groundwork for the Tribunal's subsequent prosecution of 40 members of the Auschwitz camp (including another commandant, Artur Liebehenschel) held in Kraków late in 1947 and following which slightly over half of the defendants received death sentences.

Höss, a German national, was charged with membership of the Nazi Party (in Germany and also in the occupied territory of Poland) and, like Göth, with membership in the Waffen-SS (although in the Höss case, specific allegations were put forth involving the Nazi Party alone).[102] He also was indicted in regards to his role at Auschwitz where he "supervised" the "Nazi system of persecution and extermination of nations in concentration and death camps […] against the Polish and Jewish civilian population and against other nationals of the territories occupied by Germany, as well as to Soviet prisoners of war".[103] The accusations against Höss were staggering in terms of their enormity: depriving 300,000 camp registered inmates of life, along with 4,000,000 people ("mainly Jews") brought to the camp and 12,000 Soviet prisoners of war.[104] It was alleged that these individuals were deprived of life "by asphyxiation in gas-chambers, shooting, hanging, lethal injections of phenol or by medical experiments causing death, systematic starvation, by creating special conditions in the camp which were causing a high rate of mortality, by excessive work of the inmates, and by other methods".[105] The Prosecution noted that while at Auschwitz Höss "perfected" the "system" that "was built on patterns established in other concentration camps".[106] In addition, Höss was indicted with ill-treating and torturing these inmates "physically and morally" and also with supervising "robbery of property, mostly jewels, clothes and other valuable articles taken from people on their arrival to the camp, and of gold teeth and

[102] *Ibid*., p. 18.

[103] *Ibid*., p. 11.

[104] *Ibid*.

[105] *Ibid*.

[106] *Ibid*., p. 13. The report on the case notes that Höss "underwent special training in camp duties and practiced in this respect in the Dachau and Sachsenhausen concentration camps, before he took over the commandant's duties at Auschwitz".

fillings extracted from dead bodies of the victims".[107] Hair was sheared from the corpses of women and used *inter alia* to manufacture felt (deployed for industrial purposes, hats and stockings worn by Reich railway employees "to keep their feet warm").[108] The property crimes officially undertaken by the Nazis against the Jewish inmates were colossal in scale, but were hampered by theft and larceny perpetrated by individual guards and officers for their own personal use.[109] Höss was very concerned that his subordinates were skimming off what the Nazis had stolen for official Reich use.

Höss transformed Auschwitz from a "poorly-resourced but brutal concentration camp for Poles" to "a source of slave labour" and then readied it for Soviet prisoners of war, who began to arrive in July 1941, and who were among the first to be murdered through the use of Zyklon B gas.[110] Höss found that the use of gas and crematoria mitigated the psychological harm to his staff in effecting such massive numbers of killings, and he assiduously expanded this part of the camp's architecture. Höss himself was squeamish about seeing people suffer and die. Acting at the suggestion of his associate, Karl Fritsch, Höss pioneered the use of the cyanide-based insecticide Zyklon B in the camps, which he favoured over exhaust gas which had initially been conceived as the method of choice in the death chambers. The result was a more efficient method of killing.

Höss's trial was held in Warsaw between 11 and 29 March 1947. He was found guilty and was sentenced to death by hanging. The execution took place on 16 April 1947, at a gallows adjacent to the Auschwitz crematorium (in the "Death Block" of the camp where inmates had been executed).

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[107] *Ibid*., p. 12. An order from Himmler (23 September 1940) stipulated that gold be extracted from the teeth of inmates murdered in the concentration camps and then used for the benefit of the Reich.

[108] Tenenbaum, 1953, p. 223, fn. 33, see *supra* note 1.

[109] See Lower, 2013, p. 101, *supra* note 26:

> Personnel in the occupied territories shipped trainloads of plundered items to family in Germany and Austria – crates of eggs, flour, sugar, clothing, and home furnishings. It was the biggest campaign of organized robbery and economic exploitation in history, and German women were among its prime agents and beneficiaries. This indulgence was not condoned by the regime; Jewish belongings were officially Reich property and not meant for personal consumption.

[110] See Rees, 2011, *supra* note 56.

As was also the case with Göth, the Tribunal pronounced the loss of Höss's public/civic rights and the forfeiture of all of his property. Höss was represented at trial by two attorneys. He more or less admitted all the facts alleged in the indictment. Although he denied that he personally committed any acts of ill-treatment or cruelty and questioned the accuracy of the total number of persons alleged to have been killed in Auschwitz, he "recognized his entire responsibility for everything that occurred in the camp whether he personally knew it at the time or not".[111] Höss, however, did not adduce any evidence of his own or call any witnesses on his behalf. The lodestar of his defence was superior orders, in particular, to Himmler. Höss contemplated no space whatsoever to refuse the orders of his superiors.[112] This defence failed, although it is unclear whether Höss intended it as a basis to disclaim responsibility or, rather, whether the defence was merely an indication of how he saw himself, that is, as a crucial cog in the functional apparatus of the state.[113]

Prusin notes that Höss "stunned the court audience with his mild manners, quiet voice, and most important, his admission of guilt".[114] Höss was in fact the first senior official to acknowledge the horrors that occurred at Auschwitz. All told, through his testimony at the IMT,

[111] Law Reports, p. 17, see *supra* note 3: "[H]e admitted that he was a member of the NSDAP and the SS, and that in his capacity as commandant of the concentration camp at Auschwitz and later as chief of the D.I. Department of the Central Economic and Administrative Office of the SS he carried out and supervised the extermination of many million Jews and other people".

[112] Höss, 1992, pp. 153–54, see *supra* note 92: "Outsiders cannot possibly understand that there was not a single SS officer who would refuse to obey orders from Himmler, or perhaps even try to kill him because of a severely harsh order. Whatever the Führer or Himmler ordered was always right".

[113] Höss himself used the term "cog" to describe his place within "the terrible German extermination machine", recognising that he was "totally responsible for everything that happened [at Auschwitz], whether [he] knew about it or not", *ibid.*, p. 189, in a letter to his wife. In an interview with a psychologist while he was at Nuremberg as a witness, Höss stated: "[F]rom our entire training the thought of refusing an order just didn't enter one's head, regardless of what kind of order it was"; Gilbert, 1961, p. 230, see *supra* note 95. In any event, "[a]t Auschwitz […] there is not one recorded case of an SS man being prosecuted for refusing to take part in the killings"; Rees, 2011, see *supra* note 56.

[114] Prusin, 2010, p. 11, see *supra* note 4. See also at p. 16, describing Höss as the only Tribunal defendant who did not "vehemently den[y]" his guilt. Höss saw himself, in his own words as related by a psychologist, as "entirely normal … [e]ven while I was doing this extermination work, I led a normal family life, and so on". Gilbert, 1961, p. 237, see *supra* note 95.

through his memoirs and through his testimony before the Polish Tribunal, "[f]ew witnesses confessed as readily and truthfully" as Höss. In this vein, Höss's candour had great expressive value in authenticating early on the systemic nature of the concentration camps and their vast scale.[115] Several days before his execution, moreover, he declared his "bitter recognition of how deeply [he] transgressed against humanity":

> As commandant of the Extermination Camp Auschwitz, I carried out a part of the horrible extermination plans of human beings by the "Third Reich." I have by that act caused the gravest injury to humanity. Particularly have I caused untold suffering to Polish people. For my own responsibility I pay with my life. May God some day forgive me my conduct. The Polish nation I ask for forgiveness.[116]

Joseph Tenenbaum notes "[t]he omission of any allusion to his Jewish victims" in Höss's final declaration.[117] Höss was, and remained, deeply anti-Semitic to the end; he considered the Jews as the "enemy" of the German nation.[118] He faulted the Third Reich leadership for having caused the war, noting that "the necessary expansion of the German living space could have been attained in a peaceful way".[119] In his memoirs, Höss scathingly wrote:

> Today I realize that the extermination of the Jews was wrong, absolutely wrong. It was exactly because of this mass extermination that Germany earned itself the hatred of the entire world. The cause of anti-Semitism was not served by

[115] Höss's memoirs, in addition, extensively narrate many aspects of camp life that fell outside of judicial accounts at the time. Such aspects include a self-proclaimed typology of the guards at the camps and rivalries among groups of prisoners; and also homosexual activity in prisons and camps, a phenomenon which anguished Höss greatly. See Höss, 1992, pp. 65–66, 106–9, 149, see *supra* note 92.

[116] Höss, *Erklaerung* cited in Tenenbaum, 1953, p. 235, see *supra* note 1.

[117] Tenenbaum, 1953, p. 235, see *supra* note 1.

[118] Höss, 1992, p. 142, see *supra* note 92. By way of example, in his memoirs Höss faulted the Germans for permitting the Jews to discredit the country. Höss opined that "the Jews have a very strong sense of family. They cling to each other like leeches, but from what I observed, they lack a feeling of solidarity. In their situation you would assume that they would protect each other. But no, it was just the opposite. I heard about, and also experienced, Jews who gave the addresses of fellow Jews who were in hiding".

[119] *Ibid.*, p. 182.

> this act at all, in fact, just the opposite. The Jews have come much closer to their final goal.[120]

Relatedly, although the Holocaust of European Jews figured prominently in the trial, the proceedings against Höss also narrated the fate of Soviets, Poles and victims of nearly two dozen other nationalities in Auschwitz.[121] The Prosecution detailed the killing capacity of the camp, the nature of the forced labour and the horrid conditions.[122] The Prosecution also adduced into evidence how Poles were registered as criminals only because of their nationality. The case against the accused, much like that against Göth, was based upon witness testimony, documentary evidence, and statements by experts; it is also noted that a "documentary film was projected in the court, showing the camp buildings and establishments".[123]

The report on the Höss case accorded considerable attention to the charges of "medical war crimes", notably, "numerous medical experiments […] performed on men and women of non-German origin, mostly Jews".[124] Among the experimenters was Dr. Josef Mengele. Specific types of experiments included: castration, sterilisation, premature termination of pregnancy, artificial insemination and cancer research.[125] These procedures led to great pain, debilitation, suffering and death. The discussion of these gruesome experiments is stomach churning. The inclusion of this discussion fulfilled a pedagogic function at a time when information about the activities at the camps was inchoately emerging. But for carefully sourced judgments such as Höss, this information might otherwise be met with stupefied incredulity.

The report on the case included within the category "other experiments" that "[f]ifteen to twenty-one young girls were deprived of

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120 *Ibid.*, p. 183.

121 *Ibid.*, p. 12. "Soviet prisoners of war were the first victims of this extermination campaign. They were followed by Jews who perished in even larger numbers. Poles constituted the largest group of murdered from among the registered inmates of the camp".

122 Law Reports, p. 12, see *supra* note 3: "Only a small number of individuals survived owing to exceptional powers of endurance or to fortunate accidents".

123 *Ibid.*, p. 14.

124 *Ibid*.

125 Lippman, 1999–2000, p. 73, see *supra* note 19: "The experiments involved procedures ranging from massive X-ray treatment, injections of large amounts of fluids into the uterus and fallopian tubes, radical amputations, surgical excisions and transplantations".

their virginity in a brutal manner by SS men".[126] This conduct apparently was not described in the indictment as rape or sexual torture. Although very infrequently prosecuted as such, gender-based sexual violence was recognised at the time as an offence. The work of the *ad hoc* tribunals and the International Criminal Court has gone some way to remedy this painful omission, although greater efforts are still required to adequately respond to and prevent gender-based violence.

Taken as a whole, according to the report on the case, the Tribunal found that these medical experiments "violated all rules which must be observed when medical experiments are performed on human beings"[127] and the "[s]pecial circumstances in which they were performed constitute in addition elements which allow them to be classified as violations of the laws and customs of war and of laws of humanity".[128] These experiments were determined to serve no scientific purpose. In terms of the sources of law, the Tribunal additionally noted that these experiments "violated general principles of criminal law as derived from the criminal laws of all civilized nations".[129]

The Tribunal's judgment did not accept all the charges in the indictment. It eschewed the language of "depriving of life" and instead described these offences as "participation in the murder of".[130] The Tribunal concluded that "at least 2,500,000, mainly Jews" were murdered, thereby departing from the allegation of 4,000,000. In all likelihood both of these numbers are exaggerated, however, as Höss himself claimed in his memoirs; other estimates indicate that slightly over 1 million people, overwhelmingly Jews, were murdered at Auschwitz.[131] In his memoirs, Höss wrote that 1,130,000 people were killed at Auschwitz; the US Holocaust Memorial Museum has accepted the figure of 1,100,000, as have other experts.[132] The Tribunal held that Höss took part in the

[126] Law Reports, p. 16, see *supra* note 3.

[127] *Ibid.*, p. 24.

[128] *Ibid.*, pp. 24–25.

[129] *Ibid.*, p. 25.

[130] *Ibid.*, p. 17.

[131] Rees, 2011, see *supra* note 56. See also Harding, 2013, *supra* note 95: "By the end of the war, 1.1 million Jews had been killed in the camp, along with 20,000 gypsies and tens of thousands of Polish and Russian political prisoners".

[132] In his sworn written affidavit (and oral testimony) at the IMT, Höss stated that 2.5 million people were murdered at Auschwitz, with another half million perishing from starvation or

wholesale robbery of property, rather than supervised it as the indictment had alleged. Finally, as noted in the report on the case, the Tribunal "did not express any explicit view on the question whether the accused did personally ill-treat or tortured any of the inmates […] and in addition brought the corresponding charges within the wording of the relevant provisions in force at the time of the trial".[133]

Like both Göth and Greiser, the Höss judgment identified the heart of the charges as falling within the notion of genocide. The Prosecution posited this argument when it came to the extermination of the Jews; the judgment itself noted "that the Nazi Party had as one of its aims the biological and cultural extermination of subjugated nations, especially of the Jewish and Slav nations, in order to establish finally the German *Lebensraum* and the domination of the German race".[134] The Höss case explored how the grisly medical experiments conducted at Auschwitz helped operationalise this system of extermination. It connected these experiments to the genocidal scheme. According to the notes and report on the case:

> [P]aramount importance should be attached to the political aspect of the crime. The general scheme of the wholesale experiments points out clearly to the real aim. They were obviously devised at finding the most appropriate means with which to lower or destroy the reproductive power of the Jews, Poles, Czechs and other non-German nations which were considered by the Nazi as standing in the way of the fulfillment of German plans of world domination. Thus, they were preparatory to the carrying out of the crime of genocide.[135] […]
>
> Thus in view of the political directives, issued by the Supreme German authorities, and the character of the experiments performed in Auschwitz on their orders, it seems obvious that they constituted the preparatory stage of

disease, meaning that 3 million people died there in total. He later repudiated this figure, however.

133 Law Reports, p. 18, see *supra* note 3.

134 *Ibid.*, p. 24.

135 *Ibid.*, p. 25.

> one of the forms of the crime of genocide, which was intended to be perpetrated by scientific means.[136]

Specific mention was made of the X-ray experiments aimed at creating conditions in which injured genes could be multiplied and progenated. Other experiments aimed to achieve sterilisation through drug therapy.[137]

The Höss judgment dovetailed with the overarching narrative that in addition to Jews other national groups also were targets of genocide, notably but not exclusively Poles. The report on the case specifically noted that Höss himself "confirmed the existence of plans of wholesale destruction of the Slav nations, and of Poles and Czechs in particular".[138] The Polish Tribunal engaged with a purposive conceptualisation of the term genocide in light of the conventional wisdom that the Nazi genocidal Final Solution (*Endlösung*) was aimed at European Jewry alone. To be sure, other groups were subject to the commission of war crimes and crimes against humanity. The Tribunal's findings were purposive in that it is not generally accepted that genocidal intent accompanied crimes committed against the Polish or Czech populations. The overlap of political motivation with genocide also surpasses the boundaries of the contemporary understanding of the crime, although politically motivated violence may well serve as preparations (as the Polish Tribunal stated) to genocide.

When it came to the intent requirements, the Tribunal innovated insofar as this element was not firmly set out as a requirement under the underlying consolidated Decree. According to Matthew Lippman:

> [For] the Polish Tribunals […] the defendant's intent was demonstrated through their [sic] statements, the nature and

[136] *Ibid.*, p. 26. Lippman, 1999–2000, see *supra* note 19, p. 77: "The unique contribution of the *Höss* case was the determination that the medical experiments conducted on inmates constituted biological genocide through scientific means, thus extending the definition of genocide to include preparations for the prevention of births".

[137] Law Reports, p. 26, see *supra* note 3, reporting that "periods would continue, internal female genital organs would remain healthy and damage inflicted to the reproductive power of women concerned would remain unobserved. The wholesale application of such a drug, the discovery of which cannot be ruled out, would have paved a way to a demographic policy aiming at a total extinction of nations".

[138] *Ibid.*, p. 25, noting also that: "Höss declared that the experiments of wholesale castration and sterilization were carried out in accordance with Himmler's plans and orders. These aimed at the biological destruction of the Slav nations in such a way that outside appearance of a natural extinction would have been preserved".

> purpose of their criminal activity, awareness of the Reich's genocidal plans, and the presumption that the accused were aware of the connection between their actions and the Reich's ultimate genocidal aspirations.[139]

The Höss judgment – similarly to Göth – also dealt with the tricky issue of membership in criminal organisations. The Tribunal noted that Höss was a member of both the Nazi Party and the Waffen-SS (to be clear, the Prosecution specifically alleged Nazi Party membership, though focused only on Waffen-SS membership in the closing speeches).[140] The Tribunal, however, emphasised the Waffen-SS membership and the criminal nature of the Waffen-SS, despite the pleadings. It did so because it concluded that Höss could not be convicted for membership in the Nazi Party as a criminal organisation insofar as Höss was not held to be in a leading position within that organisation (this being a requirement of a criminal conviction on this count). Nevertheless, the sentence more or less conflated membership in the Waffen-SS with membership in the Nazi party, insofar as the former was considered "a tool" of the latter that was "used for committing war crimes and crimes against humanity".[141]

The report on the Höss case discussed the question of criminal membership in the Nazi Party in some detail. The heart of the legal concerns lies in Article 4(3) of the consolidated 1946 Decree, according to which Nazi Party membership was considered criminal "as regards all leading positions".[142] This phrase predictably became subject to interpretive discussion among Polish judges. Consensus emerged around the proposition that "only such leading ranks and positions of the NSDAP should be considered as criminal as are enumerated in the Nuremberg Judgment, i.e., the Reichsleitung of the Party, the Gauleiters, the Kreisleiters, and the Ortsgruppenleiters, as well as the Amtsleiters who were heads of offices on the staffs of the Reichsleitung, Gauleitung and

[139] Lippman, 1999–2000, p. 78, see *supra* note 19 (footnotes omitted).

[140] Law Reports, p. 19, see *supra* note 3.

[141] *Ibid.*

[142] Article 4(1) thereof criminalised membership in "a criminal organization established or recognized by the authorities of the German State or of a State allied with it, or by a political association which acted in the interests of the German State or a State allied with it". Article 4(2) offered a rudimentary definition and article 4(3) non-exhaustively listed several organisations in which membership was considered "especially" criminal (Nazi Party, SS, Gestapo and the Sicherheitsdienst ['SD']).

Kreisleitung".[143] This view was definitively affirmed after the Göth and Höss judgments by a ruling of the Polish Supreme Court of 28 February 1948.[144] Interestingly, among the justifications for proceeding in this fashion was a perceived legislative wish to bring Polish municipal law in line with the substantive developments of international criminal law (specifically the London Charter and Nuremberg judgment), thereby demonstrating how international criminal law may serve as a best-practice benchmark for national frameworks.

Polish courts, however, were not "bound by the fact that certain other group or organisations have not been indicted and adjudicated [at the IMT] as criminal groups within the meaning of the Charter".[145] Hence, the Polish courts were free to go beyond whatever the Nuremberg Tribunal determined.[146] The Tribunal precisely did so in determining that members of the concentration camp staff at Auschwitz constituted a criminal group (the Tribunal eschewed the term "organisation").[147] This determination was not made in the Höss case but in a subsequent case involving 40 camp officials where judgment was issued on 22 December 1947. This judgment held that "the authorities, the administration and members of the garrison of the Auschwitz camp [were] a criminal group, irrespective of whether or not the members of these administrative or military units were at the same time members of the SS or any other organisation pronounced criminal by the Nuremberg Tribunal".[148] In this

[143] Law Reports, p. 19, see *supra* note 3.

[144] *Ibid.*

[145] Law Reports, Annex, Polish Law Concerning Trials of War Criminals, pp. 82, 87, see *supra* note 3.

[146] The Nuremberg Tribunal declared the Leadership Corps of the Nazi Party, Gestapo/SD and SS as criminal organisations. In other instances (the Reich Cabinet, German General Staff, and High Command), the Nuremberg Tribunal issued no declaration; it declared the SA not to be a criminal organisation.

[147] The Nuremberg Tribunal did not explicitly include concentration camps as among the groups determined to be criminal, though was never actually asked to do so. That said, according to the report on the Höss case, "the Tribunal did make in its Judgment many references to the concentration camps which it described as a means for systematic commission of war crimes and crimes against humanity". Law Reports, p. 22, see *supra* note 3, including as a '"factory dealing in death'" (*ibid.*, quotation directly from the Nuremberg judgment). To this end, the approach of the Polish judges was compatible with the ethos of the Nuremberg judgment.

[148] *Ibid.*, p. 20. In the Fischer and Leist case, adjudged in 1947, the Tribunal declared the occupation government of the Government General of Poland to be a criminal group.

regard, then, the domestication of the Nuremberg judgment does not straitjacket national actors (here, international law was described as applying only subsidiarily in that municipal law has priority in municipal jurisdiction). A group explicitly declared not to be criminal by the Nuremberg Tribunal would not be declarable as criminal by Polish national courts, but there "is no legal obstacle in the way of supplementing the legal principles established in [the Nuremberg] Judgment by further principles, if in substance they are not in contradiction". [149] Hence, concentration camps could be declared as criminal groups notwithstanding that the Nuremberg Tribunal did not do so.[150]

The authorities, administrators and personnel of the camp were included within this group in their individual capacities, but the inmates "under compulsion" were not – ostensibly even those inmates who participated in inflicting atrocities upon others. This question was far from academic in light of the extensive use of *Kapos* and the *Sonderkommando* (Jewish Special Squads) in the camps, including in the process of leading inmates to their deaths and subsequently pillaging (for example, by extracting teeth and shearing hair) and disposing of the bodies. [151] These inmates, however, could be responsible "for their

[149] *Ibid*. See also Grzebyk, 2014, p. 626. *supra* note 6: "The […] Tribunal concluded that it was not limited by the list of criminal organizations prepared by the IMT and had the right to extend it save for those organisations which the IMT had clearly defined as non-criminal".

[150] "There is no doubt that the organization of the German concentration camps is a criminal group in the meaning both of the Nuremberg Judgment and of Article 4 of the Decree of 1944, as these camps had been set up with the aim of unlawfully depriving of freedom and health, property and life of individuals and groups of people because of their race (Jews and Gipsies), nationality (Poles and Czechs), religion (Jews) or political convictions (socialists, communists and anti-Nazis). The organization of the German concentration camps thus aimed at committing crimes against humanity, which at the same time were crimes in violation of the penal law of all civilized nations, and also war crimes as regards the acts committed against the Soviet prisoners of war". Law Reports, pp. 20–21, see *supra* note 3.

[151] Höss uncharitably described the *Sonderkommando* as follows:

> They carried their gruesome task with a dumb indifference. Their one goal was to finish the work as quickly as possible so that they could have a longer period of time to search the clothing of the gassed victims for something to eat or smoke. Although they were well-fed and given many additional allowances, they could often be seen shifting corpses with one hand while they chewed on something they

personal deeds".[152] Many of these inmates, in any event, were ultimately murdered by the Nazis.

Elaboration was not forthcoming, however, in terms of the requisite level of individual knowledge of group activities. It is assumed that the Polish court intended the Nuremberg standard to apply, to wit, that persons "became or remained members of the organization with knowledge that it was being used for the commission of acts declared criminal [by the Charter], or who were personally implicated as members of the organization in the commission of such crimes".[153] The report on the Höss case assumes that "every member of [the camp's] personnel must have known that these camps were being used for the commission of acts which any ordinary sensible person must have acknowledged as criminal".[154]

38.5. Conclusion

Examining the Tribunal's work refines the epistemology of the historical development of international criminal law. Recovering the Tribunal's role fulfils a valuable function in detailing the diverse hinterland to international criminal law and excavating elements that dominant and

> were holding in the other. Even when they were doing the most revolting work of digging out and burning the corpses buried in the mass graves, they never stopped eating.

Höss, 1992, p. 45, see *supra* note 92.

[152] To elaborate see Law Reports, p. 21, *supra* note 3:

> Those people had no ideological ties with the organization of the concentration camps, but had been simply used as tools for the perpetration of certain crimes. This does not protect them from punishment for their personal acts, but they cannot be declared guilty of membership of a criminal organization as a separate offence.

[153] *Ibid.*, pp. 23–24 (citation from judgment). See generally on criminal organisations, Lippman, 1999–2000, pp. 102–3, *supra* note 19:

> The theory of organizational criminality obviated the requirement that the prosecution demonstrate an explicit or implicit agreement among the defendants to pursue a common design or plan. The scope of liability was circumscribed by the contours of the organization. All of those who were aware of an organization's criminal purpose, who nevertheless remained or entered the organization, were vicariously liable. This was intended to facilitate the prosecution of large numbers without the burden of establishing individual criminality.

[154] Law Reports, p. 24, see *supra* note 3.

often ideologically motivated narrations of history may exclude, overlook, or ignore.

The Tribunal's work forms part of an underappreciated history, eclipsed as it was by the IMT; its pioneering discussion of genocide soon was superseded by the adoption of the Genocide Convention (which paradoxically contained a narrower definition of the crime than what the Tribunal put into play); and its judgments also were overrun, in the case of Höss, by the publication of his memoirs which have had greater expressive value than his trial judgment, suggesting the limits to legal judgment as pedagogic tool. That said, the Tribunal communicated the destruction inflicted on the Polish nation (a particularly important political goal at the time), aired the horrors of the *Ostrausch*, authenticated the terrors of the concentration and forced labour camps, and introduced in juridical terms the eliminationist policies of the Nazis. The scant attention paid to the Tribunal's work belies the didactic importance of its trials.[155] The narrative of Polish victimhood crafted by the Tribunal, however, has been muddled in recent years by the mining – itself a form of recovery – of other trials conducted under the auspices of the 1944 Decree against actual Polish collaborators.

The 1944 Decree, as accreted and consolidated over time, also permitted a large number of trials to be held against putative collaborators who, in actuality, were harassed because they were political opponents of the post-war regime. The underlying statutory framework became deployed to advance other ambitions, in particular, when aimed at targeting dissidents who were characterised as enemies of the state owing to their perceived departures from Communist orthodoxy. Once domesticated, the punitive framework for fascist enemies became elastic – it broadened to encompass more than just the overseers of the Holocaust and *Drang nach Osten* in Poland. Here, the purpose shifted to controlling actual, inchoate, or spectral political enemies: in the language of Judith Shklar, then, trials trended towards the destructive.[156] Eerie parallels arise between prosecutions conducted under the Polish decrees and those

[155] On didactic trials, see generally, Mark Osiel, *Mass Atrocity, Collective Memory, and the Law*, Transaction Publishers, New Brunswick, 1997; Gerry J. Simpson, "Didactic and Dissident Histories in War Crimes Trials", in Gerry J. Simpson (ed.), *War Crimes Law*, vol. 1, Ashgate, Aldershot, 2004, pp. 401–39.

[156] Judith N. Shklar, *Legalism: Law, Morals, and Political Trials*, Harvard University Press, Cambridge, MA, 1964, p. 220.

conducted over 50 years later in Rwanda under the *gacaca* legislation, which was also simultaneously used to prosecute both genocide-related offences and persons pretextually alleged to have collaborated in or denied genocide but who were actually hounded for their perceived opposition to the Kagame regime. The domestication of international legal norms, generally perceived as synonymous with justice and widely heralded, may in turn simply add another weapon to the punitive arsenal of the state.

The work of the Tribunal also contributes to the typological study of perpetrators of mass atrocity.[157] Göth and Höss stand as dispositional foils to each other. Göth – rash, riotous, sadistic and impulsive – enjoyed the violence as bacchanal and could not contain himself within the confines of his designated role. Ultimately he was sacked by the SS. His removal from the camp and arrest by the Germans saved many lives. Höss, on the other hand, was the consummate organisation man. He massacred administratively, matter-of-factly (and who described his massacres in such a fashion), and dispassionately, and in this sense epitomises a trait that Hannah Arendt famously described: like Eichmann, Höss simply seemed "terribly and terrifyingly normal".[158] For Höss genocide was about duty; for Göth it was about slaking his avarice, actualising his hedonistic psychopathy and revelling in a grotesque carnival.

[157] On a typology of atrocity perpetrators, see Alette Smeulers and Fred Grünfeld, *International Crimes and Other Gross Human Rights Violations*, Martinus Nijhoff, Leiden, 2011, pp. 318–24.

[158] Hannah Arendt, *Eichmann in Jerusalem*, Penguin, London, 2006, p. 276.

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Historical Origins of International Criminal Law: Volume 2

Morten Bergsmo, CHEAH Wui Ling and YI Ping (editors)

The historical origins of international criminal law go beyond the key trials of Nuremberg and Tokyo but remain a topic that has not received comprehensive and systematic treatment. This anthology aims to address this lacuna by examining trials, proceedings, legal instruments and publications that may be said to be the building blocks of contemporary international criminal law. It aspires to generate new knowledge, broaden the common hinterland to international criminal law, and further develop this relatively young discipline of international law.

The anthology and research project also seek to question our fundamental assumptions of international criminal law by going beyond the geographical, cultural, and temporal limits set by the traditional narratives of its history, and by questioning the roots of its substance, process, and institutions. Ultimately, the editors hope to raise awareness and generate further discussion about the historical and intellectual origins of international criminal law and its social function.

The contributions to the three volumes of this study bring together experts with different professional and disciplinary expertise, from diverse continents and legal traditions. Volume 2 comprises contributions by prominent international lawyers and researchers including Professor LING Yan, Professor Neil Boister, Professor Nina H.B. Jørgensen, Professor Ditlev Tamm and Professor Mark Drumbl.

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