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# Stepping Beyond Nuremberg's Halo

The Legacy of the Supreme National Tribunal of Poland

Mark A. Drumbl\*

## Abstract

*The Supreme National Tribunal of Poland (Najwyższy Trybunał Narodowy (Tribunał)) operated from 1946 to 1948. It implemented the 1943 Moscow Declaration in the case of suspected Nazi war criminals. This article unpacks two of the Tribunal's trials, that of Rudolph Höss (Kommandant of Auschwitz (Oświęcim)) and Amon Göth (commander of the Kraków-Plaszów labour camp). Following an introduction, the article proceeds in four sections. Section 2 sets out the Tribunal's provenance and background, offering a flavour of the politics and pressures that contoured (and co-opted) its activities so as to recover its place within the imagined spaces of international criminal accountability. Sections 3 and 4, respectively, examine the Göth and Höss cases. These sections set out the two defendants and their crimes. They also excavate the Tribunal's doctrinal innovations and frustrations, in particular regarding how it understood genocide, organizational liability, membership in criminal organizations and medical war crimes. Section 5 concludes. It does so by assessing the Tribunal's legacy and by linking the Tribunal's activities to broader epistemological, didactic and penological concerns central to the operation of transitional justice.*

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## 1. Introduction

The Supreme National Tribunal of Poland (*Najwyższy Trybunał Narodowy* (Tribunal)) operated for a brief two-year period from 1946 to 1948. The Tribunal enforced the 1943 Moscow Declaration. This instrument provided for the repatriation of suspected Nazi war criminals. Defendants were to be sent to the countries where they had allegedly committed atrocities to stand trial and, if convicted, to face sentences — all based on applicable national laws. The Tribunal presided over seven high-profile cases. These proceedings implicated a total of 49 individual defendants.

This article unpacks two of the Tribunal's trials:<sup>1</sup> that of Rudolph Höss (*Kommandant* of Auschwitz (Oświęcim))<sup>2</sup> and that of Amon Göth (commander of the Kraków-Plaszów labour camp).<sup>3</sup> The Tribunal's opening case concerned Arthur Greiser, the notorious Governor of the Warthegau (a region of occupied Poland).<sup>4</sup> 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 insofar as it predates the judgment and sentence of the International Military Tribunal (IMT, or Nuremberg Tribunal). The Tribunal, in subsequent cases, addressed the responsibility of members of the General Government established by the Nazis in the central and southern part of occupied Poland and determined the General

- 1 Each of the *Höss*, *Göth* and *Greiser* cases is summarized in English in the *Law Reports of Trials of War Criminals*, a compiled anthology of notes and reports of selected post-World War II proceedings assembled by the United Nations War Crimes Commission. These are available in bound volumes and on the Legal Tools Database. The Law Reports do not *verbatim* reproduce any aspect of the proceedings (including the judgment). Rather, they summarize in English (not Polish) the indictment, trial, verdict and the judgment (although on occasion they directly excerpt the Tribunal's language albeit in English translation) while also analysing key legal issues and providing rich factual background. Four of the Tribunal's seven judgments are compiled in this anthology. The anthology also contains relevant statutory materials, including Polish Law Concerning Trials of War Criminals, in an Annex (hereinafter 'Law Reports, Annex'). The Law Reports are not authentic primary documents and hence arrive with some inherent limitations (as do I, in so far as I do not speak or read Polish). I nonetheless believe the Law Reports to be of very high credibility and hence extensively rely upon them as sources.
- 2 *Höss* proceedings reported in the Legal Tools Database, available online at <http://www.legal-tools.org/en/go-to-database/record/9e87ed/> (visited 30 September 2015) (hereinafter 'Höss Law Reports'). Auschwitz served both as a concentration camp (forced labour for a small minority of inmates, generally followed by death) and as an extermination camp (immediate execution). See also J. Tenenbaum, 'Auschwitz in Retrospect: The Self-Portrait of Rudolf Höss, Commander of Auschwitz', 15 *Jewish Social Studies* (1953) 203, at 219 ('The sprawling Camp Auschwitz extended for over 40 square kilometers, with 60 affiliated labor camps .... At its peak, Auschwitz contained 140,000 prisoners').
- 3 *Göth* proceedings reported in the Legal Tools Database, available online at <http://www.legal-tools.org/en/doc/7ac212/> (visited 30 September 2015) (hereinafter 'Göth Law Reports').
- 4 For discussion of this case, see M. Drumbl, 'Germans are the Lords and Poles are the Servants': The Trial of Arthur Greiser in Poland, 1946', in G. Simpson and K. Heller (eds), *Untold Stories: Hidden Histories of War Crimes Trials* (Oxford University Press, 2013) 411.

Government to be a criminal organization.<sup>5</sup> The *Bühler* case, decided in July 1948, offers a rich description of the deployment of the judicial function in occupied Poland as 'part of the German machinery for extermination of people'.<sup>6</sup>

The Tribunal pursued punitive as well as didactic goals in conducting its trials. On this latter note, the Tribunal aspired to educate the world about Poland's suffering during the Nazi occupation. Accordingly, its proceedings tended to project the Final Solution as crimes against Europe's Jewish population *as well as* against the Polish peoples and the Slavic nations. Poland had clamoured — unsuccessfully — for special status at the IMT.<sup>7</sup> The Tribunal was a response to the Allies' having rebuffed the Polish request. Polish prosecutors felt the IMT judgment did not engage sufficiently with the suffering of the Polish people at the hands of the Nazis. Through its work, the Tribunal intended to redress this deficit. It also sought to telegraph to European audiences an image of a competent and professional Polish legal system. While the trials assuredly were about the accused, they also were about the Polish nation as a whole; the trials served both as a means for justice and as a medium to disseminate a much wider historical narrative.

Notwithstanding these expressive ambitions, strikingly little has been written about the Tribunal outside Poland. While more robust, discussion within Poland has nonetheless failed to catalyse a broader transnational conversation. The marginalization of the Tribunal in international legal circles traces to several factors: the influence of the Anglosphere in international criminal law, the anaemic distribution of Tribunal judgments, linguistic barriers, the Cold War divide and unresolved historiographical debates over collaboration and resistance in occupied Poland. The hagiography of Nuremberg as a *situs* of post-war justice, moreover, colonizes any conversation about the Tribunal. Tellingly, one of the few English language scholarly articles on the Tribunal is entitled 'Poland's Nuremberg'.<sup>8</sup> This editorial move makes plain Nuremberg's relentless iconicity 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.

The neglect of the Tribunal's work disappoints in light of the distinctive quality of its jurisprudence, its salience to Poland and its myriad doctrinal contributions. While the Tribunal was informed by the IMT and international instruments, it also cultivated its own voice and its own agenda which intentionally departed from the IMT's.

This article seeks to recover the Tribunal's place within the imagined spaces of international criminal accountability. In this regard, this article also seeks

5 The *Bühler* case (which is among those summarized in the Law Reports (hereinafter 'Bühler Law Reports') available online at <http://www.legal-tools.org/en/go-to-database/record/7721bd/> (visited 30 September 2015) and the *Fischer and Leist* case (unreported).

6 Bühler Law Reports, *ibid.*, at 27. Bühler, a lawyer, was the deputy to Governor-General Hans Frank.

7 A. Prusin, 'Poland's Nuremberg: The Seven Court Cases of the Supreme National Tribunal, 1946-1948', 24 *Holocaust and Genocide Studies* (2010) 1, at 2.

8 *Ibid.*

to highlight the catalytic role of East Europeans in the genesis and construction of post-war justice, including eventually within the United Nations War Crimes Commission.<sup>9</sup> This role is often peripheralized, stereotyped or downplayed. Relatedly, this article also excavates the Tribunal's doctrinal contributions. At times, these contributions were elegant; at other times, they were awkward.

The decrees that wove the Tribunal's foundational legal base were enacted in a tautly political atmosphere. These instruments were initially adopted in haste by the Polish Committee of National Liberation (the Lublin Committee)<sup>10</sup> and later amended and consolidated as Communist authorities — backed by Stalin — tightened their grip over the liberated country. These decrees were not received into domestic law in a democratic or reflective fashion. From the perspective of virtue ethics, moreover, these decrees were intended to inflate the state's punitive reach over domestic 'traitors' and 'fascist-Hitlerite criminals', including members of the former underground resistance and others perceived as part of the non-Communist opposition movement.<sup>11</sup> Many such 'traitors' were prosecuted in summary courts before, during and after the Tribunal's operation. Despite the motivations behind and realities of these decrees, however, they paradoxically served as the bedrock of the substantive law as applied by the Tribunal which also included, *inter alia*, domesticated elements of international treaty and customary law at the time. The Tribunal therefore stands as an example of how moments of transitional justice may spring from impure sources; repressive penal law may facilitate outcomes that international lawyers would embrace as transformative or emancipatory. On an obverse note, and apart from the Polish case, once international criminal law is domesticated a risk also arises that it may become deployed for coercive, ulterior and regressive purposes regardless of the fanfare and good intentions that may accompany its initial reception into domestic law. Penal law's intrinsic dual aspects — namely, as simultaneous conduits for justice and for repression — remain surprising only if one accepts the starry-eyed, albeit strikingly pervasive, *mystique* of international criminal law as messiah plagued only by lack of adequate enforcement.

This article proceeds in four sections. Section 2 sets out the Tribunal's provenance and background, while also surveying the politics and pressures that dually enabled and crimped its activities. Sections 3 and 4, respectively, examine the *Göth* and *Höss* cases. These sections set out the two defendants and their crimes, while also raising doctrinal quandaries and contributions.

9 For general exposition of the unheralded contributions of the 1943–1948 UN War Crimes Commission, see the excellent work of the Research Programme on UN War Crimes Commission.

10 The Lublin Committee was proclaimed as a provisional government of Poland on 22 July 1944.

11 K. Kersten, *The Establishment of Communist Rule in Poland, 1943–1948* (trans. J. Micgiel and M.H. Bernhard, University of California Press, 1991), at 108–109. See also *ibid.*, at 153–154, 240, 318, 384–385, 421, 459–461 for detailed discussion of a variety of criminal prosecutions conducted under a diverse array of enabling instruments in Poland and in the Soviet Union against *inter alia* members of the former Polish underground.

Throughout, references are made to other cases pursued by the Tribunal. Section 5 concludes.

## 2. The Tribunal: Creation, Political Context and *Dénouement*

A Polish Decree of 22 January 1946 delineated the Tribunal's jurisdiction and powers.<sup>12</sup> Subsequent decrees were adopted inter alia on 17 October 1946<sup>13</sup> and 11 April 1947. The 17 October Decree extended the jurisdiction of the Tribunal to all war criminals rendered to Poland for trial and also over alleged war crimes regardless of where committed. Earlier decrees from 1944 and 1945 had elucidated what came to be the Tribunal's substantive law of application, as well as the law of application of other post-war courts (including ones that proceeded summarily). Particularly noteworthy in this regard was a Decree of 31 August 1944 (*sierpniówka*), promulgated by the Lublin Committee, concerning the punishment of 'fascist-Hitlerite criminals' and 'traitors to the Polish nation'.<sup>14</sup> This Decree was perfunctorily adopted shortly after the liberation of some Polish territories yet before the emergence of the full-fledged Communist state. The Lublin Committee, to be clear, declared itself in contradistinction to the Polish government in exile and was strongly supported by the Soviet Union.<sup>15</sup> Although Communist authorities in Poland began to repress many elements of what had hitherto been the Polish underground, their recurrent deployment of language such as 'enemies' and the 'Polish nation' (understood in ethnic terms) reverts to terminology that the underground resistance itself had used. Another decree, from 13 June 1946, was ominously introduced as 'concerning crimes particularly dangerous in the period of the

12 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. A. Rzepliński, 'Prosecution of Nazi Crimes in Poland 1939-2004', *The First International Expert Meeting on War Crimes, Genocide, and Crimes Against Humanity*, organized by International Criminal Police Organization — Interpol General Secretariat (IPSG), held in Lyon, France (23–25 March 2004), at 1. These 'hood courts' conducted secret proceedings, passed summary sentences and could punish only by the death penalty. Connelly notes that these courts focused on treason, a term that was deployed to describe those Poles who helped the enemy, rather than merely referring to collaboration. J. Connelly, 'Why the Poles Collaborated So Little — And Why that Is no Reason for Nationalist Hubris', 64 *Slavic Review* (2005) 771, at 774.

13 This decree abolished the Special Criminal Courts for trial of alleged war criminals.

14 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. According to Rzepliński (writing in 2004), the main provision of this decree (Art. 1(1)) still remained in force in Poland, although as of 1 September 1998 the death penalty had been replaced by life imprisonment. Rzepliński, *supra* note 12, at 1 and notes 5 and 6.

15 Some members of the Polish government in exile joined the Lublin Committee by the end of 1944. After the Soviets entered Warsaw, the Lublin Committee was transformed into the Provisional Government of the Republic of Poland. For comprehensive discussion of the stabilization of power in the hands of Communist authorities, see generally Kersten, *supra* note 11.

reconstruction of the State.<sup>16</sup> Krystyna Kersten fingers one of the major political trials in Kraków in 1947 as proceeding under this particular decree.<sup>17</sup>

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, domesticated international norms and general principles of law, the Hague Convention No. IV and the London Agreement — understandable, to be sure, in light of the lack of comprehensive law regarding war crimes, crimes against humanity and crimes against the peace available at the time.<sup>18</sup> The Chief Commission for the Examination of German Crimes in Poland oversaw prosecutions.<sup>19</sup> 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 to commute any sentence.

The Decree of 31 August 1944 listed offences and identified modes of liability. It also provided penalties, to wit, 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.<sup>20</sup> While it was intended for the confiscated property to return to the original private party owner who had been dispossessed, such claims proved difficult to establish; frankly, the state had limited interest in supporting them.<sup>21</sup> The property thereby remained with the Polish state. Governmental 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.’<sup>22</sup> On this latter note, convictions of deemed traitors or collaborators under the Decree bolstered the Polish government's push towards nationalization (including without compensation).<sup>23</sup>

The creation of the Tribunal as a special enforcement mechanism underscored the extraordinary nature of the defendants' criminality. Although some concerns arose over bias, victor's justice, retroactivity and emaciated due

16 Law Reports, Annex, *supra* note 1, at 90.

17 Kersten, *supra* note 11, at 384–385.

18 In *Höss*, the Prosecution additionally alleged that crimes committed against Soviet prisoners of war violated the Geneva Convention Relative to Prisoners of War. *Höss* Law Reports, *supra* note 2, at 18.

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

20 A series of specific decrees and laws from 1944 to 1946 extended the confiscation and restitution regime. For details see S. Herman, ‘War Damage and Nationalization in Eastern Europe’, 16 *Law and Contemporary Problems* (1951) 498, at 508–509.

21 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.*, at 509.

22 *Ibid.*, at 507.

23 *Ibid.*, at 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’).

process,<sup>24</sup> the work of the Tribunal has nonetheless been lauded.<sup>25</sup> Prusin, for example, renders a favourable assessment of the quality of the Tribunal's work when placed within its historical and temporal context.<sup>26</sup> He also 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.<sup>27</sup>

The favourable assessment of the Tribunal's work when it came to high-profile Nazis, however, belies the co-extensive, and deliberate, deployment of its foundational instruments (in particular, the Decree of 31 August 1944) to persecute persons whom the government — starkly influenced by Stalin and the Soviet Union — determined to be political enemies (and to hamper socialist reconstruction) even if they had served in the underground resistance during the war.<sup>28</sup> This one Decree thereby simultaneously served goals of transition and repression; a judicial system that revealed a progressive face to the world, in the form of the Tribunal, flexed a coercive muscle at home in the form of special summary courts bereft of due process. These summary courts, cloaked in celerity and secrecy, served ominous and ulterior motives. To be clear: Polish resistance pushed back not only against the Germans, but also against the Soviets who occupied the eastern part of the country. During World War II, German occupation encompassed 48% of the area of the pre-war Polish state (inhabited by 22 million Polish citizens) while Soviet occupation in the east swallowed the remaining 52% (inhabited by 13 million Polish citizens).<sup>29</sup> This partition was rendered in accordance with the German–Soviet Pact of 28 September 1939 (the second Molotov–Ribbentrop agreement, later breached by Germany when it invaded the Soviet Union). Within the German-occupied territories, a further division was effected between regions in the west, which were directly incorporated into Germany in violation of international law, and regions in central and south, which fell under a General Government intended to serve as a protectorate but also constituting an occupation in flagrant violation of international law.<sup>30</sup> Serious human rights abuses, along with acts of

24 M. Lippman, 'Prosecutions of Nazi War Criminals Before Post-World War II Domestic Tribunals', 8 *University of Miami International and Comparative Law Review* (1999–2000) 1, at 11.

25 In Greiser's case, see C. Epstein, *Model Nazi: Arthur Greiser and the Occupation of Western Poland* (Oxford University Press, 2010), at 328.

26 Prusin, *supra* note 7, at abstract. He recognizes certain inequities, nevertheless, such as the fact that the prosecution had greater resources than the defence, along with more time to present and prepare the case. *Ibid.*, at 17.

27 *Ibid.*, at 5.

28 Kersten, *supra* note 11, at 108 (noting that the Decree of 31 August's application to traitors to the Polish nation 'subsumed prosecution of AK [*n.b.* the Home Army] soldiers and occupation-era members of the underground authorities in the period 1944–1955'). In addition, civilians were prosecuted for political crimes under the Criminal Code of the Polish Army.

29 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* (2009), at 22, 25, 81 (noting that 'repressive operations were preludes to Poland's Germanization on the one hand, and Sovietization on the other').

30 Bühler Law Reports, *supra* note 5, at 23, note 1.



resistance, occurred in both the German- and Soviet-occupied zones. The Soviets utilized language such as ‘enemies of the state’ to target Polish officials, many of whom were murdered (including most notoriously at Katyn).

The Tribunal delivered its first judgment on 7 July 1946 when it convicted Arthur Greiser of membership in a criminal organization, aggressive war and exceeding the rights accorded to the occupying power under international law (in other words, war crimes and crimes against humanity). Although the *Greiser* case centrally involved the charge of aggressive war, it also touched upon the avidity of Germanization in what historian Wendy Lower calls the ‘Wild East’.<sup>31</sup> The *Greiser* case narrated the German *Drang nach Osten* 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. 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 formally recognized under international law. The Tribunal, moreover, broadly conceived of genocide as imbricating physical, biological, spiritual and cultural aspects, including Nazi destruction, confiscation, theft and seizure of cultural property, art and archives (whether publicly or privately held).

Historian Catherine Epstein remarks that ‘the Greiser indictment did not ignore Holocaust crimes’, but it ‘subsumed the Final Solution under crimes against the Polish people’.<sup>32</sup> Germanization was seen as destroying the Polish nation and the Jewish population.<sup>33</sup> This approach also informed the *Göth* and *Höss* cases, although less evidently, insofar as these two latter trials exposed the horrors of the concentration camps and the targeting of European Jews. Centralizing the narrative of Polish suffering at the hands of the Germans served immediate political purposes for Polish post-war authorities.

The Tribunal was a specially created institution of primary jurisdiction that dealt with only a small number of high-profile Nazi defendants. Other trials of Nazis and collaborators were summarily conducted in common district courts which retained residual jurisdiction and also in military courts.<sup>34</sup> The stipulated decrees also applied to these prosecutions,<sup>35</sup> which continued for decades.

31 W. Lower, *Hitler's Furies: German Women in the Nazi Killing Fields* (Harcourt, 2013). Germanization 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.

32 Epstein, *supra* note 25, at 317.

33 Cf. Bühler Law Reports, *supra* note 5, at 34 (the Government-General ‘gave rise in fact, as was intended, to mass criminality indulged in by German officials and functionaries against the individuals, and the Polish and Jewish nations as a whole’).

34 Rzepliński, *supra* note 12, at 1 (‘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.’)

35 As regards war crimes cases, all these courts apply the same substantive law as laid down in the Decree of 31<sup>st</sup> August, 1944’. Law Reports, Annex, *supra* note 1, at 97.

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'.<sup>36</sup> Rzepliński also determines that '[a]bout 95% of all investigations into Nazi crimes and other war crimes concern victims of Polish nationality'.<sup>37</sup> A separate prosecutorial office was established in the year 2000 (following post-Communist transition). By early 2004, this office had 'conducted 1295 investigations, including 335 ... in Nazi crime cases, 878 ... in Communist crimes cases, and 82 ... in cases concerning other crimes ...'.<sup>38</sup>

The Tribunal's vision — to which it closely hewed — of transitional justice was one that highlighted Polish victimization and German oppression. The Tribunal's justice, to be clear, was selective justice: it prosecuted Nazi crimes alone. Other injustices, however, also roiled war-time Poland. Left off the Tribunal's discursive frame were Russian and Soviet crimes, along with human rights abuses perpetrated by Poles against Jews. On this latter note, assessment of Polish criminality would have fit uneasily with the Tribunal's overarching purpose. The Tribunal's narrative, however assiduously assembled, was nonetheless coarsened by a few other cases brought against individual Poles in Polish courts. Although not involving the foundational decrees, these cases (notably implicating the Jedwabne massacre)<sup>39</sup> brought to light instances of Polish complicity and initiation of anti-Jewish pogroms. One view among historians is that Polish collaboration (described by the underground resistance as treason) was quite limited, with Connelly emphasizing that the Nazis unleashed their 'fantastic brutality' upon Poland because of 'the Polish refusal to collaborate'.<sup>40</sup> This view however, is perturbed by the vivid debates that persist on this topic. Connelly himself notes that 'remarkably little' is known 'about the thorniest of all issues in recent Polish history, namely Polish complicity in the Holocaust of Jews'.<sup>41</sup>

Soviet crimes were systemic and extensive. Public discussion of these crimes was nonetheless not countenanced at the time. Any such discussion would

36 Rzepliński, *supra* note 12, at 3 (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.*, at 3, note 12. See also Prusin, *supra* note 7, at 1–2 ('[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.')

37 Rzepliński, *supra* note 12, at 3.

38 *Ibid.* For extensive discussion of these investigations in the case of Nazi crimes, see *ibid.*, at 4–12.

39 The Verdict of Circuit Court in Lomza (16–17 May 1949) (involving the Jedwabne massacre of 1941).

40 Connelly, *supra* note 12, at 773 (italics omitted).

41 *Ibid.*, at 779.

have resulted in severe sanction. It is only in recent decades, after the transition from Soviet domination, that an aperture has opened to address accountability for these abuses.

In sum, then, 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 concludes that the Tribunal: ‘[S]tood 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”’.<sup>42</sup>

The Tribunal was composed of quality personnel coming from the many diverse strands of Polish political life at the time. Hence, the institution was politically balanced and professionally pedigreed. This composition was intentional. The Polish government wished in the immediate post-war period to show the West, and the world, that Polish justice was civilized justice. Hence, 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. 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”’.<sup>43</sup>

This moment, however, soon faded. The initial ferment of the post-war Communist transition gave way to a more monolithic regime that deprioritized Nazi prosecutions. Polish authorities fixated on perceived political opponents instead of judicial accountability for erstwhile Nazi oppressors. Polish authorities became less concerned with Western perceptions. The Tribunal’s political usefulness tapered off. It was disbanded in 1948 despite the fact that it was still preparing future cases against major war criminals.<sup>44</sup> Its jurisdiction was reassigned to the regional courts.<sup>45</sup> Some distinguished Tribunal members even 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’.<sup>46</sup> Mieczyslaw Siewierski, one of the leading prosecutors (who participated in

42 Prusin, *supra* note 7, at 5.

43 *Ibid.*, at 18.

44 P. Grzebyk, ‘The Role of the Supreme National Tribunal of Poland in the Development of Principles of International Criminal Law’ (2014) (on file with the author), at 7 (noting the intention to prosecute those responsible for the destruction of Warsaw and the demolition of the Warsaw ghetto). Grzebyk also points to the dissipating likelihood of Western states extraditing an accused to a state now behind the Iron Curtain as among the reasons why the Tribunal was disbanded.

45 Prusin comments that the termination of the Tribunal ‘signaled that the Communists had assumed total control over the country’. Prusin, *supra* note 7, at 19.

46 *Ibid.*

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'.<sup>47</sup> 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 when the Tribunal was dismantled.

The role of the Polish courts, nevertheless, eventually morphed — albeit slightly — yet again. The foundations laid by the 1944 Decree as concatenated also helped facilitate the eventual investigation of select state crimes committed by the secret police between 1944 and 1955. In some instances, these investigations implicated the very 'Stalinist' torturers who had turned to the 1944 Decree to torment perceived opponents. The Polish case study, therefore, reveals law's malleability and capacity for shape shifting. Law's source does not preordain its destiny; its start does not dictate where it stays.

### 3. *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 two recognized criminal organizations: the NSDAP (Nazi Party)<sup>48</sup> and the Waffen SS. In addition to having 'personally issued orders to deprive of freedom, ill-treat and exterminate individuals and whole groups of people', Göth also was accused of having himself 'murdered, injured and ill-treated Jews and Poles as well as people of other nationalities'.<sup>49</sup> *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'.<sup>50</sup> Fiennes was nominated for an Academy Award and won a BAFTA Award for Best Supporting Actor for his role. Jews 'saved' by Schindler's intervention later rendered accounts of Göth's cruelty. In 2008, a documentary entitled *Inheritance* featured a poignant meeting between Göth's daughter Monika (who was one-year old when Göth died) and Helen Jonas, one of his servants who survived his brutalities.<sup>51</sup>

47 *Ibid.*

48 Göth became a member of the Nazi Party in Austria in 1932.

49 Göth Law Reports, *supra* note 3, at 1.

50 L. Rees, 'Rudolf Höss — Commandant of Auschwitz' (on file with the author, last updated 17 February 2011).

51 H. Havrilesky, "Your father was a monster", *Salon*, 10 December 2008 (on file with the author). In 2002, Monika published her memoirs, which she entitled *But I Have to Love my Father, Don't I?* (translated from the original German). Monika's daughter Jennifer Teege published a book in 2013, which she titled *My Grandfather Would Have Shot Me* (translated from the original German).

Göth, an Austrian national born in Vienna on 11 December 1908, faced multiple charges in his indictment.<sup>52</sup> 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.’<sup>53</sup> 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.’<sup>54</sup> Secondly, 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.’<sup>55</sup> The Kraków ghetto was set up on 21 March 1941 and initially contained 68,000 residents.<sup>56</sup> The notes on the Göth case provide considerable detail 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 victims. Purges of ghetto residents occurred systematically, presaging the final liquidation.<sup>57</sup> Thirdly, Göth was charged with demolishing the Tarnów ghetto, also in Kraków district, as a result of which ‘an unknown number of people perished.’<sup>58</sup> The fourth accusation against Göth involved his role in shuttering the forced labour 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.’<sup>59</sup> 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 criminal membership in the Nazi Party and the *Waffen SS*.

Göth was arrested by the *SS* police in Kraków on 13 September 1944, effectively ending his career. Göth had fraudulently misappropriated considerable inmate property for personal use, rather than confiscating it for official Reich purposes. He thereby amassed a fortune. Moreover, 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 his superiors became concerned.<sup>60</sup> Göth’s arrest by the *SS* demonstrates the Nazi tendency not to favour sadists or persons who zealously killed for their own personal enrichment. *SS* doctors reportedly diagnosed Göth with mental

52 The Indictment against Göth was filed with the Tribunal on 30 July 1946, this being two months before the pronouncement of the Nuremberg judgment.

53 Göth Law Reports, *supra* note 3, at 1.

54 Holocaust Education & Archive Research Team, *The Trial of Amon Göth*, at 6 of print-out (hereinafter ‘*Holocaust Education Research*’).

55 Göth Law Reports, *supra* note 3, at 1. Göth was known as the ‘butcher of Płaszów’.

56 *Ibid.*, at 2.

57 *Ibid.*, at 3.

58 *Ibid.*, at 1.

59 *Ibid.*

60 *Holocaust Education Research*, *supra* note 54, at 16 of print-out (‘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.’)

illness — he was arrested by the US military in May 1945 while in a sanitarium in Germany.<sup>61</sup>

Göth lorded over the Płaszów camp. He ostentatiously discarded any pretence of rules or regulations.<sup>62</sup> He was reportedly always intoxicated; he had a series of mistresses, who at times intervened to stop him from killing or further beating detainees;<sup>63</sup> he forced prostitution and imposed sexualized terror at the camp.<sup>64</sup> According to trial witnesses, he organized 'orgies' at his villa. He reportedly shot inmates from his balcony if they were moving too slowly or resting; he abused his staff, including servants and cooks, on the slightest pretext (i.e. the soup being too hot); and his dogs mauled detainees. He inflicted collective punishments upon prisoner work teams for a perceived infraction committed by one individual member.

Although arrested by the SS police, Göth was never prosecuted or investigated — apparently because of the 'collapsing fortunes of Germany' at the time.<sup>65</sup> He was captured by the Americans and subsequently extradited to Poland. The witnesses before the Tribunal delivered extensive testimony about Göth's conduct in the labour camps which recounted innumerable gratuitous barbarities.<sup>66</sup>

The *Göth* trial jointly highlighted the extermination of the Jewish population and the suffering of Poles. 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.<sup>67</sup> The culmination of these 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'<sup>68</sup> and, then, the crushing operation of those death camps. At the time, therefore, one important contribution of the *Göth* trial was to clarify the obvious, namely, that the pogroms against the Jewish community served no military objective and, hence, constituted something other than the war effort. Decades later, and on another continent, when Rwandan defendants argued that the massacre of all 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.

61 D. McKale, *Nazis after Hitler: How Perpetrators of the Holocaust Cheated Justice* (Rowman & Littlefield, 2012), at 201.

62 *Holocaust Education Research*, *supra* note 54, at 7 of print-out.

63 One of his longer term mistresses, Ruth Kalder, first met Göth when she worked as a secretary at Schindler's enamelware factory in Kraków. Ruth was Monika's mother. See *supra* note 51.

64 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.' *Holocaust Education Research*, *supra* note 54, at 30 of print-out.

65 *Ibid.*, at 3 of print-out.

66 *Ibid.*, at 7, 18 and 32 of print-out.

67 Göth Law Reports, *supra* note 3, at 2.

68 *Ibid.*, at 3.

Göth pleaded not guilty. He was represented by two Tribunal-appointed attorneys. His trial was held at Kraków between 27 and 31 August and 2 and 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 erudite legal testimony regarding the content of international criminal law.<sup>69</sup> 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 (a more typical charge for higher level defendants).<sup>70</sup> For a senior 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 administrative and bureaucratic duties.<sup>71</sup> While new research suggests that administrative massacre may not be as banally bureaucratic as Hannah Arendt had famously posited in the case of Adolf Eichmann,<sup>72</sup> the contrast between Höss and Göth remains evident.<sup>73</sup> It is noteworthy that, according to the reports, the Tribunal early on recognized the peculiarity of administrative massacre. The report on the Tribunal’s condemnation of Josef Bühler, who served as the deputy to Governor-General Hans Frank in the Government-General, for example indicate that:

In the words of the ... Tribunal, Bühler was a type of war criminal who did not directly commit any common crime himself, but one who sitting comfortably in his cabinet office, took part in the commission of war crimes and crimes against humanity by directing and supervising the actual perpetrators, and by providing them with the useful instrument of

69 *Ibid.*, at 4.

70 *Ibid.*, at 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 Research*, *supra* note 54, at 7 of print-out.

71 See e.g. Rees, *supra* note 50 (‘There is no record of [Höss] ever hitting — let alone killing — anyone. ... 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’).

72 B. Stangneth, *Eichmann Before Jerusalem: The Unexamined Life of a Mass Murderer* (trans. R. Martin, Knopf, 2014) (arguing that the image of the cautious bureaucrat was deliberately circulated by Eichmann as a defence strategy at trial and that Arendt uncritically accepted this as actual rather than pre-textual).

73 That said, as detailed in his personal memoirs, in 1923 Höss was imprisoned for six years (albeit 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.

administrative and legal measures; he was the chief engineer of the complicated and widespread criminal machinery, who guided thousands of the willing tools in how to use it.<sup>74</sup>

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.<sup>75</sup> The Tribunal additionally 'pronounced the loss of public and civic rights, and forfeiture of all [his] property'.<sup>76</sup> 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 final words were 'Heil Hitler'. His body was cremated; his ashes thrown into the Vistula River.<sup>77</sup>

Two aspects of the *Göth* proceedings are jurisprudentially noteworthy. These are: first, the charges relating to membership in criminal organizations (the Nazi Party and the *Waffen SS*); and, secondly, the explicit deployment 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 organizations (these provisions were promulgated for the first time in a Decree of 10 December 1946 that formed part of the multi-layered corpus that grounded the Tribunal's activities). The report on the *Göth* case emphasizes that the Polish Prosecution pursued a broad interpretation of the Nazi Party's criminal character.<sup>78</sup> Whereas the Polish Prosecutor characterized 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'.<sup>79</sup> The Polish Tribunal for its part opined that the Nazi Party was a criminal organization based on its commission of war crimes and crimes against humanity, and established the facts of Göth's participation therein. The Tribunal's conclusion was largely congruent with that of the IMT (released shortly thereafter). That said, insofar

74 Bühler Law Reports, *supra* note 5, at 35.

75 The Decree of 31 August 1944 precluded superior orders and duress from evacuating criminal responsibility. Following Göth's conviction, the consolidating decree of 10 December 1946 in Art. 5(1) stipulated: 'The fact that an act or omission was caused by a threat or order, or arose out of obligation under municipal law does not exempt from 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 defence of military necessity was neither applicable nor admissible.' Göth Law Reports, *supra* note 3, at 10.

76 *Ibid.*, at 4.

77 *Holocaust Education Research*, *supra* note 54, at 43 of print-out.

78 Göth Law Reports, *supra* note 3, at 5.

79 *Ibid.*, at 6 (noting also that the Nuremberg Charter additionally referenced crimes against peace).



as the 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'.<sup>80</sup> Even setting aside this legal murkiness, however, 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'.<sup>81</sup> Membership *simpliciter* would not suffice. 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'.<sup>82</sup>

Similar ambiguities regarding criminal organization 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 economize.<sup>83</sup> Subsequent developments in international criminal law, however, have not fared much better in grappling with the conundrum of organizational criminality. Vivid debates continue to erupt today over joint criminal enterprise and other accessorial modes of liability. Nor have debates fared any better at the national level, where debates over criminal membership in declared terrorist organizations, for example, continue to bedevil domestic prosecutors and judges alike. The Tribunal, nonetheless, boldly attempted 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. Today, the crime of genocide is well established in international law. This crime prohibits a series of violent acts intended to destroy, in whole or in part, a national, ethnical, racial or religious group as such. In the late 1940s, however, genocide was not yet formally an international crime. Raphael Lemkin conjured the neologism and added it to the popular lexicon only in 1944. Unsurprisingly, then, the Polish Decrees (as amended and consolidated) proscribed war crimes and crimes against humanity. 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

80 *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').

81 *Ibid.*

82 *Ibid.*

83 See discussion *infra*. The Tribunal's judgments in *Fischer and Leist* (1947) and in *Bühler* (1948) also discuss membership in criminal groups, in those instances, the General Government established by the Germans in occupied Poland.

*genocide ...*'<sup>84</sup> 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,<sup>85</sup> suggesting this Polish scholar's transformative contribution. Similarly to the submissions regarding criminal organization, the Polish Prosecution endeavoured to surpass the scope of the language deployed at the IMT proceedings, which conceived of genocide only in the physical and biological sense. Polish prosecutors instead intended to appreciate genocide's economic, social and cultural connotations. Unlike the experiences with criminal organization, however, here the Tribunal explicitly accepted the Prosecution's submissions (this move also can be juxtaposed with the approach of the Nuremberg judges, who did not deploy the term genocide in their eventual judgment). The judges in the *Göth* case determined that the 'wholesale 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.'<sup>86</sup> In this vein, the *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. However awkwardly, at the time Polish Jews were classed as Jews (based on religion or race), while Poles not identified as Jews were classed as Polish (based on nationality). The genocide of the Polish nation may have been co-extensive with the Holocaust, but it was posited as a horror that was quite independent in nature. The *Göth* judgment, while detailing the industrialization 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.'<sup>87</sup>

#### 4. Höss Case

The proceedings against *Obersturmbannführer* Rudolf Franz Ferdinand Höss, a notorious *Kommandant* of the Auschwitz concentration camp, were held in March 1947. The *Höss* trial, the Tribunal's fourth, post-dated both *Greiser* and *Göth*. Höss' 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.<sup>88</sup>

84 *Göth* Law Reports, *supra* note 3, at 7 (italics in original).

85 *Ibid.* (albeit limiting it to 'the destruction of a nation or of an ethnic group').

86 *Ibid.*, at 9 (judgment cited).

87 *Ibid.*

88 R. Höss, *Death Dealer: The Memoirs of the SS Kommandant at Auschwitz* (ed. S. Paskuly, trans. A. Pollinger, and published with a foreword by Primo Levi, da Capo Press, 1992) (hereinafter '*Höss, Memoirs*'). Höss was encouraged to write his memoirs by Jan Sehn, prosecuting attorney for the Polish War Crimes Commission; Höss did so in part to recollect events for the strategic purpose of his trial. See Höss, *Memoirs, ibid.*, at 19 (of Paskuly introduction).

Höss served as Auschwitz *Kommandant* from 1 May 1940 until 1 December 1943; he subsequently served as Head of the DI Department (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 time period where a very large number of Hungarian Jews were deported to Auschwitz and murdered). The Prosecution submitted that after Höss left the post of Auschwitz *Kommandant* he ‘fulfilled ... the functions of Himmler’s special plenipotentiary for extermination of Jews and in that capacity he either sent people to Auschwitz or supervised the extermination on the spot.’<sup>89</sup>

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 nearby family. The British eventually caught Höss, tortured him and then handed him 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.’<sup>90</sup> Höss also testified at the IMT proceedings, where 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’ cameo appearance as a witness at Nuremberg has received as much, if not more, play than his 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 ...’<sup>91</sup> One of his daughters, now residing in the United States, remembers Höss fondly as a father, describing him as ‘the nicest man in the world ... [h]e 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.<sup>92</sup> Höss, too, often spoke and wrote lovingly of his family. He was deeply committed to his wife and children. One of his regrets was that working so hard to fulfil his genocidal obligations detracted from the time he could spend with his family — an outlandish lament. Höss was motored by duty: for him, running the camp was an administrative task. He emphasized diligence rather than zeal among his staff.<sup>93</sup> In

89 Höss Law Reports, *supra* note 2, at 13.

90 Höss, *Memoirs*, *supra* note 88, at 181.

91 Rees, *supra* note 50. See also T. Harding, ‘Hiding in N. Virginia, a daughter of Auschwitz’, *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 confided in a psychologist that his sex life suffered once his wife found out ‘about what he was doing’ at the camp. G. Gilbert, *Nuremberg Diary* (Farrar, Straus, 1961), at 238.

92 Harding, *ibid.*

93 Lower reports that Höss’ reaction to the appointment of Johanna Langefeld, the first female superintendent of Birkenau, was negative owing to his sense that Langefeld was ‘too assertive’. Lower, *supra* note 31, at 109.

his forward to Höss' memoirs, noted author and Holocaust survivor Primo Levi identifies as believable Höss' claim that 'he never enjoyed inflicting pain or killing: he was no sadist, he had nothing of the satanist'.<sup>94</sup>

Höss' 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 internalized and which informed his membership in and promotions within the Nazi hierarchy. Höss describes himself as a loner. Prior to setting up Auschwitz, 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.<sup>95</sup>

The proceedings against Höss, beginning with the indictment, unravelled 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'.<sup>96</sup> In this regard, the *Höss* proceedings fulfilled an expressive function. It did so alongside the British *Belsen* trial, (which involved many Auschwitz guards, subsequent Auschwitz trials held in Frankfurt, West Germany, in the 1960s, and the 2015 conviction of 94-year-old Oskar Gröning, Auschwitz's bookkeeper, in Germany on charges of serving as accessory to the murder of over 300,000 inmates (mostly Hungarian Jews). In particular, the *Höss* trial detailed the grisly medical experiments performed at the camp. *Höss* also laid some groundwork for the Tribunal's subsequent prosecution of 40 Auschwitz officials (including another commandant, Artur Liebehenschel) held in Kraków late in 1947 and as a result of which slightly over half of the defendants received death sentences.

Polish prosecutors charged Höss, a German national, 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).<sup>97</sup> He also was indicted for 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 ...'.<sup>98</sup> 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

94 Höss, *Memoirs*, *supra* note 88, at 4 (of Levi foreword). Elsewhere, however, Levi discusses how elements of the book are deceitful.

95 Rees, *supra* note 50. See also Tenenbaum, *supra* note 2, at 226 ('Höss was rather intimate with Eichmann and they met frequently in good fellowship and bouts of conviviality'). For discussion of contacts between Eichmann and Höss, see Stangneth, *supra* note 72, at 5, 35, 49 and 169.

96 Höss Law Reports, *supra* note 2, at 12.

97 *Ibid.*, at 18.

98 *Ibid.*, at 11.

prisoners of war.<sup>99</sup> 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’.<sup>100</sup> The Prosecution noted that while at Auschwitz Höss ‘perfected’ the ‘system’ that ‘was built on patterns established in other concentration camps’.<sup>101</sup> In addition, Höss was indicted with ill-treating and torturing these inmates ‘physically and morally’ and also with supervising ‘wholesale robbery of property, mostly jewels, clothes and other valuable articles taken from people on their arrival to the camp, and of gold teeth and fillings extracted from dead bodies of the victims’.<sup>102</sup> 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’).<sup>103</sup> 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 gain. Höss was very concerned that his subordinates were skimming from 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.<sup>104</sup> 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’ 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).

99 *Ibid.*

100 *Ibid.*

101 *Ibid.*, at 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’. *Ibid.*

102 *Ibid.*, at 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.

103 Tenenbaum, *supra* note 2, at 223, note 33.

104 See Rees, *supra* note 50.

As with Göth, the Tribunal pronounced the loss of Höss' 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 Höss 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'.<sup>105</sup> Höss, however, did not adduce any evidence of his own or call any witnesses on his behalf. The cornerstone of his defence was superior orders, in particular, to Himmler. Höss did not visualize any room whatsoever to refuse the orders of his superiors.<sup>106</sup> 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.<sup>107</sup>

Prusin notes that Höss 'stunned the court audience with his mild manners, quiet voice, and most important, his admission of guilt'.<sup>108</sup> Höss was in fact the first senior official to acknowledge the horrors that occurred at Auschwitz. Several days before his execution, moreover, Höss 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 someday forgive me my conduct. The Polish nation I ask for forgiveness.<sup>109</sup>

Tenenbaum notes '[t]he omission of any allusion to his Jewish victims' in Höss' final declaration.<sup>110</sup> Höss was, and remained, virulently anti-Semitic to the bitter end; he considered the Jews as the 'enemy' of the German nation.<sup>111</sup> He

105 Höss Law Reports, *supra* note 2, at 17.

106 Höss, *Memoirs*, *supra* note 88, at 153–154 ('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.')

107 Höss himself used the term 'cog' to describe his place within 'the terrible German extermination machine,' recognizing that he was 'totally responsible for everything that happened [at Auschwitz], whether [he] knew about it or not'. Höss, *Memoirs*, *supra* note 88, at 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, *supra* note 91, at 230. That said, '[a]t Auschwitz ... there is not one recorded case of an SS man being prosecuted for refusing to take part in the killings'. Rees, *supra* note 50.

108 Prusin, *supra* note 7, at 11. See also *ibid.*, at 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, *supra* note 91, at 237.

109 Tenenbaum, *supra* note 2, at 235 (citing Höss *Erklärung*).

110 *Ibid.*

111 Höss, *Memoirs*, *supra* note 88, at 142.

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’.<sup>112</sup> 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 this act at all, in fact, just the opposite. The Jews have come much closer to their final goal.<sup>113</sup>

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.<sup>114</sup> The Prosecution detailed the killing capacity of the camp, the nature of the forced labour and the horrid conditions. The Prosecution also introduced 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 ‘film was projected in the court, showing the camp buildings and establishments’.<sup>115</sup>

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’,<sup>116</sup> under the immediate direction of Dr Carl Clauberg whose preoccupation was with female infertility. Specific types of experiments included: castration, sterilization, premature termination of pregnancy, artificial insemination and cancer research. 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 have otherwise been 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 their virginity in a brutal manner by SS men’.<sup>117</sup> 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 recognized at the time as an offence. The subsequent work of the ad hoc tribunals and the International Criminal Court has begun to address this painful omission, although significant efforts

112 *Ibid.*, at 182.

113 *Ibid.*, at 183.

114 Höss Law Reports, *supra* note 2, at 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.’ *Ibid.*

115 *Ibid.*, at 14.

116 *Ibid.*

117 *Ibid.*, at 16.

are still required to adequately respond to and prevent gender-based violence. While the ad hoc tribunals have convicted many suspects for gender-based crimes, as of the time of writing there have been no convictions for such crimes at the International Criminal Court.

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'<sup>118</sup> 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'.<sup>119</sup> These experiments were deemed to serve no scientific purpose. In terms of sources of law, the Tribunal additionally noted that these experiments transgressed 'general principles of criminal law as derived from the criminal laws of all civilized nations'.<sup>120</sup>

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 incorrect, however. In his memoirs, Höss wrote that 1,130,000 people were killed at Auschwitz; the United States Holocaust Memorial Museum has accepted the figure of 1,100,000, as have other experts.<sup>121</sup> The Tribunal held that Höss took part in the 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'.<sup>122</sup>

Like both *Göth* and *Greiser*, the *Höss* judgment identified the heart of the charges as falling within genocide. The Prosecution raised this contention 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'.<sup>123</sup> The *Höss* case explored how the grisly medical experiments conducted at Auschwitz helped operationalize 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

118 *Ibid.*, at 24.

119 *Ibid.*, at 24–25.

120 *Ibid.*, at 25.

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

122 Höss Law Reports, *supra* note 2, at 18.

123 *Ibid.*, at 24.



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.<sup>124</sup>

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 one of the forms of the crime of genocide, which was intended to be perpetrated by scientific means.<sup>125</sup>

Specific mention was made of the X-ray experiments aimed at creating conditions in which injured genes could be multiplied and progenated. Other related experiments sought to sterilize through drug therapy.

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’.<sup>126</sup> The Polish Tribunal engaged with a purposive conceptualization 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, however, 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 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 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.<sup>127</sup>

The Höss judgment — similarly to *Göth* — also dealt with the tricky issue of membership in criminal organizations. 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).<sup>128</sup> The Tribunal, however, emphasized the Waffen SS membership, and the criminal nature of the Waffen SS, despite the pleadings. It did so because it concluded — as it had in *Göth* — that Höss could not be convicted for membership in the Nazi Party as a criminal

124 *Ibid.*, at 25.

125 *Ibid.*, at 26.

126 *Ibid.*, at 25.

127 Lippman, *supra* note 24, at 78 (several footnotes omitted).

128 Höss Law Reports, *supra* note 2, at 19.

organization as Höss was not held to be in a leading position within that organization. Nevertheless, the sentence more or less conflated membership in the Waffen SS with membership in the Nazi Party; the former was considered 'a tool' of the latter 'used for committing war crimes and crimes against humanity'.<sup>129</sup>

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 lay in Article 4(3) of the consolidated 1946 Decree, according to which Nazi Party membership was considered criminal 'as regards all leading positions'.<sup>130</sup> 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 Kreisleitung'.<sup>131</sup> This view was definitively affirmed after the Göth and Höss judgments by a ruling of the Polish Supreme Court of 28 February 1948.<sup>132</sup> 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 judgments (even those whose international provenance is only partial), may serve as best practices benchmarks for national frameworks.

Polish courts, however, were not 'bound by the fact that certain other group or organizations have not been indicted and adjudicated [at the IMT] as criminal groups within the meaning of the Charter'.<sup>133</sup> When the IMT spoke regarding the criminality of an organization, the Polish courts had to follow those findings;<sup>134</sup> but when the IMT was silent, the Polish courts could on their

129 *Ibid.*

130 Art. 4(1) thereof criminalized 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 ...'. Art. 4(2) offered a rudimentary definition and Art. 4(3) non-exhaustively listed several organizations in which membership was considered 'especially' criminal (Nazi Party, SS, Gestapo and the SD). Art. 4(2)'s definition of a criminal organization was one 'which has as its aims the commission of crimes against peace, war crimes or crimes against humanity' or 'which while having a different aim, tries to attain it through the commission of crimes [i.e. crimes against peace, war crimes or crimes against humanity]':

131 Höss Law Reports, *supra* note 2, at 19.

132 *Ibid.*

133 Law Reports, Annex, *supra* note 1, at 82, 87.

134 The IMT declared the Leadership Corps of the Nazi Party, Gestapo/SD and SS as criminal organizations. It declared the SA not to be a criminal organization. It made no declaration regarding the alleged criminality of the Reich Cabinet on the grounds that: (1) it did not really act as a group and (2) of the 48 members, eight were dead and 17 were on trial, such that it was only at most 23 individuals to whom the declaration would have any effect. On the latter point, the IMT noted that the practical advantages in declaring an organization to be criminal dissipated when the organization was small.

own declare a group or organization to be criminal.<sup>135</sup> The Tribunal did so in determining that members of the concentration camp staff at Auschwitz constituted a criminal group (the Tribunal eschewed the term ‘organization’).<sup>136</sup> This determination was not made in *Höss* 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 organization pronounced criminal by the Nuremberg Tribunal.’<sup>137</sup> In the *Fischer and Leist* case, adjudged in 1947, and the *Bühler* case, adjudged in 1948, the Tribunal declared the governorships and top-ranking officials of the occupation government of the Government-General of Poland to be criminal.<sup>138</sup> In *Bühler*, the finding of criminal membership of the accused meant, according to the report on the case, that he ‘had to bear the responsibility for all criminal acts, whether committed by himself as one of the leaders, organisers, instigators and accomplices who participated in the formulation or execution of a common plan or conspiracy to commit such acts, or committed by his subordinates in execution of such plan.’<sup>139</sup> On this note, then, there is some conflation — slightly quizzical — between membership criminality and criminality based upon some sort of command responsibility. In total, it was estimated that this declaration would capture several hundred persons,<sup>140</sup> distinguishing it from the IMT’s decision to issue no declaration in the case of the Reich Cabinet on reasons inter alia that a declaration in the latter case would have limited practical impact upon fewer than two dozen people.

135 Bühler Law Reports, *supra* note 5, at 40–41.

136 The IMT 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’ (*Höss* Law Reports, *supra* note 2, at 22) 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.

137 *Ibid.*

138 For a lengthy discussion of the factors the Tribunal considered in determining this group to be criminal, see Bühler Law Reports, *supra* note 5, at 43–46 (including in the group at the least ‘all members of the government of the General Government (central office of the General-Governor), all district governors and their deputies, further all heads of departments and sections in the governors’ offices and all heads of lesser districts, i.e. all who were commonly known as the political authority’). The report on the *Bühler* case notes that criminal responsibility begins when the member joins the criminal group. *Ibid.*, at 43. Retribution is identified as a justification for criminalizing membership in a proscribed group. *Ibid.*, at 46. The report also notes that: ‘Crimes committed by groups of people do not diminish, but rather increase the responsibility of members of the group, as such acts are more dangerous than crimes committed by individuals. That is why penal repression of such crimes must be more severe.’ *Ibid.*, at 43.

139 *Ibid.*, at 45.

140 *Ibid.*, at 48.

In this regard, then, the domestication of the Nuremberg judgment did 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 ...'.<sup>141</sup> Hence, concentration camps could be declared as criminal groups notwithstanding that the Nuremberg Tribunal did not do so.<sup>142</sup>

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 supervising the prisoners, leading many to their deaths at the hands of SS gassers, subsequently pillaging their bodies (i.e. by extracting teeth and shearing hair for purposes of Reich business), and burning their bodies in the crematoria. These inmates, however, could be found responsible 'for their personal deeds'.<sup>143</sup> Many of the *Kapos* and the *Sonderkommando*, in any event, were ultimately murdered by the Nazis. The few Auschwitz *Sonderkommando* who survived soon documented, through their words and art, the operations of the *Krematoria* (where many of them actually lived).

Elaboration was not forthcoming, however, in terms of the required level of individual knowledge of group activities for the purposes of criminal membership. 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'.<sup>144</sup> The report on the Höss

141 Höss Law Reports, *supra* note 2, at 20. Cf. Grzebyk, *supra* note 44, at 18 ('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').

142 '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 Gypsies), 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.' Höss Law Reports, *supra* note 2, at 20–21.

143 To elaborate: '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.' *Ibid.*, at 21.

144 *Ibid.*, at 23–24 (citation from judgment).

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.’<sup>145</sup> This latter conclusion, to be sure, seems eminently reasonable.

## 5. Conclusion

Recovering the Tribunal’s role fulfils a valuable function in detailing the diverse hinterland to international criminal law and excavating elements that dominant and often ideologically motivated narrations of history may exclude, overlook or ignore. In the end, then, such a move pulls towards diversifying the epistemology of international criminal law.

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 had 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, thereby suggesting the limits to juridification as pedagogic tool. Contemporary international criminal justice institutions have barely given the Höss and Göth judgments any attention. Göth was cited twice (albeit only *en passant*) in the 2001 *Krstić* judgment of the International Criminal Tribunal for the former Yugoslavia: first, in terms of helping to define the crime of ‘extermination’ and secondly (together with Höss) in support of locating a definition of ‘persecution’.<sup>146</sup> Göth, described as a ‘Nuremberg era case’, was cited (along with *Greiser*) by the Extraordinary Chambers in the Courts of Cambodia in the August 2014 trial judgment in Khmer Rouge Case 002/01 to support the proposition that before 1975 courts had ‘entered numerous convictions for forced movements of population including displacement within national boundaries perpetrated on grounds not recognized in international law, namely civilian security or military necessity’.<sup>147</sup>

The Tribunal nonetheless 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 contributed to the capital of Kelsen’s ‘juristic consciousness’ by germinating an embryonic legal vocabulary for the Nazis’ eliminationist policies. And it did so at a time when Poland was reeling from devastation and was roiled with internal refugee movements, disease and hunger. The scant attention paid to the Tribunal’s work belies the didactic importance of its trials. The narrative of Polish victimhood crafted by the

145 *Ibid.*, at 24.

146 Judgment, *Krstić* (IT-98-33-T), Trial Chamber, 2 August 2001, §§ 492, 575.

147 Judgment, *Case 002/01, E313*, Extraordinary Chambers in the Courts of Cambodia, 7 August 2014, § 454 and Annex IV — Table of Authorities.

Tribunal, however, has become muddled by the mining — itself a form of recovery — of other trials against actual Polish collaborators. Generated as it was by Nuremberg's inadequacies, the Tribunal's veritable soul-mate remains the *Eichmann* trial in Israel. Both of these trials constituted national investments into the judicial process for purposes of state-building. In both cases, albeit particularly acutely in *Eichmann*, the populations tormented by the perpetrators would determine the fates of the accused.

The 1944 Decree, as accreted and consolidated over time, proved to be malleable. It served as the foundation of a wide array of separate prosecutions motored by different goals — a reckoning for the overseers of the Holocaust and *Drang nach Osten*, persecution of dissident traitors to the state, and then justice for those who had persecuted those putative enemies. Law domesticated in the wake of conflict may serve multiple goals, including the identification of actual, inchoate or spectral enemies. Eerie parallels arise between prosecutions conducted under the Polish decrees and those conducted 60 years later in Rwanda under the *gacaca* legislation, which was also simultaneously used to prosecute both genocide-related offences and persons pre-textually alleged to have collaborated in or denied genocide but who were arguably hounded for their perceived opposition to the governing Kagame regime. In the case of Rwanda, the law was enacted for transitional goals and then devolved into another arrow in the punitive quiver of the autocratic state. The Polish case tends to the obverse. Here, the law was enacted for the purposes of political control, but then also came to serve transitional goals. The lesson is one of elasticity: domestication of international criminal law, however seemingly idyllic, may come to serve undesirable ends while illiberal criminal law, however dismissively nightmarish, may come to serve salutary ends.

The work of the Tribunal also contributes to the psycho-social study of perpetrators of mass atrocity. Göth and Höss stand as dispositional foils to each other. Göth — rash, riotous, mentally unstable, sadistic and impulsive — enjoyed the violence as bacchanal and could not contain himself within the confines of his designated role. Ultimately, his sacking, removal from camp and arrest by the Germans saved many lives. Höss, on the other hand, was the consummate bureaucrat. He massacred administratively, matter-of-factly, and dispassionately. In this regard, Höss epitomizes traits that Hannah Arendt extrapolated in her discussion of Adolf Eichmann: like Eichmann, Höss simply seemed 'terribly and terrifyingly normal'.<sup>148</sup> While Arendt's assessment of Eichmann has been denuded as incomplete, and hence somewhat caricatural in nature, in the case of Höss genocide was about duty.<sup>149</sup> In fact, when in Argentina, Eichmann in a taped interview defended Höss for his work at Auschwitz, seen as occurring on the 'front', and emphasized that had he received 'the order to gas Jews or to shoot Jews, I would have carried out that

148 H. Arendt, *Eichmann in Jerusalem* (Penguin, 2006), at 276.

149 Stangneth, *supra* note 72.

order', thereby implying that Höss in fact was simply duty-bound.<sup>150</sup> Eichmann felt as such even though Höss, testifying at the IMT in Kaltenbrunner's defence, 'stated that Eichmann had not only been involved in the building of the camp and the decision to use Zyklon B, but that he had also conveyed orders to Höss and was an even more fervent anti-Semite than Höss himself'.<sup>151</sup>

Yet for Göth the violence was about slaking his avarice, actualizing his hedonistic psychopathy and revelling in a grotesque carnival. These findings underscore the aching need to develop a heuristic to better understand the penology of international crime, so as to invigorate deterrent and (perhaps in the case of lower level perpetrators) rehabilitative efforts. These findings also suggest pitfalls in essentializing all perpetrators as dispositionally interchangeable. We simply cannot wish away the fact that atrocity perpetrators are diversely human and that humans (not monochromatic monsters or demons) created the Holocaust.

150 *Ibid.*, at 279. Stangneth contends that: 'Heinrich Himmler had told the Auschwitz commandant that he must carry out the slaughter so that the generations to come wouldn't have to. This imperative turned the extermination of the Jews into something that men like Höss and Eichmann had missed out on: fighting on the front lines.' *Ibid.*, at 278. The Tribunal's judicialized narrative, among many others, helped dispel the notion that the genocide was part of a war effort with the concentration camps serving purposes of military advantage on the front-lines.

151 *Ibid.*, at 64.