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## Tadeusz Cyprian: Polish War Crimes Prosecutor and Photographer

### Introduction<sup>1</sup>

**FOTO1. Tadeusz Cyprian, year unknown. From the private collection of @Tomasz Mościcki**

This article begins with a photograph of the Polish war crimes prosecutor and photographer, Tadeusz Cyprian (1898-1979) [FOTO1]. The use of Cyprian's image, alongside photographs of various trial proceedings, demonstrates the enduring relationship between the law and the visual. This connection can raise important questions about the past that are quite distinct from the written record, which includes the trial transcript. Entrenched narratives, beginning with discourses concerning the Polish war crimes trials and Poland's contribution to international criminal law, may thereby be disrupted.<sup>2</sup> The paper shows that the photograph is an underused source of law. The biographical information contained within a visual image of a legal or judicial figure may serve to unmask the connection between that individual and a legal principle.

All of these photographs capture a world that was facing grave challenges, and was therefore addressing uncertainty or instability, on the one hand, and hope or promise on the other. For Poland, the independence regained in 1918, after a century and a half of partition, was transitory. The country had suffered grievous losses during WW2 and had been the site

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<sup>1</sup> Research for this article was supported by a 2018 Socio-Legal Studies Association (SLSA) Small Grant Scheme award, towards archival work at the Institute for National Remembrance in Warsaw, Poland. I first presented on this topic at the #tracesoflaw symposium at Edinburgh Law School in March 2019. I am grateful to my #tracesoflaw colleague, who have inspired me to pursue this project, alongside colleagues at the Institute of Advanced Legal Studies, during my Visiting Fellowship. I thank Dr Patrycja Grzebyk for her comments on an earlier draft and the SLSA 2020 Law & Literature panel for its feedback. Responsibility for any errors in the resulting work remains my own.

2. Agata Fijalkowski and Sigrun Valderhaug, 'Legal Decisions, Affective Justice, and 'Moving On'?', (2015) 7(2) *Oñati Socio-Legal Series*, 337-364 and Agata Fijalkowski, 'Musine Kokalari and the Power of Images: law, aesthetics and memory regimes in the Albanian Experience', (2015) 28(3) *International Journal for the Semiotics of Law*, 577-602.

of egregious crimes perpetrated by the Soviet and German armed forces throughout the war.<sup>3</sup> For those Polish lawyers who had survived, holding the perpetrators of such crimes accountable was an important goal. It became a possibility with the creation of courts that were granted the relevant jurisdiction. In due course a legal team emerged, possessing the requisite legal knowledge and expertise to ensure that proceedings before the Supreme National Tribunal (*Najwyższy Trybunał Narodowy*) (SNT) — its remit encompassing war crimes - were procedurally and legally sound. One member of this team, Tadeusz Cyprian, played a pivotal role in the success of the SNT, directly and indirectly.

This article centres on an unconventional figure. Cyprian was not only an outstanding lawyer but also a talented photographer. He contributed to the documentation of Nazi crimes during WW2. Cyprian was a prosecutor before the SNT, and one of the four Polish delegates at the Nuremberg Trials.<sup>4</sup> With his colleague Jerzy Sawicki, Cyprian devoted many publications in both Polish and English to the topic of the Nuremberg Trials as well as the legal consequences of the occupation of Poland.

My investigation concerns the issue of responsibility for crimes committed by the Germans during WW2 from the perspective of Cyprian as prosecutor and as photographer. Illustrations loom large in the article, and still more so in the whole study, given the aims of the research. The research method that is presented here is not often used by lawyers for methodological reasons. Yet law is not a system detached from external reality. Legal research and the interpretation of the law should be conducted in an interdisciplinary way.

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3. See, for example, Timothy Snyder, *Bloodlands: Europe between Hitler and Stalin* (London: The Bodley Head, 2010). The focus of this paper is on the prosecution of German war criminals.

<sup>4</sup> The other three delegates were Stefan Glaser, Marian Muszkat, and Mieczysław Szerer. See <http://www.unwcc.org/wp-content/uploads/2017/04/UNWCC-history-appdx1.pdf> (accessed 19 August 2020). For an excellent account of Stefan Glaser see Karolina Wierczynska and Grzegorz Wierczyński, 'Stefan Glaser', in Frédéric Mégret and Immi Tallgren, ed., *The Dawn of a Discipline: International Criminal Justice and Its Early Exponents* (Cambridge: Cambridge University Press, 2020), 306-334. Glaser had a peculiar approach to retrospective justice and the legality principle.

My article is divided into four parts: (1) the theoretical and contextual framework; (2) key episodes in Cyprian's biography; (3) the dispensing of justice in Poland; and (4) the individual behind the legal principle of the punishment and prevention of genocide. The value of the first part consists, inter alia, in its highlighting of the importance of interdisciplinary research. This is especially relevant for legal biographical studies, for examining the functioning of a specific court, for its judges and for the specific category of trials.

### **1. Theoretical and Contextual Framework**

In scrutinising the photograph of an individual held to be behind a legal principle, we are in fact engaging with a judicial or legal biography. My research pertaining to questions about the author of a legal principle comes at a time when the discipline of law is witnessing a proliferation of such works. In international law, for example, this is most evident in the numerous biographies of prominent international lawyers.<sup>5</sup> These studies have also resulted in lengthy discussions regarding legal and historical methodologies. Commentators allege that most lawyers are not historians by training, while conversely most historians do not have in-depth expertise in law. Importantly, both positions interrogate the underlying motive of such studies and ask whether we should be concerned with the historical account or its legal afterglow and feel good factor.<sup>6</sup> This dichotomy distracts us from what is at stake: ensuring that we do not miss the nuances that inform the development of law. It thus seems clear that an inter- and/ or cross-disciplinary approach presents 'better narrations of the history of law'

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5. Such as Pierre Marie Dupuy and Vincent Chetail, eds., *The Roots of International Law/Les fondements du droit international – Liber Amicorum Peter Haggemacher* (Leiden: Martinus Nijhoff, 2014), Bardo Fassbender and Anne Peters, eds., *The Oxford Handbook of the History of International Law* (Oxford: Oxford University Press, 2012), and Martti Koskenniemi, *The Gentle Civilizer of Nations: the Rise and Fall of International Law 1870-1960* (Cambridge: Cambridge University Press, 2001).

6. Valentina Vadi, 'International Law and its Histories', (2017) 58(2) *Harvard International Law Journal*, 311-352, 324.

through acknowledgement of underused sources. As Valentina Vadi notes, rather than merely focusing on ‘consolidated, but obsolete, intra-disciplinary approach to the history of international law’,<sup>7</sup> the deployment of a wide variety of different approaches provides the elements needed to better appreciate the origins of legal principles, such as the prohibition of genocide, the prevention of genocide, or the punishment of genocide. The role of the individual in history is known to legal, humanities and social science scholars. Yet legal biography continues to face an uphill struggle in the domain of international law.

Legal biography has its place in performance. Some stage actors forensically examine historical, biographical narrative material drawing on specific methods to source original material and transfer the excavated material into a series of performative actions/events.<sup>8</sup> These approaches explore and test potential interactions between (auto) biographical theatre practice and ethnographic and archival study in the arts, social sciences and humanities, which includes law.<sup>9</sup>

Recent years have seen the development of interdisciplinary research into ‘law in film’, ‘law and art’, ‘law and images’.<sup>10</sup> Visual culture is not situated outside the law. Clearly, law and justice benefit from technological developments. The main Nuremberg trial was an example of this, which was not only a political and a legal event on an unprecedented scale, but also a remarkable media undertaking. It was broadcast and recorded.<sup>11</sup> Moreover,

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7. Valentina Vadi, ‘International Law and its Histories’, (2017) 58(2) *Harvard International Law Journal*, 311-352, 351.

8. For example, Jane Arnfield’s work in drama is underpinned by the Biographical Narrative Interviewing Methods (BNIM), which aims to disrupt and push the boundaries of contemporary (auto) biographical theatre practice through an interdisciplinary questioning of its role and function.

9. The compelling narrative in Leon Üris, *QBVII* (London: Corgi, 1970) is an example of the performativity of the law at the centre of a novel. I thank Kate Astall for drawing my attention to this book.

10. For example, Christian Delage and Peter Goodrich, eds., *The Scene of the Mass Crime: History, Film, and International Tribunals* (London: Routledge, 2013), 1-6, 2. Christian Delage, *Caught on Camera: Film in the Courtroom from the Nuremberg Trials* (Philadelphia: University of Pennsylvania Press, 2014).

11. Dan Kiley was commissioned in 1945 to design a courtroom in which the Nuremberg proceedings could be filmed, and the venue was to accommodate the screening of newsreels on a big screen. Christian Delage and Peter Goodrich, ‘Introduction’, *The Scene of the Mass Crime: History, Film, and International Tribunals*, eds. Christian Delage and Peter Goodrich (London: Routledge, 2013), 1-6, 2. Christian Delage, *Caught on Camera: Film in the Courtroom from the Nuremberg Trials* (Philadelphia: University of Pennsylvania Press, 2014). See the Soviet documentary *The Nuremberg Trials* (dir. Roman Karmen, 1947). ‘The truth was that Karmen’s film

photographs, films, and audio recordings were used as evidentiary material during the proceedings.<sup>12</sup>

From a historical perspective, the process of judging other people's conduct has often been turned into a playhouse for the masses. We may observe it already in the temporally distant cultures of classical antiquity. Criminal and political trials took the form of staging. As will be shown below, during World War II the first to organise such performances against the nazi criminals were the Soviets. Stalin announced it at Yalta and then implemented his promise in Kharkov, where a show trial was held as early as December 1943.<sup>13</sup> It is therefore not surprising that in 1945 Stalin sought to establish the International Military Tribunal, and to organise another round of show trials of German leaders.

Socio-legal scholars who work in the field of judicial and legal biography raise a series of questions about the manner in which judges engage with their legal work and about what it is that underpins their approach to adjudication. The research draws on published works, official records, private correspondence, oral histories, art works and film in order to encourage a broader discussion than has taken place to date about ideas of lawyering, judicial identity, judicial diversity and the changes which have occurred to these notions over time.<sup>14</sup> This body of scholarly work represents, broadly speaking, a sound response to the general perception that lawyers are not necessarily interesting and/or historically relevant individuals,

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was too raw and intense, at least for American audiences who were done with the war and ready to move forward', Francine Hirsch, *Soviet Judgment at Nuremberg: A New History of the International Military Tribunal After World War II* (New York: Oxford University Press, 2020), 6. For a fictionalised account of the proceedings see *Judgment at Nuremberg* (dir. Stanley Kramer, 1961).

<sup>12</sup> Telford Taylor, *The Anatomy of the Nuremberg Trials* (New York: Alfred A. Knopf, 1992), 200 and Susan Twist, 'Evidence of Atrocities or Atrocious Use of Evidence: The Controversial Use of Atrocity Film at Nuremberg', (2005) 26 *Liverpool Law Review*, 267-302.

<sup>13</sup> Valentyna Polunina, 'Soviet War Crimes Policy in the Far East: The Bacteriological Warfare Trial at Khabarovsk, 1949', in Morten Bergsmo, CHEAH Wui Ling and YI Ping (eds), *Historical Origins of International Criminal Law: Volume 2* (Brussels, Torkel Opsahl Academic EPublisher, 2014), 539-562. For a different perspective on the Kharkov proceedings listen to NPR, Walter Conkrite: History Lessons, 'Listening In On the Nuremberg Trials', 20 February 2006, at <https://www.npr.org/templates/story/story.php?storyId=5225486&t=1593189179957> (accessed 20 June 2020).

<sup>14</sup> Fiona Cownie, 'The United Kingdom's First Woman Law Professor: An Archerian Analysis', (2015) 42(1) *Journal of Law and Society*, 127-149.

and that few lawyers or judges deserve a biography. In general terms, lawyers are perceived as ‘agents, rather than principals’.<sup>15</sup> Yet, in their work on legal life writing, David Sugarman and Linda Mulcahy show that nothing could be further from the truth.<sup>16</sup> Biographies have moved on from a position of ‘what is it for’, to one that evidences the way that biographies matter because the ‘biography expands our knowledge of life and widens our boundaries’.<sup>17</sup> History does contain hidden individual contributions, and neglecting them when examining the development of law may jeopardise our overall understanding.<sup>18</sup> In themselves judges do represent a narrative.<sup>19</sup>

Not only do I propose to engage more fully here with judicial life accounts, but in addition I intend to address the important research undertaken in recent years in the field of law and visual culture. Studies have thus examined the various different ways in which the performative element of the law comes to be enacted, with particular emphasis being placed on the relationship between law and the visual. Scholars have for example noted how aesthetic formulations may serve to create law’s ‘foundational fantasy’.<sup>20</sup> Both law and art contribute to various forms of representation that relay the truth, whether it be in legal or in aesthetic terms.<sup>21</sup> Affective representations both arouse emotion and actualise ‘that which can otherwise only be accessed abstractly’.<sup>22</sup> Aesthetic confrontations with justice and injustice

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15. Valentina Vadi, ‘International Law and its Histories’, (2017) 58(2) *Harvard International Law Journal*, 311-352, 343.

16. Linda Mulcahy and David Sugarman, ‘Introduction: Legal Life Writing and Marginalized Subjects and Sources’, (2015) 42(1) *Journal of Law and Society*, 1-6.

<sup>17</sup> Professor Dame Hermione Lee, ‘What is biography’, *The British Academy Blog*, 7 July 2020, at [https://www.thebritishacademy.ac.uk/blog/what-is-biography/?utm\\_source=twitter&utm\\_medium=social&utm\\_campaign=blog%20%7C%20what-is%20%7C%20%20%7C%20Digital&utm\\_content=Digital&utm\\_term=20200720](https://www.thebritishacademy.ac.uk/blog/what-is-biography/?utm_source=twitter&utm_medium=social&utm_campaign=blog%20%7C%20what-is%20%7C%20%20%7C%20Digital&utm_content=Digital&utm_term=20200720) (accessed 20 July 2020).

18. Leslie J. Moran, ‘Judicial Pictures as Legal Life-Writing Data and a Research Method’, (2015) 42(1) *Journal of Law and Society*, 74-101.

19. Philippe Sands, *East West Street* (London: Weidenfeld and Nicholson, 2016).

20. Julia J.A. Shaw, *Law and the Passions: Why Emotions Matter for Justice* (Abingdon: GlassHouse Books, 2019), 28-51.

21. Julia J.A. Shaw, *Law and the Passions: Why Emotions Matter for Justice* (Abingdon: GlassHouse Books, 2019), 50.

22. Julia J.A. Shaw, *Law and the Passions: Why Emotions Matter for Justice* (Abingdon: GlassHouse Books, 2019), 50.

guide societal development through narratives that speak to the individual as well as to the wider community.<sup>23</sup> As Desmond Manderson observes, visual discourses point to different examples of visual media that order our lives, in much the same way that the law does.<sup>24</sup> Upon closer inspection, we discover that the law is immersed in performance.<sup>25</sup> Meaning is imputed to those narratives that purport to tell the truth in the legal context, while collectively the same stories represent a lived narrative that can also instruct and assist people in their engagement with the world.<sup>26</sup> For example, studies on the law and visual culture have looked at architecture and the narratives contained in brick, stone and emblems.<sup>27</sup> The performativity of space is addressed in research dedicated to the court as a space, an aspect as integral to trial proceedings as the stage is to a theatre performance. Within the court's physical space, justice is dispensed, staged and performed. There are a variety of elements, beginning with the décor, the furniture, the seating arrangements, the line of sight, the clothes worn, and various other aspects that may have an impact on the eventual performance.

It is not hard to see how powerful an impact agitation and show trials must have had on the Soviet imagination.<sup>28</sup> The trials were originally designed to be educational and entertaining, as studies of the agitation trials in early Soviet Russia would seem to indicate. As in the case of plays staged in theatres, in some of the show trials the Soviet press, radio, newsreels, school announcements, and billboards promoted the trial for weeks and months

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23. Julia J.A. Shaw, *Law and the Passions: Why Emotions Matter for Justice* (Abingdon: GlassHouse Books, 2019), 50.

24. Desmond Manderson, *Law and the Visual: Representations, Technologies, and Critique* (Toronto: University of Toronto Press, 2018), 7.

25. Austin Sarat, Lawrence Douglas, and Martha Merrill Umphrey (eds), *Law and Performance* (Cambridge, MA: University of Massachusetts Press, 2018).

26. Julia J.A. Shaw, *Law and the Passions: Why Emotions Matter for Justice* (Abingdon: GlassHouse Books, 2019), 50.

27. Agata Fijalkowski and Sigrun Valderhaug, 'Legal Decisions, Affective Justice, and 'Moving On'?', 7(2) (2017) *Oñati Socio-Legal Series*, 337-364. Also, Judith Resnik and David E. Curtis, *Representing Justice: Invention, Controversy, and Rights in City-States and Democratic Courtrooms* (New Haven, CT: Yale University Press, 2011).

28. Elizabeth Wood, *Performing Justice: Agitation Trials in Early Soviet Russia* (Ithaca, NY: Cornell University Press, 2005), 214.



beforehand. Audiences were allotted special entrance tickets. The connection between law and the visual was performativity. The obsession with the contemporary trials of the day was predicated on the struggle between good and evil, and on the moment of reckoning.<sup>29</sup> The technical aspects of the trial were used in the domestic war crimes trials. Edmund Stevens, an American journalist covering the December 1943 Kharkov war crimes trial for the *New York Times*, recalled the venue, which was the local theatre, and the way in which its space was used to maximise the effects of lighting and staging; the trial was filmed. This is reminiscent of Sergei Eisenstein's filming of 'Ivan the Terrible, Part 1': 'In many other dramatic shots he uses enormous and presumably real shadows, for example to show a huge image of Ivan's head with its wickedly pointed beard, dwarfing the members of his court'.<sup>30</sup> Apparently, Eisenstein was influenced by Carl Dreyer's 'The Passion of Joan of Arc', which is set in the context of her trial, 'during [which] Dreyer placed his heroine in a subservient position below a bench of fearsome judges, who along with onlookers are seen in frowning or angry close ups, at oblique angles, in stylized lighting',<sup>31</sup> not dissimilar to the trials proceedings of the 1940s described by Stephens.<sup>32</sup> In other words, knowing your craft will reap rewards and the selection of the appropriate setting. The performativity of the enactment of the law in the ideal venue provides the legitimacy of the message, because the audience is captured by the performativity of the law – assisted by the legal actors and brick, i.e. the venue.<sup>33</sup>

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29. Peter Brooks, *The Melodramatic Imagination* (New Haven, CT: Yale University Press, 1995). I thank Martin Thom for drawing my attention to this text.

<sup>30</sup> Roger Ebert, 'Terrible May be Great, But Not Especially Good', 19 January 2012, at <https://www.rogerebert.com/reviews/great-movie-ivan-the-terrible-parts-i-and-ii> (accessed 3 June 2020).

<sup>31</sup> Roger Ebert, 'The Passion of Joan of Arc', 16 February 1997, at <https://www.rogerebert.com/reviews/great-movie-the-passion-of-joan-of-arc-1928> (accessed 3 June 2020).

<sup>32</sup> The French film director Robert Bresson, for example, did not like working with professional actors. He thought filmmaking was all about camera and sound. The actors were expected to say the lines exactly as written. Bresson would control every slight movement they made in front of the camera. Bresson also deployed elliptical storytelling, spending a long time on mundane details. For further information see Robert Bresson, *Notes on the Cinematographer* (Paris, Éditions Gallimard, 1977). I thank Robert Shail and Martin Thom for the insights.

<sup>33</sup> Agata Fijalkowski and Sigrun Valderhaug, 'Legal Decisions, Affective Justice, and 'Moving On'?', (2015) 7(2) *Oñati Socio-Legal Series*, 337-364.

Aware though he was that the trial was scripted, Stevens noted how the didactic character of the proceedings was successfully conveyed to a packed audience.<sup>34</sup> The Kharkov proceedings would not have escaped the attention of Cyprian and his peers.<sup>35</sup> The performativity of the trial was not only appreciated by the Soviets. George Bernard Shaw, for example, wrote ‘Geneva’, a play about a trial of the three dictators. His play caricatured the fascist dictators of the 1930s; they were brought to trial in Geneva. It was first performed in Warsaw’s Teatr Polski in 1938.<sup>36</sup>

Research in the law and visual culture has also examined portraits of judges.<sup>37</sup> Portraits may thus offer traces of individual life stories, put to use in legal life writing.<sup>38</sup> Most of the photographs in my collection are of the faces of defendants and of judicial officials. For many who research into portraiture the key point to note is the fact that a photo records that someone was in front of a camera when the photo was taken, what Barthes refers to as ‘presence’.<sup>39</sup> Whether an image can tell us anything about how people actually looked is less easy to determine. A person will look different depending on how a photo has been made, including conventions of genre and aesthetics, so that a professional portrait will differ from a police mug shot. The manipulation of biography is connected to the mutability of the law, and the fine lines between hero and villain are on display, at different moments.<sup>40</sup> By and large, such definitions depend on the political context.<sup>41</sup> So, the biography of the photograph

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34. Edmund Stevens, *Russia is No Riddle* (New York: Greenberg, 1945)

35. Also, the Krasnodar trials, held on 14-17 July 1943, were known to the Poles. Both the Kharkov and Krasnodar trials predated Nuremberg. Krasnodar was held before the October 1943 Moscow Declaration. The rulings from both trials are available in English at

[https://archive.org/stream/peoplesverdictfu00unse/peoplesverdictfu00unse\\_djvu.txt](https://archive.org/stream/peoplesverdictfu00unse/peoplesverdictfu00unse_djvu.txt) (accessed 27 August 2019).

<sup>36</sup> Irishplayography Ireland at <http://www.irishplayography.com/play.aspx?playid=33013> (accessed 26 June 2020).

37. Les Moran, Gary Watt, Linda Mulcahy, and David Isaac, ‘Four Reflections on the Art of Justice: the Judge’s Perspective’, (2013) 7(1) *Law and Humanities*, 113–128.

38. Linda Mulcahy and David Sugarman, *Legal Life Writing: Subjects and Sources* (London: Wiley Blackwell, 2015)

39. Roland Barthes, *Camera Lucida* (London: Vintage, 2000), 87.

40. Agata Fijalkowski, ‘Musine Kokalari and the Power of Images: law, aesthetics and memory regimes in the Albanian Experience’, (2015) 28(3) *International Journal for the Semiotics of Law*, 337-364.

41. ‘Speaking legally’ places the subject in the appropriate category. Across time our perspective as to who is the hero and who the villain can change, and neither is necessarily correct. The maladministration of justice

includes its roots in art, performance, and theatre, serving as it does to disseminate messages about law and justice. Thus, the law does not work in a vacuum. Law cannot maintain a discourse that is separate from the circumstances of everyday life. It is imprinted with the past, and its implementation will, in certain circumstances, invoke ghosts, i.e. memories. The law has the capacity to capture the relevant social and political contexts of the period. The image also captures the social context that ordered the lives lived at that juncture. The photograph becomes a live, tangible biography, a material source from the time period of events in that specific country. Photographs are simply the most remarkable instance of stories conveyed through non-verbal communication.<sup>42</sup> Trial proceedings retain their intrinsic performativity, rendering the image rich in narrative. The photograph certainly merits a place in research pertaining to the visual enactments of the performativity of the law.

Before moving on to the next section, a final point arises regarding the coverage of the Polish domestic trials. They are the subject of several monographs about war crimes trials under the wider headings of ‘justice behind the Iron Curtain’ or ‘forgotten trials of the Holocaust’. These studies correctly argue that the Nuremberg trials and Nuremberg justice should be considered from a broader perspective, in order to acknowledge developments in international criminal law that were occurring in national legal venues. These investigations are valuable and do address some accounts of the legal teams that were involved. At the same time, it is this latter aspect of the research that leaves certain questions unanswered. Indeed, these questions are the ones that most urgently need to be answered. Gabriel Finder and Alexander Prusin have set out a detailed account of the Polish war crimes trials.<sup>43</sup> Theirs is an ambitious study, and one that offers a convincing account of the precarious times in which

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lends itself beautifully to the fluidity of these concepts and dichotomies. This is further developed in Agata Fijalkowski, *Law, Visual Culture and the Show Trial* (GlassHouse Books, forthcoming).

42. I thank Neil Walker for making this point. Neil MacCormick Fellow seminar, University of Edinburgh (June 2017).

43 Gabriel Finder and Alexander Prusin, *Justice Behind the Iron Curtain: Nazis on Trial in Communist Poland* (Toronto: University of Toronto Press, 2018)

the legal teams were working, mainly due to the political climate of Stalinist terror. Finder and Prusin discuss the SNT rulings but the connections between the individual members of the legal team and the judgments are not investigated further. Patrycja Grzebyk's important chapter on the SNT supports the view that Poland made an important contribution to the development of the legal principles of international criminal law, complementing Mark Drumbl's work on this question.<sup>44</sup> These studies, along with those by Michael Bazylar and Michael Bazylar and Frank Tuerkheimer,<sup>45</sup> do not however delve into the specific biographies of the members of the legal team in any great depth.

This article will discuss Cyprian's life story with a view to demonstrating the way in which an image, when treated as a source of data in law, can complement and enrich legal historical narratives about international criminal legal principles. I identify the punishment and prevention of genocide as Cyprian's leading preoccupation in his work as a lawyer, with his work as a photographer having a supporting role. I argue that the outbreak of WW2, on Polish soil, and the opportunity to hold perpetrators accountable, presented Cyprian with a choice to act before the political climate might dictate otherwise. His WW2 profile was centred on collecting evidence against war criminals. This article is concerned to address the past, and perhaps to sow the seeds for a proscriptive future in which the prevention of genocide is legally tangible. The discussion is organised in a concentric circle, with Cyprian at its centre, and involves a journey through key moments in Cyprian's biography and in Poland's legal historical record, with the assistance of photographs. My consideration adopts

[A]n interdisciplinary approach [that] does not always require us to fully grasp the new discipline. It is enough to offer inspiration or a tool that helps us better understand the facts to which we

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44. Patrycja Grzebyk, 'The Role of the Polish Supreme National Tribunal in the Development of the Principles of International Criminal Law', in Morten Bergsmo, CHEAH Wui Ling and YI Ping, eds., *Historical Origins of International Criminal Law: Volume 2* (Brussels, Torkel Opsahl Academic EPublisher, 2014), 603-630, available at <https://www.legal-tools.org/doc/d88600/pdf/> (accessed 29 August 2019) and Mark A. Drumbl, 'Germans are the Lords and Poles are the Servants': The Trial of Arthur Greiser in Poland, 1946', in Kevin Heller and Gerry Simpson, eds., *The Hidden Histories of War Crimes Trials* (Oxford Scholarship Online 2013), 411-429.

45. Michael Bazylar, *Holocaust, Genocide, and the Law: A Quest for Justice in a Post-Holocaust World* (New York: Oxford University Press, 2016)

want to apply the law. When seen from this perspective, the interdisciplinary approach resembles what courts regularly do when they invite experts to assess a situation. Thus, in practice and in research, law *needs* extralegal knowledge.<sup>46</sup>

In other words, reaching outside the law is not an unknown to lawyers themselves.

## 2. Who was Tadeusz Cyprian?

While Tadeusz Cyprian took part in domestic, rather than international proceedings, he was a special participant nonetheless - with a baggage of war experience, rich personal photographic documentation and an opportunity to act as a prosecutor before the Supreme National Tribunal, that is the highest court in Poland established to try nazi criminals. As the latest research indicates, Polish trials of war criminals preceded their equivalents in Nuremberg.<sup>47</sup> Cyprian is an essential part of the international criminal law narrative. This discussion reasserts the significance of legal biography and argues that all actors involved in this narrative will have had a pre-history that better informs our understanding about key developments.<sup>48</sup>

Cyprian was born in Zablotów, or Zabolotiv, now in the Ukraine, in 1898. He trained as a pilot and had served in the French Air Force during World War 1. In 1922, in the newly established Polish Republic, he graduated from the Faculty of Law at the Jagiellonian University. From 1925, Cyprian worked as a judge at the district court in Poznań. In 1938 he was appointed prosecutor of the Supreme Court in Warsaw. His legal writings were disseminated widely and he was on his way to forging an illustrious legal career, cut short, though, by war. In 1939, at the outbreak of WW2, Cyprian fled the country with First President of the Supreme Court Leon Supiński and a number of other judges. They made

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46 Victoria Guijarro, 'The Missing Chapter: Some Thoughts about the Socio-Legal Lab', BAR Socio-Lab14 April 2020, at <https://barblog.hypotheses.org/3485> (accessed 26 June 2020).

47 Patrycja Grzebyk, 'The Role of the Polish Supreme National Tribunal in the Development of the Principles of International Criminal Law', in Morten Bergsmo, CHEAH Wui Ling and YI Ping, eds., *Historical Origins of International Criminal Law: Volume 2* (Brussels, Torkel Opsahl Academic EPublisher, 2014), 603-630.

48 Karl Schlögel, *Moscow, 1937* (Cambridge, Polity Press, 2012), 8.

their way to France via Romania.<sup>49</sup> Eventually Cyprian would serve in the French and British armies. He was then reunited with his peers, those who had survived, in London, to take up the work of gathering evidence for the war crime trials. The Polish judicial community had been, to all intents and purposes, wiped out, but several key figures served in the SNT, alongside Cyprian, such as Mieczysław Siewierski, as prosecutor, and Stanisław Emil Rappaport<sup>50</sup>, as judge. In London, Cyprian was held in high regard by his British counterparts, who respected his legal background and perspicacity. Warnings about the scarcity of resources, such as the lack of a designated workspace, did not deter the Polish delegation from inserting itself in the legal community that was preparing for Nuremberg.<sup>51</sup> Cyprian would have been aware of the grave losses suffered in Polish legal circles. It was only to be expected that the remaining legal minds would devote themselves to realising Nuremberg, notwithstanding the risks.

But not all of Cyprian's time was taken up with the law, despite his many professional commitments during this period (1918-1939). Already in 1913 Cyprian had set out on a trip documenting the eastern Carpathian region, which lies within present-day Ukraine. Cyprian seems to have been caught up in the Polish fascination with the region that gained momentum

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49. Maciej Szwarczyk, *Tadeusz Cyprian (1898–1979)*, in Anna Przyborowska-Klimczak, ed., *Profesorowie Wydziału Prawa i Administracji UMCS 1949–2009. Księga jubileuszowa z okazji sześćdziesięciolecia Wydziału Prawa i Administracji UMCS w Lublinie* (The Professors of the Faculty of Law and Administration UMCS 1949-2009) (University of Marie Curie-Skłodowska: Lublin, 2009), 47–57 and Arkadiusz Bereza, 'Losy sędziów i prokuratorów Sadu Najwyższego w czasach II wojny światowej' (The Fate of Judges and Prosecutors at the Supreme Court during WW2), (2012) 1(26) *Prawnik*, 29-34, 30-31.

50. Arkadiusz Bereza, 'Losy sędziów i prokuratorów Sadu Najwyższego w czasach II wojny światowej' (The Fate of Judges and Prosecutors at the Supreme Court during WW2), (2012) 1(26) *Prawnik*, 29-34, 33, at <https://issuu.com/oirpublin/docs/130228105855-6ffdc45a74a7403fbc525252f57b19ad> (accessed 20 August 2020). For further details about Rappaport see Patrycja Grzebyk, 'Emil Stanisław Rappaport', in Frédéric Mégret and Immi Tallgren, ed., *The Dawn of a Discipline: International Criminal Justice and Its Early Exponents* (Cambridge: Cambridge University Press, 2020), 93-117.

<sup>51</sup> Telford Taylor notes that the 'UNWCC [UN War Crimes Commission] was politically weak. A majority of its members represented shadow governments, who might or might not be restored to power when their countries were liberated', in *The Anatomy of the Nuremberg Trials* (New York: Alfred A. Knopf, 1992), 26-27.

during the 19<sup>th</sup> century.<sup>52</sup> Cyprian is considered one of Poland's first photojournalists based on his coverage of WWI.<sup>53</sup>

From 1931 he was a member of various national photography clubs. His portfolio includes documentation of the devastation and the atrocities perpetrated during World War II in Poland [FOTO2 and FOTO3], covering, among other places, Warsaw and Buchenwald [FOTO4 and FOTO5]. Cyprian published a number of works on Polish photography<sup>54</sup> and in 1965 was awarded the title of Honorary Excellence by the International Federation of Photographic Art. Photography featured in Cyprian's work as a lawyer, and the law featured in his work as a photographer. Cyprian's life account demonstrates the mutability of the law. Photographs tell a story, and Cyprian would seem to have appreciated the performativity of the photograph. He kept a journal. During WWI he documented his life as a prisoner of war, an undertaking that resulted in 500 photographs. One entry reads 'One photo. This is a field where I can do a lot and I hope to '[win a] name [for] myself' and enrich the trade with new things. Because everything I read in this matter stays in my memory forever as if engraved with a hot iron'.<sup>55</sup> Cyprian demonstrated detailed knowledge of the camera, and how each of

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<sup>52</sup> Patrice M. Dabrowski, "Discovering" the Galician Borderlands: The Case of the Eastern Carpathians', (2005) 64(2) *Slavic Review*, 380-402, Agnieszka Warnke, 'Sea of Mountains: The Mysterious Hutsul Region', 19 November 2019, Culture.pl at <https://culture.pl/en/article/sea-of-mountains-the-mysterious-hutsul-region> (accessed 17 July 2020). See 'Tadeusz Cyprian', culture.pl, at <https://culture.pl/pl/tworca/tadeusz-cyprian> (accessed 17 August 2020) for rare film footage of Poland taken by Cyprian in 1931.

<sup>53</sup> Violetta Szostak, 'Życie żołnierzy poza frontem na reporterskich zdjęciach sprzed stu lat. "Cyprian był jednym z nich, a zarazem stał obok"' (The Life of Soldiers Outside the Front in Photographs from 100 Years Ago. "Cyprian was one them, and at the same time he was standing next to it"), wyborcza.pl, 15 March 2019, at <https://poznan.wyborcza.pl/poznan/7,105531,24548228,wieczorem-wezuwiusz-jest-bardzo-ozywiony.html?disableRedirects=true>

(accessed 19 August 2020) – the piece was published on the occasion of an exhibition of Cyprian's WWI photographs organised in Poznań in 2019.

<sup>54</sup> Tadeusz Cyprian was a prolific writer. His main books on photography are: *Technika nowoczesnej fotografii* (The Technique of Modern Photography) (Poznań: Księgarnia W. Wilak, 1949); *Fotografika* (The Photographer) (Warsaw: Czytelnik, 1950); *Fotografia, technika i technologia* (Photography, Technique and Technology) (Warsaw: PWT, 1953); *Jak fotografować* (How to Take Photographs) (Warsaw: FAW, 1954); *Fotografia małobrazkowa* (35mm Photography) (Poznań: Księgarnia wł. Wilk, 1950); and *Fotografia w szkole* (Photographs at School) (Warsaw: Wydawnictwa Szkolne, 1977).

<sup>55</sup> 'Notatki jeńca. Tadeusz Cyprian na 1 wojnej światowej', *Fotografia* (Notes by a POW. Tadeusz Cyprian during WWI) (13 October 2018) at <http://www.profotografia.pl/porta/publikacje/notatki-jenca-tadeusz-cyprian-na-i-wojnie-swiatowej/> (accessed 29 August 2019).

its components fit together, according to their specific purpose. He lamented his divided loyalties.

Whoever wishes to be the author of a large number of books [or] articles, and to photograph, cannot at the same time devote all his remaining energy to his professional work (also involving the writing of similar things, only in another field of human knowledge) and devote himself to creating beautiful images. A writer and an amateur artist cannot fit in the same skin; there is always someone injured by this relationship. For now, the writer is on top, but maybe the time will come when someone else will take my place in this field, and then the good old days will return, when the main photographic concern was a good image and a well-mounted exhibition.<sup>56</sup>

As will be shown in the next section, this powerful sentiment connected his two professions in a profound, but conflicting way. His diary entries record in fragmentary form his escape from Poland; as noted he made his way to London via Romania and France.<sup>57</sup> He made contact with the eminent Polish Professor of International Law, Bohdan Winiarski (soon to be judge on the International Court of Justice), who was instrumental in Cyprian being given the green light by the Polish Communist authorities to participate in the United Nations War Crimes Commission (UNWCC),<sup>58</sup> discussed in the next section. Cyprian was already aware of the Polish Communist authorities' foothold in the eastern territories of the country, and that the law was developing at a rapid pace, in particular as regards war crimes. He was keen to play his part. As his interest in international criminal law and justice grew, he could foresee all sorts of risks in trying war criminals, owing to complex legal questions. At the same time he was aware of another factor connected to the return to his native land: 'There

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56. 'Tadeusz Cyprian', Culture.pl at <https://culture.pl/pl/tworca/tadeusz-cyprian> (accessed 29 August 2019).

57. Maria Rybicka, 'Tadeusz Cyprian: Toga i obiektyw' (Tadeusz Cyprian: Gown and Lens), *Życie Uniwersyteckie* (7 January 2019) at <https://www.uniwersyteckie.pl/sto-lat-uam/prof-tadeusz-cyprian-toga-i-obiektyw> (accessed 29 August 2019).

<sup>58</sup> Winiarski was arrested shortly after the Germans occupied Poland, as part of a germanisation campaign that targeted academics, professors, judges, lawyers, doctors, engineers and other members of the *intelligentsia*, for elimination. This is discussed in the *Greiser* case as cultural genocide. Marcin Marcinko, 'The Concept of Genocide in the Trials of Nazi Criminals before the Polish National Tribunal', in Morten Bergsmo, CHEAH Wui Ling and YI Ping, eds., *Historical Origins of International Criminal Law: Volume 2* (Brussels, Torkel Opsahl Academic EPublisher, 2014), 639-696.



are even risks involved in my returning home'.<sup>59</sup> Cyprian was the subject of several books and articles that praised his skills as lawyer and photographer.<sup>60</sup>

**FOTO2. Royal Castle, Warsaw 1945 @Cyprian, commons.wikipedia.org**

**FOTO3. War, Warsaw 1949 @Cyprian, pl.wikipedia.org**

**FOTO4. Buchenwald. Cyprian, 1945. 26590 @USHMM**

**FOTO5. Buchenwald. Cyprian, 1945. 26592 @USHMM**

The third part of this study will explore Cyprian's involvement in the administration of justice in Poland, and especially his prosecutorial role in the trials before the SNT. After that, he was a prosecutor at the Supreme Court of Poland and a professor at the Adam Mickiewicz University in Poznań. Cyprian's participation in trials before the SNT and in the Bergen-Belsen and Nuremberg trials will be underlined. To date all too little is known about Poland's involvement in the work of the United Nations War Crimes Commission (UNWCC).

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59. Maria Rybicka, 'Tadeusz Cyprian: toga i obiektyw' ('Tadeusz Cyprian: Gown and Lens), *Życie Uniwersyteckie* (7 January 2019) at <https://www.uniwersyteckie.pl/sto-lat-uam/prof-tadeusz-cyprian-toga-i-obiektyw> (accessed 29 August 2019). For a German perspective and life story see the account of the German jurist Fritz Schulz, reluctant hero who managed to rise above the political climate in Weimar Germany but not without paying a price in Wolfgang Ernst, 'Fritz Schulz (1879-1957)', in Jack Breatson and Reinhard Zimmerman, eds., *Jurists Uprooted: German-speaking Émigré Lawyers in Twentieth-century Britain* (Oxford: Oxford University Press, 2004), 106-203.

60. Adam Olejnik and Henryk Kondziela, *Tadeusz Cyprian*, (Poznań: Wydawnictwo Poznańskie 1965); Wojciech Szafranski, 'Tadeusz Cyprian: artystyczna dusza prawnika' (Tadeusz Cyprian: the Artistic Soul of the Lawyer'), (2008) 3 *Kronika Miasta Poznania: miesięcznik poświęcony sprawom kulturalnym stol. m. Poznania*, 136-150; Paweł Dembiński, 'Tadeusz Cyprian: fotograficzne pasje poznańskiego uczonego' (Tadeusz Cyprian: the Poznań Scholar's Photographic Passions), (1996) 2 *Kronika Wielkopolski*, 101-105; Maciej Szwarczyk, *Tadeusz Cyprian (1898-1979)*, in Anna Przyborowska-Klimczak, ed., *Profesorowie Wydziału Prawa i Administracji UMCS 1949-2009. Księga jubileuszowa z okazji sześćdziesięciolecia Wydziału Prawa i Administracji UMCS w Lublinie* (The Professors of the Faculty of Law and Administration UMCS 1949-2009) (University of Marie Curie-Skłodowska: Lublin, 2009), 47-57; and Krzysztof Krasowski, *Zarys dziejów wydziału prawa Uniwersytetu w Poznaniu 1919-2004* (An Overview of the History of the Faculty of Law at the University of Poznań) (Poznań: Wydawnictwo Poznańskie, 2004).

Importantly, Cyprian was the Deputy Representative of the Polish government at the UNWCC, where he was involved in gathering evidence about war crimes. The collections of the UNWCC contain approximately 15,000 names of Nazi criminals reported to the Commission by Poland alone. 1535 cases were initiated, including 372 concerning crimes committed against the Jews, and these were the first cases of this type. The work carried out in the UNWCC was a dedicated, collective effort, underpinned by desire to prosecute war criminals in Nuremberg. Law was not viewed as operating in a bubble, rather, national law was a point of reference for constructing the international legal framework.<sup>61</sup> The imprint of the Polish delegation's work could be seen in the general policy towards war criminals and adherence to securing the rights of the accused, seeing national trials as preferable to achieving justice.<sup>62</sup> The UNWCC's efforts were ignored by the Soviets. Nonetheless, Cyprian read the sources, took photographs and later on used them for the purposes of the criminal proceedings.<sup>63</sup> Cyprian seemed to reach out to extra-legal knowledge for the application of law and for expanding his knowledge about components of the law that were as yet non-existent and where the law was needed quickly in order to respond to questions of accountability. This approach does not undermine the law, but enriches our understanding of it.

The creation of the Stalinist model of the judiciary and criminal law in Poland, the role of Leon Chajm in this process, and the consequences of the Polish Committee of National Liberation's (PKWN) decree of 31 August 1944 in the form of political purges and numerous court crimes (*crimen laesae iustitiae*), cannot be ignored. Yet, as we shall see, not everything

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<sup>61</sup> Karolina Wierczynska and Grzegorz Wierczynski, 'Stefan Glaser', in Frédéric Mégret and Immi Tallgren, ed., *The Dawn of a Discipline: International Criminal Justice and Its Early Exponents* (Cambridge: Cambridge University Press, 2020), 306-334, 325-326.

<sup>62</sup> Karolina Wierczynska and Grzegorz Wierczynski, 'Stefan Glaser', in Frédéric Mégret and Immi Tallgren, ed., *The Dawn of a Discipline: International Criminal Justice and Its Early Exponents* (Cambridge: Cambridge University Press, 2020), 306-334, 324-325.

<sup>63</sup>. 'Tadeusz Cyprian', GK 910/2, National Institute of Polish Remembrance, Warsaw, Poland.

was done as the system's architects had planned, and this was thanks to the judges and lawyers from the interwar period who remained for the most part resistant to indoctrination. In the first period, that is until 1948-1949, judicial independence was largely maintained.

### **3. The Polish Dispensing of Justice**

After the war Cyprian returned to work as a prosecutor in the Polish Supreme Court. By this time the political climate was very different from the one in which he had originally studied and trained.<sup>64</sup> He took up a post as Head of the Department of Criminal Law at the Adam Mickiewicz University in Poznań. The experience at the SNT was a significant step in his legal career. Cyprian stands out as prosecutor in a team that went before the SNT in seven trials of major war criminals during 1946-1948. Later Cyprian taught at the Central School of Law, which had been set up in 1948 (and would continue to function until 1953) in order to educate a new Polish legal cohort in Stalinist justice.

A close colleague and co-author of Cyprian's was Jerzy Sawicki (1910-1967), the other prosecutor noted above. Both were members of the Polish delegation involved in the preparation of the Nuremberg trials. Documentation of the Nazi crimes was under way already during the occupation, and the whole endeavour was coordinated by the Polish government in London and the Polish Underground State (which was described, among others, by Jan Karski). Importantly, the cooperation in this area was primarily with the USA and the United Kingdom.<sup>65</sup>

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64. Agata Fijalkowski, *From Old Times to New Europe* (Farham: Ashgate, 2010), 90-108.

65 Jan Karski, *The Story of a Secret State: My Report to the World* (New York: Penguin, 2012). See also 'The Role of the Polish Government-in-Exile', Memorial and Museum Auschwitz Birkenau Former Concentration and Extermination Camp, at <http://auschwitz.org/en/history/informing-the-world/the-role-of-the-polish-government-in-exile> (accessed 17 July 2020) and Pavol Jakubec, 'Together and Alone in Allied London: Czechoslovak, Norwegian and Polish Governments-in-Exile, 1940-1945', (2019) 42(3) *The International History Review*, 465-484.

Cyprian had worked at the UNWCC to gather evidence in war crimes cases. His writings refer to the British reluctance to engage in formal correspondence; a conversation went much further to ‘seal a deal’.<sup>66</sup> The UNWCC was founded in 1943 amidst much ‘political wrangling’,<sup>67</sup> with a mandate to implement the Declaration of the Four Nations on General Security, ‘Statement on Atrocities; 30 October 1943’, or the Moscow Declaration.<sup>68</sup> The Moscow Declaration set out that war criminals would be tried and judged according to the laws of the aggrieved states and before their respective courts. Law No. 10 from 20 December 1945 issued by the Allied Control Council addressed the matter of the prosecution of German war criminals and those guilty of crimes of peace and against humanity. The UNWCC’s aim was to study the indictments submitted by the individual governments, to draw up lists of war criminals that would serve as a basis for their extradition to the countries concerned, and to offer an opinion on problems relating to war crimes to any government that might approach the Commission.<sup>69</sup> The governments represented at the UNWCC also conducted research into wider jurisprudential theories that might complement these activities. Poland’s record at the UNWCC shows that some 15,000 names of war criminals were presented, but evidence could not be supplied in every single case.<sup>70</sup> The sheer volume of evidence, and the secrecy required in getting the materials to London and then on to

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<sup>66</sup> Tadeusz Cyprian, ‘Faktyczne i prawna sytuacja delegacji polskiej na procesie norymberski’ (The Factual and Legal Situation of the Polish Delegation at the Nuremberg Process), 30<sup>th</sup> Commemoration of the International Military Tribunal at Nuremberg, Educational Session of the Main Commission for the Study of Hitlerite Crimes in Poland, 22 November 1976, IPN Kr 1/265, Institute for National Remembrance.

<sup>67</sup> The ‘political wrangling’ infected the Polish delegation and its attempts to assert itself amongst the other delegations and its understanding of Anglo-American approaches to official matters. Tadeusz Cyprian, ‘Faktyczna i prawna sytuacja delegacji polskiej na proces norymberski’ (The Factual and Legal Situation of the Polish Delegation at the Nuremberg Proceedings), Academic Session devoted to the Thirtieth Commemoration of the International Military Tribunal at Nuremberg, 22 November 1967, Kr1/265, Institute for National Remembrance.

<sup>68</sup> Dan Plesch, *Human Rights After Hitler: The Lost History of Prosecuting War Crimes* (Washington, DC: Georgetown University Press, 2017), 1.

<sup>69</sup> Tadeusz Cyprian and Jerzy Sawicki, *Nuremberg in Retrospect: People and Issues of the Trial* (Warsaw: Western Press Agency, 1967), 24-25.

<sup>70</sup> Poland had the largest number of cases submitted, until France was liberated. Tadeusz Cyprian and Jerzy Sawicki, *Nuremberg in Retrospect: People and Issues of the Trial* (Warsaw: Western Press Agency, 1967), 27, fn.12.

Nuremberg, involved deftness and improvisation.<sup>71</sup> According to UNWCC records 1535 cases were submitted by Poland, which included 372 of the first such cases to identify crimes against Jews.<sup>72</sup> The Polish representatives at the UNWCC contended that

[p]resent- day Germany had from the very inception of the new regime adopted a special attitude to human beings which are from the point of view of race, creed, nationality, and religion described as Jews. It is irrelevant from a purely legal point of view why this has been done and for what reasons this point of view has been adopted. The guarantee of human rights has for a long time become the fundamental principle of civilised nations.<sup>73</sup>

The representatives continue to refer to international law and human rights documents when setting out how this position is legally inconceivable and inadmissible.<sup>74</sup> The text appeals to meta-values possessed by ‘civilised nations’ to fill the legal gap.<sup>75</sup> Likewise the indictment supported the allegation of German lawlessness and the violation of international law.

Apart from the illegal incorporation into the Reich of a part of occupied territory, the German authorities introduced into Poland an endless chain of new legal regulations completely incompatible with the [sic] international law but, moreover, quite alien to the spirit of law and sense of justice of civilised states.<sup>76</sup>

It was as part of the delegation that Cyprian visited key sites and was there able to take photographs [FOTOS 4 and 5]. Cyprian represented the newly formed Polish Communist government at the November 1945 Bergen-Belsen trial. He would later refer to a point made in that trial to strengthen the Polish case against Göth.<sup>77</sup>

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<sup>71</sup> Tadeusz Cyprian, ‘Factyczne i prawna sytuacja delegacji polskiej na procesie norymbersk’ (The Factual and Legal Situation of the Polish Delegation at the Nuremberg Process), 30<sup>th</sup> Commemoration of the International Military Tribunal at Nuremberg, Educational Session of the Main Commission for the Study of Hitlerite Crimes in Poland, 22 November 1976, IPN Kr 1/265.

<sup>72</sup> Dan Plesch, *Human Rights After Hitler: The Lost History of Prosecuting War Crimes* (Washington, DC: Georgetown University Press, 2017), 123.

<sup>73</sup> Dan Plesch, *Human Rights After Hitler: The Lost History of Prosecuting War Crimes* (Washington, DC: Georgetown University Press, 2017), 124-125.

<sup>74</sup> Dan Plesch, *Human Rights After Hitler: The Lost History of Prosecuting War Crimes* (Washington, DC: Georgetown University Press, 2017), 125.

<sup>75</sup> Gulińska-Jurgiel analyses Sawicki’s writings, her conclusion being that the term ‘civilised nations’ is never defined. Paulina Gulińska-Jurgiel, ‘How to Punish National-Socialist Crimes in Poland’, in Paulina Gulińska-Jurgiel, Yvonne Kleinmann, Miloš Řezník, Dorothea Warneck (eds) *Ends of War: Interdisciplinary Perspectives on Past and New Polish Regions* (Göttingen: Wallstein Verlag, 2019), 346-370, 361.

<sup>76</sup> ‘The Polish Government War Crimes Indictment’, WO 311/749, 14, The National Archives, United Kingdom, in which the highest-ranking officials in the German nazi regime are listed.

<sup>77</sup> Michael Bazylar and Frank Tuerkheimer, *The Forgotten Trials of the Holocaust* (New York: New York University, 2014), 119.

The SNT was also intended to judge those responsible for the fascistisation of the country.<sup>78</sup> This was the backdrop to the personal and professional challenges that Cyprian and his peers had to overcome in order to make the SNT work, nationally and internationally. There was a double existence. On the one hand, Cyprian and the team did not have job security. They understood the risks. On the other hand, their time at the SNT offered them a margin of freedom – to apply the law in innovative ways, drawing on pre-war skills and legislation, as well as the Soviet approach to war crimes. The Soviet Union was not a member of the UNWCC, following its own path when prosecuting war crimes,<sup>79</sup> but it kept a close eye on Poland's participation in the UNWCC. Under surveillance, Cyprian and his peers created a legal framework from national and international sources to try war criminals.

#### **FOTO6. 1315-2-1, Leon Chajn at a Judicial Gathering in Wrocław 1946 @IPN**

It is important to read Cyprian's life story alongside the broader account of the Polish judiciary, which began to see a change in its dispensing of justice towards the end of hostilities and during the key years following the end of World War II. The transformation was masterminded by Leon Chajn, who was the chief architect of the post-war Polish legal system [FOTO6.]. Under his leadership in the provisional, pro-Soviet body, the Polish Committee of National Liberation (*Polski Komitet Wyzwolenia Narodowego* (PKWN) in 1944 (and from 1945-1949 as Undersecretary of State in the Ministry of Justice), a close eye

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78. Which the SNT never did, unlike the special criminal courts, which were granted special jurisdiction over these crimes, discussed in this article. See *infra*, fn 85. A commission was set up by the Polish government-in-exile to look into causes of Poland's defeat in 1939. One of cases involved Tadeusz Cyprian, who was a member of this commission. See Marcin Kwiecień, 'Przyczynek do dziejów komisji powołanej w związku z wynikiem kampanii wojennej 1939 roku. Sprawa Tadeusza Cypriana przeciwko Jerzemu Giertychowi' (A Contribution to the History of the Commission Established to Investigate the Aftermath of the Military Campaign of 1939. The Case of Tadeusz Cyprian versus Jerzy Giertych, (2012) 5(4) *Krakowskie Studia z Historii Państwa i Prawa*, 329-342.

<sup>79</sup> Francine Hirsch, *Soviet Judgment at Nuremberg: A New History of the International Military Tribunal After World War II* (New York: Oxford University Press, 2020) and by the same author, 'The Soviets at Nuremberg: International Law, Propaganda, and the Making of the Postwar Order', (2008) *American Historical Review*, 701-730.

was kept on the judiciary. Meetings with judges were organised [FOTO7]. The scales of justice are particularly prominent in FOTO7, which seems to convey an air of watchfulness. The statue towers over the audience, behind speaker Chajn, reinforcing his message about the dispensing of justice and warning judges to keep in line with the objectives underpinning post-war Poland's new legal framework. The idea was promoted that all judicial personnel had to be screened carefully as new courts were being instituted in the recaptured regions, and eventually in a post-war Poland. One of the screening tools to be implemented required judicial personnel to re-apply for their positions. This process obliged individuals to disclose their previous work experience and placed particular emphasis on their activities during the German occupation. This paved the way for sentencing to death many individuals, including judges, for 'collaboration with the Nazi regime', based on the previously noted 31 August 1944 Decree concerning the punishment of Fascist-Hitlerite criminals guilty of the murder and ill-treatment of the civilian population and prisoners of war, and the punishment of traitors to the Polish Nation (as amended by the Decree of 16 February 1945).<sup>80</sup> This decree was passed by the PKWN and stated that anyone who

assisted the German occupation authorities in the commission of murder of civilians or POWs, or in their mistreatment or persecution, or act[ed] to the detriment of individuals pursued or sought by German occupation authorities for any reason ... by denouncing, capturing, or deporting them, is subject to the death penalty, or imprisonment of up to fifteen and no less than three years, or for life.

This decree was enacted subsequent to the Moscow Declaration. It was also looking to the future. This policy of purging was based on false accusations: the underlying aim was to serve the Soviet authorities' goal of ousting political opponents and promoting their own 'social revolution'. This same decree sentenced so-called Polish 'traitors' for 'assisting the enemy'. Most of the legislation that was passed between 1944 and 1945 did not rely on normal legislative techniques, such as statutes and decrees. Instead, many critical matters

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80. It is difficult to establish exact numbers. Agata Fijalkowski, *From Old Times to New Europe* (Farnham: Ashgate, 2010), 90-108.

were decided unofficially, not always by authorised officials, and often remained unpublished, apart from criminal responsibility, which was set out in the relevant decrees. It was clear that the enactments, which were passed during this period, were designed to accelerate the consolidation of Communist power. The PKWN established special criminal courts in September 1944.

Chajn complained bitterly about the attitude of the pre-war judges.<sup>81</sup> There was a deep mistrust of the pre-war judicial pool, and as a consequence a vigorous campaign of indoctrination in Marxism-Leninism-Stalinism was initiated. The purpose of the ‘war over the judiciary’ was twofold: to destroy all pre-war tendencies in the decision-making process and to undermine the prestige of the judicial profession.<sup>82</sup> The authorities set out to accomplish this by appointing judicial candidates who had not satisfied the basic requirements stipulated by the law up to that point and by creating special schools under the auspices of the Ministry of Justice, which would train the new judges on aspects of people’s justice. But he need not have worried. As we have seen above, lawyers trained in pre-war Poland contributed to the teaching. At the same time the Polish dispensation of justice was playing a part in the development of international criminal law at the SNT in such a way as to work against the ‘war against the judiciary’ campaign. Both narratives were reinforced by Soviet legal propaganda. The Communist regime was not yet fully established, and pre-war judicial officials not altogether prepared to acquiesce in political indoctrination. Nonetheless, relations were less confrontational, as Communists held the balance of power in Polish-Soviet relations.<sup>83</sup>

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81. Teresa Torńska, *Them: Stalin’s Polish Puppets* (New York: Harper Collins, 1987), the Polish version is *Oni* (Them) (Warszawa: Mysl, 1986).

82. Agata Fijalkowski, *From Old Times to New Europe* (Farnham: Ashgate, 2010), 90-108.

83. Paulina Gulińska-Jurgiel, ‘How to Punish National-Socialist Crimes in Poland’, in Paulina Gulińska-Jurgiel, Yvonne Kleinmann, Miloš Reznik, Dorothea Warneck, eds., *Ends of War: Interdisciplinary Perspectives on Past and New Polish Regions* (Göttingen: Wallstein Verlag, 2019), 346-370, 355.



### **FOTO7. 1315-33-2 Judicial Gathering in Wroclaw @IPN**

The quest for justice can also be discerned in the towering scales of justice that features in FOTO7. Albeit unintentionally, the image invited multiple interpretations as regards the meaning of justice's attributes, including the scales, the sword and the blindfold. Cyprian and his peers knew at first hand the horrors of war. Cyprian himself had documented them, as photographer, but also as a lawyer.<sup>84</sup> He was well aware of the legal gaps obviating the successful prosecution of these crimes – the sheer magnitude of which lawyers could not grasp, though they were discussed at great length both nationally and internationally. An opportunity arose in 1946, with the setting up of a Polish war crimes tribunal.

The SNT was created further to an agreement concluded by the Allies to punish all the major war criminal criminals of the European Axis at the International Military Tribunal at Nuremberg, as set out in the Charter of the International Military Tribunal from 8 August 1945. The remaining war criminals were to be judged on the territory of those countries where they had committed their crimes, further to the Moscow Declaration.

In terms of its composition, the SNT's judicial bench comprised three professional judges appointed by the State National Council (*Krajowa Rada Narodowa*, a parliament-like body that was controlled by the Soviets at that time) from among persons with the appropriate qualifications proposed by the Minister of Justice and four lay judges also appointed by the same body. The latter could outvote their professional colleagues. The mere presence of lay judges could be expected to ensure that the professional judges took

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84. '50 lat temu...' (50 Years Ago), TV Polonia, 20 November 1995. In this television programme Cyprian's role in gathering evidence against war criminals in the period following WWII and prior to the Nuremberg proceedings was shown to be critical, BUWa-I-541-435/18, Institute for National Remembrance.

‘appropriate’ decisions. This could be achieved without the former having to be proactive in the proceedings.<sup>85</sup> The domestic trials were meant to show that ordinary German citizens had committed these crimes, while under the influence of National Socialist propaganda. The trials also demonstrated that the German invasion of Poland was not a coincidence, but the result of an excessively lenient approach adopted by the West towards Germany after World War I. This is best exemplified in the *Forster* trial, with the pre-war Polish authorities portrayed then as inept.<sup>86</sup>

It is worth noting that as early as 15 December 1939, the Polish government-in-exile in London adopted a resolution on measures to be taken by the Polish state against the Germans, especially its leadership, on behalf of innocent victims. In a resolution dated 16 April 1940 it created special courts to pass secret, summary sentences and impose penalties for crimes including the inhuman persecution and maltreatment of the Polish population. These special courts were attached to the commanders of the main underground armed organisation, The Union of Armed Struggle (*Związek Walki Zbrojnej*), later, in 1942, renamed the Home Army (*Armia Krajowa*). A finding of guilt meant the death sentence. Prosecution was based on international treaties concerning war and occupation.<sup>87</sup> In fact, the Decree of the Polish President of Poland from 30 March 1943 concerning criminal liability

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85. For further details, see Adam Pogórecki, ‘Totalitarian Law: Basic Concepts and Issues’, in Adam Podgórecki and Vittorio Olgiati (eds), *Totalitarian Law and Post-Totalitarian Law* (Aldershot: Dartmouth, 1996), 1-37) and Maria Łós, *Communist Ideology, Law and Crime* (London: Macmillan, 1988).

86. Patrycja Grzebyk, ‘The Role of the Polish Supreme National Tribunal in the Development of the Principles of International Criminal Law’, in Morten Bergsmo, CHEAH Wui Ling and YI Ping, eds., *Historical Origins of International Criminal Law: Volume 2* (Brussels, Torkel Opsahl Academic EPublisher, 2014), 603-630, 606. Also see hints of a portrayal of the Polish authorities’ pre-war ineptitude in ‘Trial of Gauleiter Artur Greiser’, *Law Reports of Trials of War Criminals, selected and prepared by the United Nations War Crimes Commission*, Volume VII (London, 1948).

87. Andrzej 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), was held in Lyon, France from 23 to 25 March 2004, paper on file with author. See also Andrzej Rzepliński, *Sądownictwo w Polsce Ludowej: między dyspozycyjnością, a niezawisłością* (The Judiciary in People’s Poland: Between Disposability and Independence) (Warsaw: Oficyna Wydawnicza Pokolenie, 1989).

for war crimes provided a basis for prosecution, but Poland was not able to implement these measures.<sup>88</sup>

The SNT was not a permanent court. It operated at the same level as the Supreme Court, which had made the SNT a special court that operated under separate rules.<sup>89</sup> Its Chief Justice, Waclaw Barcikowski, held the same post at the Supreme Court. There was a desire to try more war criminals, but not all of them were extradited. The selection of the seven was meant to signal intent to try a specific sort of crime; the venue chosen for the trials was of paramount importance.<sup>90</sup> Only four of the seven are discussed in the *Law Reports of Trials of War Criminals (Law Reports)*, selected and prepared by the UNWCC. The task of preparing the cases for prosecution was mainly the responsibility of the Commission in Oświęcim to Investigate the German-Nazi Crimes (*Komisja Badania Zbrodni Niemiecko-Hitlerowskich w Oświęcimiu (tzw. Komisja Oświęcimska)*). The Commission was established by the government decree of 10 November 1945. This body would change its name several times and eventually settle on the Main Commission to Investigate German Crimes.

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<sup>88</sup> The Decree of the President of Poland from 30 March 1943 concerning criminal liability for war crimes, *Official Gazette*, no. 3, item 6, London, 30 March 1943. Marcin Marcinko, 'The Concept of Genocide in the Trials of Nazi Criminals before the Polish National Tribunal', in Morten Bergsmo, CHEAH Wui Ling and YI Ping, eds., *Historical Origins of International Criminal Law: Volume 2* (Brussels, Torkel Opsahl Academic EPublisher, 2014), 639-696.

<sup>89</sup> Patrycja Grzebyk, 'The Role of the Polish Supreme National Tribunal in the Development of the Principles of International Criminal Law', in Morten Bergsmo, CHEAH Wui Ling and YI Ping, eds., *Historical Origins of International Criminal Law: Volume 2* (Brussels, Torkel Opsahl Academic EPublisher, 2014), 603-630, 610. available at <https://www.legal-tools.org/doc/d88600/pdf/> (accessed 29 August 2019).

<sup>90</sup> Patrycja Grzebyk, 'The Role of the Polish Supreme National Tribunal in the Development of the Principles of International Criminal Law', in Morten Bergsmo, CHEAH Wui Ling and YI Ping, eds., *Historical Origins of International Criminal Law: Volume 2* (Brussels, Torkel Opsahl Academic EPublisher, 2014), 603-630, 605. available at <https://www.legal-tools.org/doc/d88600/pdf/> (accessed 29 August 2019) and Mark A. Drumbl, 'Germans are the Lords and Poles are the Servants': The Trial of Arthur Greiser in Poland, 1946', in Kevin Heller and Gerry Simpson, eds., *The Hidden Histories of War Crimes Trials* (Oxford Scholarship Online 2013), 411-429.

A total of 49 persons were sentenced. In each of the seven trials the focus was on a particular activity of the Nazis, and each was held at venues that corresponded to the crimes in question:

1. The first trial was that of Artur Greiser from 21 June to 7 July 1946 in Poznań. The proceedings centred on the scale of the persecution and suffering of the population of the Greater Poland (*Wielkopolska*) region. The trial proceedings are in the *Law Reports*.
2. The second trial was that of Amon Leopold Göth, the Commandant of the Płaszów camp from 27 August to 5 September 1946 in Kraków. The prosecution focused on the way in which the Nazis had treated the Jewish population of the German –occupied territory, the General Governate (*General Governemount*) and on the civilian population in the labour camps. As Grzebyk notes, the verdicts in these cases were passed before the final judgment at the IMT.<sup>91</sup> The trial proceedings are in the *Law Reports*.
3. The third trial was that of Ludwig Fischer (Governor of the Warsaw District), Ludwig Leist (section chief in the Office of the Warsaw District and plenipotentiary of the Governor for Warsaw), Josef Meisinger (chief of security police and security service of Warsaw), and Max Daume (section chief in the Headquarters of the *Ordnungspolizei*) from 17 December 1946 to 24 February 1947 in Warsaw. The proceedings concerned the nature of the

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91. Patrycja Grzebyk, 'The Role of the Polish Supreme National Tribunal in the Development of the Principles of International Criminal Law', in Morten Bergsmo, CHEAH Wui Ling and YI Ping, eds., *Historical Origins of International Criminal Law: Volume 2* (Brussels, Torkel Opsahl Academic EPublisher, 2014), 603-630, 605. available at <https://www.legal-tools.org/doc/d88600/pdf/> (accessed 29 August 2019).

rule of the occupying forces in Warsaw and the Warsaw district, and the persecution of the Polish and Jewish population.

4. The Rudolf Höss trial was held in Warsaw from 11 to 29 March 1947. The proceedings focused on the organisation of the concentration camps, including Auschwitz, and on the medical experiments conducted there. The trial proceedings are in the *Law Reports*.

5. At the fifth trial, or the Auschwitz trials, some 40 persons were tried. These trials were held from 24 November to 16 December 1947 in Kraków. The prosecution presented evidence in an attempt to show how this camp was a genuine death factory.

6. The Albert Forster trial, held in Gdańsk, from 5 to 27 April 1948, addressed Forster's actions aimed at detaching Danzig (Gdańsk) from Poland. The trial proceedings are in the *Law Reports*.

7. The final SNT trial was that of Josef Bühler, deputy to Hans Frank, which was designed to show that the extermination policy was not limited to Poland. The trial proceedings lasted from 17 June to 5 July 1948.

The other trials that were planned concerned the destruction of Warsaw and the demolition of the Warsaw ghetto, but they were not realised. Other trials of prominent war criminals took place before the regional courts. The SNT ceased operation, although the relevant legal statute was never repealed.<sup>92</sup> This came at a time when the most critical judicial

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92. Patrycja Grzebyk, 'The Role of the Polish Supreme National Tribunal in the Development of the Principles of International Criminal Law', in Morten Bergsmo, CHEAH Wui Ling and YI Ping, eds., *Historical Origins of International Criminal Law: Volume 2* (Brussels, Torkel Opsahl Academic EPublisher, 2014), 603-630, 605 available at <https://www.legal-tools.org/doc/d88600/pdf/> (accessed 29 August 2019).

reforms were taking place. The most significant of these changes concerned the elimination of the cassation appeal before the Supreme Court. The reforms were driven by the Polish authorities (i.e. Bolesław Bierut, formerly President of the State National Council (*Krajowa Rada Naczelna*), now President of Poland) after a so-called plot by a right-wing nationalist deviation in the Communist Party was ‘discovered’; personnel were replaced, including judges, as Stalinisation slowly began to take root.<sup>93</sup>

During this period the prosecution honed its skills. Prosecutors explicitly deployed emotion in courtroom settings, etiquette and protocol, but more often in an implicit fashion. This approach would be replicated in prosecutorial speeches in the Polish war crimes trials, with Cyprian as one of the lead prosecutors. The Polish legal team was involved in the application of international criminal law principles that went beyond what was then occurring at the Nuremberg proceedings. Many of these principles existed as legal provisions, but lacked substance.<sup>94</sup> The legal team extended its remit to include Polish war crimes trials; Allied war crimes trials, the 1932 Polish Criminal Code (still in force); and Rafael Lemkin’s writings, for the solution.<sup>95</sup> Owing to limitations of space, the discussion here will focus on the crime of genocide in the cases in which Cyprian was involved.<sup>96</sup> The 1944 Decree did not refer to the crime of genocide, but it did not exclude a ‘creative interpretation’ together with relevant provisions from the 1932 Polish Criminal Code.<sup>97</sup>

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93. Adam Lityński, ‘Review of Arkadiusz Bereza The Supreme Court 1917-2017: Presidents, Judges, Prosecutors of the Supreme Court. (Polish Supreme Court: Warsaw 2017), *Annals of the Administration and Law*, 385-390 at [https://www.humanitas.edu.pl/resources/upload/dokumenty/Wydawnictwo/Roczniki%20AiP%20-%20pliki/Podzielone/Roczniki%20AiP%202017%20z2/RAiP\\_2\\_2017-385-390.pdf](https://www.humanitas.edu.pl/resources/upload/dokumenty/Wydawnictwo/Roczniki%20AiP%20-%20pliki/Podzielone/Roczniki%20AiP%202017%20z2/RAiP_2_2017-385-390.pdf) (accessed 22 August 2019).  
94. ‘50 lat temu...’ (50 Years Ago), TV Polonia, 20 November 1995, BUWa-I-541-435/18, Institute for National Remembrance.

95. Ana Filipek Vrdoljak, ‘Human Rights and Genocide: The Work of Lauterpacht and Lemkin in Modern International Law’, (2010) 20(4)*The European Journal of International Law*, 1163-1194.

96. The ‘judicial *acquis*’ of the crime of genocide in SNT case law comprises Greiser, Göth and Höss. See Marcin Marcinko, ‘The Concept of Genocide in the Trials of Nazi Criminals before the Polish National Tribunal’, in Morten Bergsmo, CHEAH Wui Ling and YI Ping, eds., *Historical Origins of International Criminal Law: Volume 2* (Brussels, Torkel Opsahl Academic EPublisher, 2014), 639-696, 641.

97. Marcin Marcinko, ‘The Concept of Genocide in the Trials of Nazi Criminals before the Polish National

In *Greiser*, Telford Taylor was present to hear Cyprian advance Lemkin's notion of cultural genocide.<sup>98</sup> The destruction of Polish monuments, statutes, libraries and archives, all cultural assets of the region, was detailed in the prosecution's case and supported with documentary evidence. In *Greiser*

The Prosecution submitted that most of the offences enumerated in the Indictment were part and parcel of a Nazi plan the aim of which was the biological extermination of whole groups of people. This plan consisted of two phases; one which aimed at the complete disintegration of the Polish population by destroying its national, social, cultural and economic pattern, as well as [the] personal integrity of individuals; the other, the imposition of the national pattern of the oppressor.<sup>99</sup>

Scholars contend that *Greiser* is an underused judgment. The International Criminal Tribunal for the former Yugoslavia, in its discussion about extermination in *Krstić*, refers to it.<sup>100</sup>

The legal argumentation advanced by Cyprian and the prosecutorial team was prescient. Amon Göth, the defendant in the second SNT trial, was charged with murder, which was the first such case in the history of the prosecution of war criminals. The charges were based on Articles 225,235,236,248,257, and 262(1), of the 1932 Polish Criminal Code, concerning murder, grievous bodily harm, torture and ill treatment, infringement of personal liberty, and appropriation of property, respectively.<sup>101</sup> Reference was made to international

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Tribunal', in Morten Bergsmo, CHEAH Wui Ling and YI Ping, eds., *Historical Origins of International Criminal Law: Volume 2* (Brussels, Torkel Opsahl Academic EPublisher, 2014), 639-696, 645.

98. Mark A. Drumbl, 'Germans are the Lords and Poles are the Servants': The Trial of Arthur Greiser in Poland, 1946', in Kevin Heller and Gerry Simpson (eds), *The Hidden Histories of War Crimes Trials* (Oxford Scholarship Online 2013), 411-429. See also Catherine Epstein, *Model Nazi: Arthur Greiser and the Occupation of Western Poland* (Oxford: Oxford University Press, 2010).

<sup>99</sup> [https://www.loc.gov/rr/frd/Military\\_Law/pdf/Law-Reports\\_Vol-13.pdf](https://www.loc.gov/rr/frd/Military_Law/pdf/Law-Reports_Vol-13.pdf) (accessed 13 June 2020)

100. *Prosecutor v Krstić*, Case No. IT-98-33-T (2 August 2001), para 492. The ICTY has cited *Greiser* in five judgements: *Prosecutor v Kupreskić et al* Case No. IT-95-16-T (14 January 2000); *Prosecutor v Stakić*, Case No. IT-97-24-A (22 March 2006), [29]; *Prosecutor v Naletilić and Martinović*, Case No. IT 98-34-A (3 May 2006); *Prosecutor v Krstić*, Case No. IT-98-33-T (2 August 2001); and *Prosecutor v Krajišnik*, Case No. IT-00-39-T (27 September 2006), see Mark A. Drumbl, 'Germans are the Lords and Poles are the Servants': The Trial of Arthur Greiser in Poland, 1946', in Kevin Heller and Gerry Simpson, eds., *The Hidden Histories of War Crimes Trials* (Oxford Scholarship Online 2013), 411-429, 425-426. See Matthew Lippman, 'The Convention on the Prevention and Punishment of the Crime of Genocide: Fifty Years Later', (1998) 15 *Arizona Journal of International and Comparative Law*, 415-515.

101. Tadeusz Cyprian, *Przestępstwa międzynarodowe w 'współczesne polskie prawo karne'* (International Crimes in 'Contemporary Polish Criminal Law', vol.4, Łódź, IPN, Kr1/641, Institute for National Remembrance.

law, namely Article 46 of the Hague Regulations on war crimes and constituted crimes against humanity, in line with the proceedings then taking place at Nuremberg.<sup>102</sup>

The prosecution continued to argue that genocide was within the remit of the August 1944 Decree, as it provides for the punishment of murder and ill-treatment not only of individuals, but of larger groups of people persecuted on specific grounds. Cyprian raised a key point from the Bergen-Belsen trial of 17 September 1945.<sup>103</sup> The British Military Tribunal had jurisdiction over the case. Cyprian was at the UNWCC and worked closely with the British, with whom he had a good relationship. Cyprian emphasised the fact that Göth had either personally killed, or ordered the killings of Jews, about which there was ample witness testimony.<sup>104</sup> Cyprian went beyond physical and biological connotations, to argue that cultural genocide was carried out by the Germans. In other words, coordinated efforts were made to destroy Polish culture, language, religion, civil and political institutions.<sup>105</sup> In his opening speech Cyprian noted Rafael Lemkin's 1944 work, *Axis Rule in Occupied Europe*, where Lemkin defines genocide as comprising economic, social and cultural destruction.<sup>106</sup> Borrowing from the Nuremberg prosecution, Cyprian argued that not only

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102. 'Trial of Hauptsturmführer, Amon Leopold Goeth. Supreme National Tribunal of Poland (27<sup>th</sup>-31<sup>st</sup> August and 2<sup>nd</sup>-5<sup>th</sup> September 1946)', in *Law Reports of Trials of War Criminals, selected and prepared by the United Nations War Crimes Commission*, Volume VII (London, 1948), 1-10 at [https://www.loc.gov/r/frd/Military\\_Law/pdf/Law-Reports\\_Vol-7.pdf](https://www.loc.gov/r/frd/Military_Law/pdf/Law-Reports_Vol-7.pdf) (accessed 28 August 2019).

<sup>103</sup> For the trial transcript see

[http://www.bergenbelsen.co.uk/pages/TrialTranscript/Trial\\_Day\\_001.html#Day001\\_DefendingOfficers](http://www.bergenbelsen.co.uk/pages/TrialTranscript/Trial_Day_001.html#Day001_DefendingOfficers) (accessed 12 June 2020). Tadeusz Cyprian, 'Faktyczne i prawna sytuacja delegacji polskiej na procesie norymberskim' (The Factual and Legal Situation of the Polish Delegation at the Nuremberg Process), 30<sup>th</sup> Commemoration of the International Military Tribunal at Nuremberg, Educational Session of the Main Commission for the Study of Hitlerite Crimes in Poland, 22 November 1976, IPN Kr 1/265.

104. Michael Bazylar and Frank Tuerkheimer, *The Forgotten Trials of the Holocaust* (New York: New York University, 2014), 118-119.

105. Hitler's August 1939 speech at Obersalzberg contained these remarks about Poland: 'Poland will be depopulated and colonised by Germans. The only object of my pact with Poland was to gain time, and anyway, gentlemen, the same thing will happen in Russia that I have brought about in Poland. After Stalin's death (he is seriously ill) we will smash the Soviets to pieces', in Tadeusz Cyprian and Jerzy Sawicki, *Nazi Rule in Poland 1939-1945*, trans. Edward Rothert (Warsaw: Polonia Publishing House, 1961), 42. Also Michael Bazylar and Frank Tuerkheimer, *The Forgotten Trials of the Holocaust* (New York: New York University, 2014), 118.

<sup>106</sup> See also Agnieszka Bieńczyk-Missala, ed., *Civilians in Contemporary Armed Conflicts: Rafał Lemkin's heritage* (Warszawa: Wydawnictwo Uniwersytetu Warszawskiego, 2017); Ryszard Szawłowski, 'Rafał Lemkin - warszawski adwokat (1934-1939), twórca pojęcia "genocyd" i główny architekt konwencji z 9 grudnia 1948 r. ("Konwencji Lemkina") (Ralph Lemkin - Warsaw Lawyer (1934-1939) and Creator of the Term 'Genocide' and



Göth but the entire 'clique of Hitlerites' had had a 'general plan for world domination'.<sup>107</sup> In the Bergen-Belsen trial, prosecutors argued

Individual atrocities committed by individual persons were put forward to show that they were taking part in and acquiescing in the system which a group were carrying on. They were a unit acting in common, under a commanding officer, Kramer, who was the Kommandant of that camp.<sup>108</sup>

To recall, Lemkin identified eight forms of genocidal activities comprising political, social, cultural, economic, biological, physical, religious, and moral and three spaces in which these occur, namely physical, biological and cultural.<sup>109</sup> Göth's case satisfied the criteria of a physical and biological genocide. However, the prosecution went beyond this to show how the defendant's actions at the Płaszów and Szebnie labour camps, and the liquidations of the Kraków and Tarnów ghettos, also demonstrated social, economic, and cultural genocide. These aspects of the crime were within the remit of the 1944 Decree.<sup>110</sup>

Media coverage proved critical. 'And as the terrible scenes of Bergen-Belsen and Buchenwald and Dachau were shown in newspaper photographs and *Pathé* newsreel footage, the public demand for justice became intense'.<sup>111</sup> The trial was about the entire system of genocide, but without the charge, as it was a war crimes trial. Cyprian would have been aware of the criticisms of the trial<sup>112</sup> and noted the interest that Sir Hartley Shawcross,

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Chief Architect of the Convention from 9 December 1948 ("Lemkin's Convention") in *55-lecie śmierci, (55<sup>th</sup> Year of His Death)* (Warszawa: Naczelna Rada Adwokacka, 2015); Adam Redzik, *Rafał Lemkin (1900-1959) : co-creator of international criminal law : short biography* (Warsaw: Oficyna Allerhanda, 2017).

107. Michael Bazylar and Frank Tuerkheimer, *The Forgotten Trials of the Holocaust* (New York: New York University, 2014), 118.

108 [https://www.loc.gov/rr/frd/Military\\_Law/pdf/Law-Reports\\_Vol-2.pdf](https://www.loc.gov/rr/frd/Military_Law/pdf/Law-Reports_Vol-2.pdf) (accessed 12 June 2020)

109 Raphael Lemkin, *Axis Rule in Occupied Europe: Laws of Occupation, Analysis of Government, Proposals for Redress* (Washington DC: Carnegie Endowment for International Peace, 1944), 82-90.

110 'Trial of Hauptsturmführer, Amon Leopold Goeth. Supreme National Tribunal of Poland (27<sup>th</sup>-31<sup>st</sup> August and 2<sup>nd</sup>-5<sup>th</sup> September 1946)', in *Law Reports of Trials of War Criminals, selected and prepared by the United Nations War Crimes Commission*, Volume VII (London, 1948), 1-10, 8 at [https://www.loc.gov/rr/frd/Military\\_Law/pdf/Law-Reports\\_Vol-7.pdf](https://www.loc.gov/rr/frd/Military_Law/pdf/Law-Reports_Vol-7.pdf) (accessed 28 August 2019).

111 A.T. Williams, 'Forgotten Trials: the other side of Nuremberg', History Extra, November 2016, at <https://www.historyextra.com/period/second-world-war/forgotten-trials-the-other-side-of-nuremberg/> (accessed 20 August 2020).

112 A.T. Williams, 'Forgotten Trials: the other side of Nuremberg', History Extra, November 2016, at <https://www.historyextra.com/period/second-world-war/forgotten-trials-the-other-side-of-nuremberg/> (accessed 20 August 2020).

Attorney General, took in setting out a target having 500 minor war crimes cases to be tried in Germany by 1946.<sup>113</sup> The target would eventually change, but the distinction between major and minor would be noted and possibly affect the manner in which the Polish legal team approached national cases.

Genocide had been defined by Cyprian's compatriot, but Lemkin had failed to have genocide made into a specific charge at Nuremberg. It was not until 1948 that it was codified into a UN Convention. Yet Lemkin's writings on genocide were at the heart of the prosecution in the Polish war crimes trials. In fact, almost all the seven trials featured innovation by the judge, the prosecution and the defence - who set out the crimes within a broader context – the crimes against the Polish people – and pointed out that the nazis had singled out the Jews – to whom the Poles were connected by culture, tradition, mentality – for extermination.<sup>114</sup>

The *Göth* trial may not have received a great deal of attention, but it was well attended, in particular by Jewish survivors, who made up the bulk of the audience. The press went out of its way to acknowledge the chance it offered Jewish survivors to obtain some sort of justice for their sufferings.<sup>115</sup> The prosecution's case noted that the 'policy of extermination was in the first place directed against the Jewish and Polish nations' and that this 'criminal organization did not reject any means of furthering their aim to destroy the Jewish nation. The wholesale extermination of Jews and also of Poles had all the

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<sup>113</sup> A.T. Williams, 'Forgotten Trials: the other side of Nuremberg', History Extra, November 2016, at <https://www.historyextra.com/period/second-world-war/forgotten-trials-the-other-side-of-nuremberg/> (accessed 20 August 2020).

114. Michael Bazylar and Frank Tuerkheimer, *The Forgotten Trials of the Holocaust* (New York: New York University, 2014), 117.

115. Michael Bazylar and Frank Tuerkheimer, *The Forgotten Trials of the Holocaust* (New York: New York University, 2014), 118.

characteristics of genocide in the biological meaning of this term, and embraced in addition the destruction of the cultural life of these nations'.<sup>116</sup>

In *Höss*, the SNT heard Cyprian set out a detailed account, relying on expert witnesses, of the medical experimentation that was carried out at Auschwitz. The prosecutorial questioning and evidence demonstrated the sheer disregard for human life and dignity.<sup>117</sup> Once again the team made sure to show that the crime of genocide was committed. Cyprian and his team prepared scrupulously. 'It was common practice during the trials before the Polish courts to meticulously substantiate the criminal activities of concentration camps'.<sup>118</sup> The attention to detail in testimony and documentation is evident throughout Cyprian's legal and photographic career. Such an attribute was no doubt instilled during his education (a matter I turn to later) and at the UNWCC, as part of the Polish delegation led by Glaser.<sup>119</sup>

The success of the SNT lay in the prosecution, whereby it established its case against the defendant, but it also showed how his actions against numerous Jews and Poles, or against whole groups of persons based on political, racial or religious grounds, constituted genocide. The final point in this trial was to set out an account of the German policy of large-scale persecution and wholesale extermination of peoples. Both Cyprian and his colleague, Sawicki, were concerned early on by the circumscribed remit and limited resources afforded to the Polish delegation at Nuremberg; both took seriously their responsibility to represent the

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116. 'Trial of Hauptsturmführer, Amon Leopold Goeth. Supreme National Tribunal of Poland (27<sup>th</sup>-31<sup>st</sup> August and 2<sup>nd</sup>-5<sup>th</sup> September 1946)', in *Law Reports of Trials of War Criminals, selected and prepared by the United Nations War Crimes Commission*, Volume VII (London, 1948), 1-10, 9 at [https://www.loc.gov/rr/frd/Military\\_Law/pdf/Law-Reports\\_Vol-7.pdf](https://www.loc.gov/rr/frd/Military_Law/pdf/Law-Reports_Vol-7.pdf) (accessed 28 August 2019).

117. *Trial of Obersturmbannführer Rudolph Franz Ferdinand Hoess* in *Law Reports of Trials of War Criminals, selected and prepared by the United Nations War Crimes Commission*, Volume VII (London, 1948), 11-26 at [https://www.loc.gov/rr/frd/Military\\_Law/pdf/Law-Reports\\_Vol-7.pdf](https://www.loc.gov/rr/frd/Military_Law/pdf/Law-Reports_Vol-7.pdf) (accessed 28 August 2019).

118. Marcin Marcinko, 'The Concept of Genocide in the Trials of Nazi Criminals before the Polish National Tribunal', in Morten Bergsmo, CHEAH Wui Ling and YI Ping, eds., *Historical Origins of International Criminal Law: Volume 2* (Brussels, Torkel Opsahl Academic EPublisher, 2014), 639-696, 647..

119. Karolina Wierczynska and Grzegorz Wierczyński, 'Stefan Glaser', in Frédéric Mégret and Immi Tallgren, ed., *The Dawn of a Discipline: International Criminal Justice and Its Early Exponents* (Cambridge: Cambridge University Press, 2020), 306-334, 323-326.

victims – and treated ethnic Poles and Polish Jews alike as Polish citizens.<sup>120</sup> It complemented the mood of the media reporting. In this way the SNT actively promoted Soviet legal propaganda that sought to prevent the dissemination of information by the Germans intended to downplay their role in the atrocities. It also indirectly promoted Polish-Soviet relations in their common struggle to defeat fascism.<sup>121</sup> At the same time, the extension of the category of genocide worked against the Soviet position, which preferred political groups to be omitted, for obvious reasons.<sup>122</sup>

Importantly, Cyprian and Sawicki's prosecutorial approaches were informed by the Soviet model. As at the Soviet agitation trials, the struggle between good and evil, and the moment of reckoning, was on display at Nuremberg in the Soviet prosecutor's speeches. For example, one of the Soviet prosecutors at the Nuremberg trials, Roman Rudenko, also had prior prosecutorial experience at key national trials; in fact he had been the Chief Prosecutor at the Trial of the Sixteen.<sup>123</sup> Cyprian and Sawicki reflected upon their Soviet counterparts' performances at Nuremberg

The force of their arguments [General Rudenko, Colonel Pokorovsky and Colonel Smirnov] consisted in their straightforward and succinct presentation of the evidence. Their approach was more like that of representatives of the nation which had suffered [at] the hands of the criminals, and [who] now [were] present[ing] an account[,] rather than that of learned lawyers giving a well-balanced appraisal of someone's crimes. The account they had to present was [remarkably wide-ranging] in scope and shocking in precision; it could not admit of any legal scholasticisms in view of the overwhelming evidence of facts.<sup>124</sup>

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120. Gabriel Finder and Alexander Prusin, *Justice Behind the Iron Curtain: Nazis on Trial in Communist Poland* (Toronto: University of Toronto Press, 2018), 99-100.

121. Patrycja Grzebyk, 'The Role of the Polish Supreme National Tribunal in the Development of the Principles of International Criminal Law', in Morten Bergsmo, CHEAH Wui Ling and YI Ping, eds., *Historical Origins of International Criminal Law: Volume 2* (Brussels, Torkel Opsahl Academic EPublisher, 2014), 603-630.

122. Paulina Gulińska-Jurgiel, 'How to Punish National-Socialist Crimes in Poland', in Paulina Gulińska-Jurgiel, Yvonne Kleinmann, Miloš Řezník, Dorothea Warneck (eds) *Ends of War: Interdisciplinary Perspectives on Past and New Polish Regions* (Wallstein, 2019), 346-370.

123. Agata Fijalkowski, 'Politics, Law and Justice in People's Poland: the Fieldorf File', (2014) 73(1) *Slavic Review*, 85-107. The Trial of the Sixteen was a show trial of 16 members of the Polish Underground, who were accused of illegal activity and tried in Moscow in 1945.

124. Tadeusz Cyprian and Jerzy Sawicki, *Nuremberg in Retrospect: People and Issues of the Trial* (Warsaw: Western Press Agency, 1967), 48-49.

The source for the Soviet war crimes trials was an April 1943 Soviet Decree ‘On measures of punishment for German-Fascist villains guilty of killing and torturing the Soviet population and captive Red Army soldiers, for spies and traitors to the Motherland from among Soviet citizens and their accomplices’. Its key provision was quite vague and mandated harsh punishment for Axis war criminals and their collaborators. The term ‘atrocities’ was used in lieu of ‘war crimes’. The same judges and prosecutors who were recruited for Nuremberg had similar roles in the Moscow Trials of 1937. This was done to reinforce the aim that ‘the Hitlerites’ must be brought to justice.<sup>125</sup>

Notably, Sawicki was prosecutor at the Majdanek trials (held 27 November to 2 December 1944). In addition to the 1943 Moscow Declaration, the Majdanek prosecution also relied on international law, namely Article 46 of the Hague Regulations on war crimes. For Sawicki, the moment of reckoning was on display at the Majdanek trials, where his speech referred to the ‘system of evil’ that permeated the nazis’ vision of world order. ‘Words are created by humans, but what happened in the camp is inhuman. Words are comprehensible, but what happened here is incomprehensible. Words have their own logic, but what happened here... This is Majdanek! Imagine the powerlessness of mothers, who went to their deaths along with their children. This is Majdanek!’<sup>126</sup> The Majdanek trials dispensed justice swiftly, with defendants knowing of the charges only 48 hours before the trial and with limited legal advice. The Nuremberg process changed the way that these trials were conducted, as seen at the SNT proceedings.

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<sup>125</sup> Francine Hirsch, *Soviet Judgment at Nuremberg: A New History of the International Military Tribunal After World War II* (New York: Oxford University Press, 2020) and by the same author, ‘The Soviets at Nuremberg: International Law, Propaganda, and the Making of the Postwar Order’, (2008) *American Historical Review*, 701-730, at 710-711.

<sup>126</sup> Gabriel Finder and Alexander Prusin, *Justice Behind the Iron Curtain: Nazis on Trial in Communist Poland* (Toronto: University of Toronto Press, 2018), 38.

**FOTO8. Majdanek Trials, 1944 @IPN**

**FOTO9. Majdanek Trials, 1944 @IPN**

The imagery of the Majdanek trials is especially powerful, owing to the (unidentified) defence counsel's curled hand as he delivers his speech, with the defendant [?] weeping beside him [FOTO8].<sup>127</sup> It shows a degree of continuity between Soviet and Polish war crimes trials, where the audience, both national and international, was integral to the dispensing of justice in providing it with a veneer of legitimacy. The legal framework of the Majdanek trials mirrored the Soviet model in terms of style and performance, notably the Krasnodar and Kharkov trials, cited above [FOTO8 and FOTO9].

The Majdanek trials also took advantage of the propaganda against Germans, which was consistent and all-pervasive. Daily news bulletins would announce that there were no good Germans, only bad. Political leaders would ask that no mercy be shown to Germans who had escaped justice. Polish society at that date was steeped in a rhetoric of hatred towards the Germans. It was in this spirit that the Majdanek trials were conducted. The indoctrination would not be lost on the Polish legal team, in particular Cyprian. The momentum that was generated to dispense justice supported the request for Germans to be extradited to Poland to be tried for war crimes. The Polish stance was convincing. The country had been the site of atrocities, and it played an important role at Nuremberg with the documentation compiled by the Commission serving as evidence. Cyprian's visit to Buchenwald in April 1945 would see him establish a different kind of relationship with his country because of the responsibility he held in his post at the UNWCC, to gather insights and information about the crimes that had occurred there [FOTOS 4 and 5]. As Shaw notes, 'a lawyer is always at best more than simply a lawyer, just as the law is never nothing but the

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127. The note on the reverse of FOTO8 refers to defence counsel only.

law...[t]he words of the law contain more than they say. The texts are not just words. They have *anima*, spirit and that is to be preferred and to be followed'.<sup>128</sup> Shaw also sees that power in institutions, 'such as law to incite, induce, or seduce its subjects is only possible because social relations are always subject to sensory experience: consequently aesthetic responses trigger certain emotions which shape our personal and collective notions of beauty, which in turn, can motivate a greater concern for justice'.<sup>129</sup> Cyprian seemed to have understood this connection. The success of a prosecutor rests on her ethos, which is based in its turn on the power of rhetoric. Rhetoric, Shaw goes on to assert, 'offers a systematic account of how passions are the property of rational mental activity and rhetoric; whereby 'rhetoric based on emotion can offer an alternative mode of perception and consciousness'.<sup>130</sup>

A blend of pre-war legal education and the intensive legal training received in a new political order had offered Cyprian and his colleagues vital skills for survival and legal thinking alike. While Cyprian's legal background was the University of Jagiellonian in Kraków, Sawicki's was at Lwów, where Hersch Lauterpacht and Rafael Lemkin had studied.<sup>131</sup> Lemkin had been taught by Oswald Balzer (legal history), Ernest Till (civil law), and Stanisław Starzyński (constitutional and international law).<sup>132</sup> The intersection of

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128. Julia J.A.Shaw, *Law and the Passions: Why Emotions Matter for Justice* (Abingdon: GlassHouse Books, 2019), 17 noting Peter Goodrich, 'Flores quae faciunt coronam or the Flowers of Common Law', in O. Bendor, ed., *Law and Art: Ethics and Aesthetics* (London: Routledge, 2011), 259-272, 270-27.

129. Julia J.A.Shaw, *Law and the Passions: Why Emotions Matter for Justice* (Abingdon: GlassHouse Books, 2019), 29.

130. Julia J.A.Shaw, *Law and the Passions: Why Emotions Matter for Justice* (Abingdon: GlassHouse Books, 2019), 13. I thank colleagues at Royal Holloway, namely Christos Kremmydas, Lene Rubinstein, Simone Gigliotti and Lawrence Newport, organisers of the stimulating Nurnberg 2.0 workshops, for provoking further thoughts about the prosecutors' rhetoric at the Nuremberg trials.

131. Marek Wasowicz, 'Jerzy Sawicki', The Polish Internet Dictionary of Biographies at <https://www.ipsb.nina.gov.pl/a/biografia/jerzy-sawicki?print> (accessed 23 August 2019). For details concerning Hersch Lauterpacht and Ralph Lemkin and their studies in what was the city of Lemberg and then Lwów, see Philippe Sands, *East West Street* (London: Weidenfeld and Nicholson, 2016), 149-152.

<sup>132</sup>Adam Redzik, 'Masters of Rafał Lemkin: Lwów School of Law', in Agnieszka Bieńczyk-Missala, ed., *Civilians in contemporary armed conflicts: Rafał Lemkin's heritage* (Warszawa: Wydawnictwa Uniwersytetu Warszawskiego, 2017), 235-240; Adam Redzik, *Rafał Lemkin (1900-1959): co-creator of international criminal law: short biography* (Oficyna Allerhanda, 2017).

experiences between members of the Polish legal team and the Poles that emigrated to work in international law, whether in the academy or in legal practice, is not coincidental. The members of the Law Faculty (at the University of Lemberg, then Jan Kazimierz (1919-1939)) at the turn of the twentieth century included some of the finest and most inspiring legal thinkers of their generation, such as Roman Longchamps de Brier (civil law); Ludwik Ehrlich (international law), and Juliusz Makarewicz (criminal law).<sup>133</sup> Ehrlich wrote reports for the SNT on key points in international law.<sup>134</sup> This SNT narrative developed alongside the Soviet and Nuremberg trials, and cannot be detached from the special criminal courts created to implement the August 1944 Decree.

The influence of the SNT, as a court, was far-reaching, because its legal team possessed the right skills to make it work. Time, for the most part, was on its side. It relied on a great deal of testimony and it adhered to the basic principles of a fair trial, broadly understood. There are accounts of defence lawyers who wished to be recused from the proceedings, on the grounds that they themselves had been victims of the defendant, but were denied. The defence was rigorous and identified a fair number of gaps in the provisions.<sup>135</sup> The SNT was in large part about the prosecution, and the prosecution's hidden agenda. Certainly one of the items on that agenda was making these national war crimes trials a

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133. Philippe Sands, *East West Street* (London: Weidenfeld and Nicholson, 2016), 149-152.

134. Patrycja Grzebyk, 'The Role of the Polish Supreme National Tribunal in the Development of the Principles of International Criminal Law', in Morten Bergsmo, CHEAH Wui Ling and YI Ping, eds., *Historical Origins of International Criminal Law: Volume 2* (Brussels, Torkel Opsahl Academic EPublisher, 2014), 603-630, 609 available at <https://www.legal-tools.org/doc/d88600/pdf/> (accessed 29 August 2019), 620, n. 91. By the same author, 'Indywidualna odpowiedzialność za wojnę agresywną oraz zbrodni wojenne w świetle ekspertyz Ludwika Ehrlicha przed Najwyższym Trybunałem Narodowym' (Individual Responsibility for Waging an Aggressive War and War Crime in Light of Ludwik Ehrlich's Expertise Before the Supreme National Tribunal), in *Sila prawa zamiast prawa siły. Ludwik Ehrlich i jego wkład w rozwój nauki prawa międzynarodowego oraz wkład do stosunków międzynarodowych* (The Force of Law instead of the Law of Force: Ludwik Ehrlich and His Contribution to International Law and International Relations, eds. Patrycja Grzebyk and Rafał Tarnogórski (Warsaw: PISM, 2020), 67-83.

135. Patrycja Grzebyk, 'The Role of the Polish Supreme National Tribunal in the Development of the Principles of International Criminal Law', in Morten Bergsmo, CHEAH Wui Ling and YI Ping, eds., *Historical Origins of International Criminal Law: Volume 2* (Brussels, Torkel Opsahl Academic EPublisher, 2014), 603-630, 609 available at <https://www.legal-tools.org/doc/d88600/pdf/> (accessed 29 August 2019).



success and a source of law in future war crimes trials; a domestic imprint on the international criminal law timeline. This discussion revealed the complexities of one prosecutor's account, and the difficulties presented in the form of law itself – both hurdles to be overcome in order to reach this goal. Undoubtedly, the legal principles of the prohibition and the prevention of genocide was shaped by Cyprian's personal, educational, and professional backgrounds. These can be broken down further, with a view to bringing out the complexities. A personal background beginning with being born in a partitioned Poland. An educational background that included an analysis of law that was being developed in a newly reestablished Polish state. The re-development of law would occur again during Stalinist rule. Both pre-war and Soviet education would shape his approach to the interpretation of the law. Cyprian, like his mentors at Lwów, would forge an interpretation of the law that was ahead of its time. Moreover, it is important to bear in mind that, compared to the ongoing debates between Anglo-American lawyers during this period, there were no wider discourses in Poland among the legal community about legal approaches and solutions to war crimes.<sup>136</sup> These were challenging and unpredictable times. The one constant was Cyprian's photography, which he excelled at professionally. Was this what enabled him to keep his focus during this remarkable and challenging time?

Without any warning, the Tribunal was disbanded in 1948. The work of the UNWCC also ceased that same year.

Cyprian continued to write. Many of his peers were arrested and, indeed, disappeared. From 1950, Cyprian was professor at the Faculty of Law at the Marie Curie-Skłodowska

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<sup>136</sup> Joanna Lubecka, 'German Crimes Tried in Poland, in Magnus Brechtken, Władysław Buhlak and Jürgen Zarusky, eds., *Political and Transitional Justice in Germany, Poland and the Soviet Union from the 1930s to the 1950s* (Göttingen: Wallstein Verlag, 2019), 210-238, 211.

University in Lublin. Meanwhile Cyprian and Sawicki continued to document their experiences at Nuremberg. Cyprian nurtured his love of photography, and was admired for his approach to the art – described as ‘factual’. His writings on photography were aimed at amateur photographers. His images from the interwar period were exhibited at various international venues. His portfolio from this period shows a passion for landscape, but also snapshots of daily life, in the spirit of documentary photography.

#### **4. The Individual behind the Legal Principle**

##### **FOTO10. Tadeusz Cyprian. Toga i obywatel. @uw**

Directly, Cyprian reached out to Polish criminal law to resolve the question of prosecuting a new type of crime, involving atrocities on such a scale that they could not be allowed to go unpunished. He envisaged accountability and seeing genocide punished. These crimes had after all occurred in his homeland. Indirectly, his internal photographer established a connection with performativity, inspired in this regard by the national trials and their venues, and by legal propaganda informing the prosecutorial speeches of his peers. In this way the discussion has demonstrated how Cyprian’s application of the law and photography involve an affective dimension. This emotional aspect manifests loss as well as the desire to avenge evil. Cyprian’s outlook would have been motivated by the past and by the need to achieve accountability for war atrocities, as much as by the future in a newly constituted Poland. His vision was above all international, and his collaborations in print with Sawicki evince a determination to cement Poland’s role in establishing the international criminal legal principle that any person who commits - or is an accomplice to another - in the commission of an act which constitutes a crime under international law is responsible and therefore liable to be punished.<sup>137</sup> Cyprian made an impression on several members of the prosecutorial team

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137. Tadeusz Cyprian and Jerzy Sawicki, *Nuremberg in Retrospect: People and Issues of the Trial* (Warsaw:

at Nuremberg. The British prosecutor Shawcross, in a letter from June 1946, thanks Cyprian for making his visit to Poland memorable - Cyprian's English must have been excellent - 'I hope, also, that before long we shall have the opportunity of renewing our own friendship'.<sup>138</sup> The US prosecutor Robert Jackson wrote to Cyprian in October 1946 about how sorry he was not to be able to attend the conferral of a Doctoral Law degree by the University of Warsaw upon him.<sup>139</sup> And Elwyn Jones, junior counsel for Shawcross at Nuremberg, in a letter from July 1946, expresses deep gratitude and affirms his friendship.<sup>140</sup> These are testaments of lasting impressions and importance.

The visual images and accompanying narratives demonstrate the importance of the visual record, for Cyprian and for the wider legal discourse. Cyprian was surrounded by testimonies in the form of films and diaries, and importantly visual images, at Nuremberg, and in Poland. Moreover, he would have been familiar with Soviet efforts to document the war crimes trials, in the guise of film. For Cyprian the photograph was the key in laying out a record in the form of a visual account – perhaps this was the essence of both Cyprian as prosecutor and Cyprian as photographer [FOTO10]. Not only did he himself appreciate the materiality of the visual image, in reinforcing power relations, but also the visual image and its power for affective justice and establishing the visual legal account. These two latter elements are destined to outlive any dominant political narrative.

A photograph is thus much more than a captured moment. Here we see the moment that the image releases narratives about people, the limits of the law, the seeking of justice for atrocities and the longevity of the visual record. Cyprian's account challenges the legal

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Western Press Agency, 1967), 215-225. Also by the same authors, *Nazi Rule in Poland 1939-1945* (Warsaw: Polonia Publishing House, 1961).

138. IPN, file Tadeusz Cyprian, GK910/4, 802/4, Institute of National Remembrance.

139. IPN, file Tadeusz Cyprian, GK910/4, 802/4, Institute of National Remembrance.

140. IPN, file Tadeusz Cyprian, GK910/4, 802/4, Institute of National Remembrance.

historical discourses regarding this period. It shines a spotlight on a series of forgotten war crimes trials and on innovation in defining new sorts of crime in specific trials. The appreciation of visual images and their use in research are not intended to supersede other sources of law, but rather to complement them. The consideration of visual images overlaps with other sources of law to create a critical narrative, as seen in the case of the post-war Polish judiciary and war crimes prosecutor Tadeusz Cyprian [FOTO10].

Cyprian was an actor and an important creator of the concepts of international criminal law, as well as a lawyer embedded in the tragic period of Stalinist Poland, who in spite of all this tried to rise above the political sphere. He was, as the aptly named 2019 exhibition in Poznań shows, ‘one of them, and at the same time standing next to it’.<sup>141</sup> And he succeeded in this endeavour, also thanks to the photography.

### **Concluding Remarks**

This paper began its analysis with a photograph of the Polish war crimes prosecutor and photographer, Tadeusz Cyprian. It used the image to engage with an analysis about war crimes trials in Poland. This topic, though already addressed in several important works, has not been discussed from the point of view of law and the visual, where the image is treated as a source of data, existing alongside strictly legal sources. After an overview of Cyprian’s life account, the discussion turned to the individual behind the legal principle. These legal

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<sup>141</sup> Violetta Szostak, ‘Życie żołnierzy poza frontem na reporterskich zdjęciach sprzed stu lat. “Cyprian był jednym z nich, a zarazem stał obok” (The Life of Soldiers Outside the Front in Photographs from 100 Years Ago. “Cyprian was one them, and at the same time he was standing next to it”’, wyborcza.pl, 15 March 2019, at <https://poznan.wyborcza.pl/poznan/7,105531,24548228,wieczorem-wezuwiesz-jest-bardzo-ozywiony.html?disableRedirects=true> (accessed 19 August 2020) – the piece was published on the occasion of an exhibition of Cyprian’s WWI photographs organised in Poznań in 2019.

principles, the promotion and prevention of genocide, concern the way that the prosecution before the SNT treated war crimes. In the trials, Cyprian advanced arguments that predated judgments at Nuremberg. The legal principles in play were genocide, murder and representing Polish Jews as Polish citizens. We learned that Cyprian was a prolific writer about photography during his time as prosecutor. Many works were published in the 1950s. His photographs of Poland after WW2 show the full extent of the devastation. His appreciation of the role of documentation in photographic work would inform his endeavours as a lawyer. Seeking for a way to address atrocities, for which there was then no adequate law, meant looking to the Nuremberg proceedings and at domestic Polish law, to fill the gaps. It is clear that Cyprian was himself devastated by the losses suffered by his country. He would have been conscious of the Stalinisation of justice in Poland and the vulnerability of his profession. Yet he managed to create a basis on which to pursue war crimes trials in a fashion that is not only underreported, but underappreciated. Only very recently have works addressed the far-reaching rulings that at times appear in Cyprian. We thus find them cited by present-day judges in contemporary war crimes rulings. If the mutability of law shows its link to politics, it may be that the author of a legal principle will have hidden a kernel of longevity within the law.



**FOTO1. Tadeusz Cyprian, year unknown. From the private collection of @Tomasz Mościcki**



**FOTO2. Royal Castle, Warsaw 1945 @Cyprian, commons.wikipedia.org**



**FOTO3. War, Warsaw 1949 @Cyprian, pl.wikipedia.org**



**FOTO4. Buchenwald, 1945. Cyprian. 26590 @USHMM**



**FOTO5. Buchenwald, 1945. Cyprian. 26592 @USHMM**

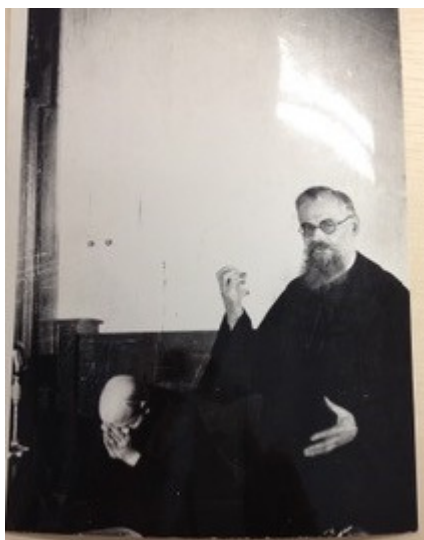


**FOTO6. 1315-2-1, Leon Chajn at Judicial Gathering in Wroclaw 1946 @IPN**



**FOTO7. 1315-33-2 Judicial Gathering in Wroclaw 1946 @IPN**





**FOTO8. Majdanek Trials, 1944 @IPN**



**FOTO9. Majdanek Trials, 1944 @IPN**



**FOTO10. Tadeusz Cyprian (year unknown). Toga i obietyw @uw**