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# Nuremberg and the Crime of Abortion

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## ARTICLES

### NUREMBERG AND THE CRIME OF ABORTION

Jeffrey C. Tuomala\*

#### ABSTRACT

THE crime of abortion played prominently in two international trials held at Nuremberg following World War II—the *Goering* and *Greifelt* cases. Allied prosecutors made the case that voluntary and involuntary abortion were war crimes and crimes against humanity. The *Goering* judgment identified the Political Leadership Corps of the Nazi Party as a criminal organization, in part because of its policies promoting abortion.

The *Greifelt* indictment charged ten defendants with voluntary and involuntary abortion. The prosecution's case focused in part on the Nazis' removal of the protection of law from unborn children in occupied Poland and unborn children of Eastern workers in Germany that the Nazis considered racially non-valuable. The prosecution argued that voluntary abortion was punishable because it was a crime against the unborn child. The prosecution proceeded on the theory that Germany had a duty to afford protection of law to unborn children and that the deliberate failure of high-level officials to do so constituted crimes against humanity and genocide by acts of omission. After summarizing evidence of voluntary abortion policies in its judgment, the *Greifelt* tribunal found two defendants guilty and one not guilty of forcible abortion and seven not guilty simply of abortion.

The Nuremberg tribunals generally limited their jurisdiction over crimes against humanity to offenses committed during wartime. The post-WWII doctrine that high-level government officials are liable for massive human rights violations committed against their own citizens in peacetime has become widely accepted and has major implications for international criminal law.

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## INTRODUCTION

The trial of Nazi war criminals at Nuremberg following World War II marked a milestone in the enforcement of international human rights.<sup>1</sup> Soon after Allied soldiers brought an end to the frenzy of calculated Nazi atrocities, Allied lawyers exposed the immensity of those atrocities in war-crimes trials.<sup>2</sup> International tribunals at Nuremberg tried individual defendants for conspiracy, crimes against peace, war crimes, and crimes against humanity.<sup>3</sup> Nazi abortion policies were among the atrocities that Allied lawyers prosecuted and that international tribunals held to constitute criminal activities.

The trials and judgments at Nuremberg were not limited to evidence and findings related to guilt or innocence of individual defendants in the dock. The German state, the Nazi Party, and even dead high-ranking officials—including Adolf Hitler and Heinrich Himmler—were in effect placed on trial. To ensure that the German people—and indeed the world—would know what had happened and never forget was a main purpose for creating a detailed and lengthy record of the proceedings.<sup>4</sup> The Nuremberg tribunals pronounced judgment on policies and activities orchestrated at the highest levels, including Nazi abortion policies.

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1. There were 13 trials held in Nuremberg, Germany. In the first and most important of these trials, *United States v. Goering*, 6 F.R.D. 69 (Int'l Mil. Trib. 1947), the Allied powers prosecuted 22 major Nazi defendants before the International Military Tribunal. The most comprehensive record of the proceedings in that case is found in 1-42 TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL (1946) [hereinafter IMT], available at [http://www.loc.gov/rr/frd/Military\\_Law/NT\\_major-war-criminals.html](http://www.loc.gov/rr/frd/Military_Law/NT_major-war-criminals.html). The *Goering* case commenced on November 20, 1945, and concluded on October 1, 1946. 2 IMT, *supra*, at 29; 22 IMT, *supra*, at 589. The IMT found 19 of the 22 defendants guilty of at least 1 offense and sentenced 12 to death by hanging. 1 IMT, *supra*, at 366-67 (Tabulation of Sentences). The United States prosecuted 177 other Nazi defendants in 12 subsequent proceedings before several Nuremberg Military Tribunals. The most comprehensive records of those proceedings are found in 1-15 TRIALS OF WAR CRIMINALS BEFORE THE NUERNBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10 (1946-49) [hereinafter NMT], available at [http://www.loc.gov/rr/frd/Military\\_Law/NTs\\_war-criminals.html](http://www.loc.gov/rr/frd/Military_Law/NTs_war-criminals.html). The trials in those 12 cases began in October 1946 and concluded in April 1949. 1 NMT, *supra*, at III. Brigadier General Telford Taylor served as Chief of Counsel for War Crimes in the subsequent proceedings before the Nuremberg Military Tribunals. His Final Report provides a summary of those cases and introduction to the issues. TELFORD TAYLOR, FINAL REPORT TO THE SECRETARY OF THE ARMY ON THE NUERNBERG WAR CRIMES TRIALS UNDER CONTROL COUNCIL LAW NO. 10 (1949) [hereinafter TAYLOR, FINAL REPORT], available at [http://www.loc.gov/rr/frd/Military\\_Law/NT\\_final-report.html](http://www.loc.gov/rr/frd/Military_Law/NT_final-report.html). Of the 177 defendants prosecuted to verdict, 142 were convicted of at least 1 offense and 24 were sentenced to death. TAYLOR, FINAL REPORT, *supra*, at 91.

2. The war in Europe ended on May 9, 1945, when Adolf Hitler's successor, Admiral Karl Doenitz, then serving as Germany's Head of State, surrendered to the Allies. 1 IMT, *supra* note 1, at 310-11.

3. *E.g.*, *id.* at 28; 4 NMT, *supra* note 1, at 608-18.

4. *See, e.g.*, 3 IMT, *supra* note 1, at 92 (U.K. Prosecutor's Opening Speech); 5 IMT, *supra* note 1, at 370 (French Prosecutor's Opening Speech); 22 IMT, *supra* note 1, at 171-72 (U.K. Prosecutor's Final Speech); Henri Donnedieu de Vabres, *The Nuremberg Trial and the Modern Principles of International Criminal Law*, reprinted in PERSPECTIVES ON THE NUREMBERG TRIAL 213, 262 (Guénaél Mettraux ed., 2008).

The International Military Tribunal ("IMT") tried the major Nazi defendants in the single case *United States v. Goering*, which was the first and most important of the Nuremberg trials.<sup>5</sup> Lawyers from the four major Allied powers<sup>6</sup>—the United States, the United Kingdom, France, and the Soviet Union—comprised a prosecution team that introduced evidence of Nazi abortion policies and practices in support of the charges of war crimes and crimes against humanity.<sup>7</sup> Prosecutors also argued that Nazi abortion policies encouraging and permitting abortion were among the criminal activities marking the Political Leadership Corps of the Nazi Party as a criminal organization.<sup>8</sup>

In its judgment, the IMT found that defendants Martin Bormann and Alfred Rosenberg were guilty of the crimes of "Murder and Ill-treatment of Civilian Population."<sup>10</sup> That finding was based in part on their roles in implementing Nazi population policies in the German Occupied Eastern Territories.<sup>11</sup> Those policies called for the reduction of fertility among non-Aryan peoples through the promotion of abortion and contraceptives.<sup>12</sup> The IMT also declared that the Political Leadership Corps was a criminal organization, based in part on its implementation of abortion policies for dealing with Eastern workers.<sup>13</sup> Those policies provided that pregnant workers could apply for permission to abort their racially non-valuable children.<sup>14</sup>

In *United States v. Greifelt*,<sup>15</sup> one of the 12 "subsequent proceedings,"<sup>16</sup> a Nuremberg Military Tribunal ("NMT") tried 10 Nazi defendants for the crime of

5. 6 F.R.D. 69 (Int'l Mil. Trib. 1947). See also 1 IMT, *supra* note 1, at 27 (Indictment), 171 (Judgment). Telford Taylor also served as a key member of the prosecution team in *Goering*. His book, *THE ANATOMY OF THE NUREMBERG TRIALS: A PERSONAL MEMOIR* (Alfred A. Knopf ed., 1992) [hereinafter TAYLOR, *THE ANATOMY OF THE NUREMBERG TRIALS*], provides a very informative and readable insider's view of the *Goering* proceedings.

6. 1 IMT, *supra* note 1, at 3-5 (Prosecution Counsel).

7. See discussion *infra* Part III.B. and accompanying footnotes.

8. See discussion *infra* Part III.C.2.

9. Bormann served as Secretary to Hitler. 1 IMT, *supra* note 1, at 338 (Judgment). The IMT convicted Bormann of war crimes and crimes against humanity *in absentia*. *Id.* at 339-41 (Judgment). Rosenberg was Reich Minister for the Occupied Eastern Territories. *Id.* at 294 (Judgment). The IMT found him guilty of crimes against peace, conspiracy, war crimes, and crimes against humanity. *Id.* at 294-96 (Judgment).

10. 1 IMT, *supra* note 1, at 232, 237 (Judgment). See discussion *infra* Part III.D.1.

11. For examples of these policies, see *infra* notes 12 and 13.

12. See discussion *infra* Part III.B.3. See also 8 OFFICE OF UNITED STATES CHIEF OF COUNSEL FOR PROSECUTION OF AXIS CRIMINALITY: NAZI CONSPIRACY AND AGGRESSION 52-59 (1946) [hereinafter Document R-36] (translation of Document R-36). "The fertility of the Slavs is undesirable. They may use contraceptives or practice abortion, the more the better." *Id.* at 53.

13. See discussion *infra* Part III.D.2. The IMT based its findings primarily on Document D-884, which set forth Nazi abortion policies as implemented in the territory of Baden-Alsace. OFFICE OF UNITED STATES CHIEF OF COUNSEL FOR PROSECUTION OF AXIS CRIMINALITY: NAZI CONSPIRACY AND AGGRESSION Supp. A. 1018-23 (1947) [hereinafter Document D-884] (translation of Document D-884).

14. See discussion *infra* Part III.B.4.

15. *The United States v. Ulrich Greifelt et al.*, microformed on Nat'l Archives Collection of World War II War Crimes Records, Records of the U.S. Nuremberg War Crimes Trials, Record Group 238, United States of America v. Ulrich Greifelt et al. Oct. 10, 1947-Mar. 10, 1948,

abortion.<sup>17</sup> In that case, the indictment specifically alleged—and the prosecution argued—that both voluntary and forcible abortions were international crimes.<sup>18</sup> The trial proceeded to judgment on the charges of voluntary and forcible abortion despite defendants' argument that at least voluntary abortion did not constitute a crime under international law.<sup>19</sup>

The NMT entered extensive findings regarding Nazi abortion policies in Poland and Germany.<sup>20</sup> These included the abortion policies implemented in occupied Poland, which called for the promotion of abortion and contraceptives.<sup>21</sup> The *Greifelt* tribunal also recounted policies promoting abortion among Eastern workers in Germany, as adopted by high-ranking officials—in particular, Heinrich Himmler, Leonardo Conti, and Ernst Kaltenbrunner—who were not available for trial.<sup>22</sup> The NMT convicted two *Greifelt* defendants of forcible abortion, while acquitting one.<sup>23</sup> The NMT acquitted the other seven defendants of the simple charge of abortion.<sup>24</sup>

While no evidence produced at the *Greifelt* trial showed that any particular abortion carried out under Nazi abortion policies actually had been forced, the NMT ruled that the language of one policy document disproved defendants' contention that all abortions had been voluntary.<sup>25</sup> Although the document

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Microfilm Publication M894 (38 Reels) [hereinafter Microfilm Publication M894]. The majority of U.S. Nuremberg War Crimes records are available at the National Archives website, <http://www.archives.gov/research/captured-german-records/war-crimes-trials.html>. Microfilm Publication M894 includes the complete record of the *Greifelt* proceedings. An abridged record of the proceedings is found in 4 NMT, *supra* note 1, at 597-1185 and 5 NMT, *supra* note 1, at 1-192. Because the abridged record is more widely available, when documents have been reprinted in full, citations will usually be made only to 4 NMT or 5 NMT. When a document is not reprinted in 4 NMT or 5 NMT, the citations will be only to the microform. Generally, both sources are cited when an excerpt of a relevant part of a document is reprinted in 4 NMT or 5 NMT.

16. The 12 trials held before the Nuremberg Military Tribunals following the *Goering* case are referred to as the "Subsequent Proceedings." See TAYLOR, FINAL REPORT, *supra* note 1, at 13.

17. 4 NMT, *supra* note 1, at 609-10; 5 NMT, *supra* note 1, at 154-64.

18. See discussion *infra* Parts IV.A.1, IV.D.

19. See discussion *infra* Part IV.E.1-4.

20. 5 NMT, *supra* note 1, at 109-12.

21. Prosecution Exhibit No. 82, Document No. NO-3732, Microfilm Publication M894, *supra* note 15, at Roll 14, Document Page 34, Frame 0474 (quoted in 5 NMT, *supra* note 1, at 95-96 ("All measures serving birth control are to be admitted or to be encouraged. Abortion must not be punishable in the remaining territory. Abortives and contraceptives may be publicly offered for sale in every form without any police measures being taken.... Institutes and persons who make a business of performing abortions should not be prosecuted by the police.")).

22. Himmler and Conti committed suicide before they could be tried, and Kaltenbrunner was executed pursuant to a sentence of the IMT. JOSEPH PERISCO, NUREMBERG: INFAMY ON TRIAL 175, 70, 426 (1994).

23. 5 NMT, *supra* note 1, at 154-64.

24. *Id.* See also discussion *infra* Part IV.F.4. The prosecution had failed to produce sufficient evidence that the eight acquitted defendants played a significant role in implementing Nazi abortion policies, either voluntary or forcible. See also discussion *infra* Part IV.F.4.

25. A letter from the Director of the SD-sub-district Koblenz to all SD-(Main) Branch Offices dated Feb. 18, 1944 stated in part: "Although pregnancy interruptions ought to be carried out on a voluntary basis only, pressure is to be applied in each of these cases." Prosecution Exhibit 471(a), Document No. L-8, Microfilm, Publication M894, *supra* note 15, at Roll 16, Document Page 1,

arguably created an ambiguity as to whether the NMT considered voluntary as well as forcible abortion to be a war crime and crime against humanity, there was no ambiguity in the prosecution's theory of the case—abortion is a crime against the unborn child.<sup>26</sup>

Part I of this article sets out the juridical origin and legal framework for both the IMT, which tried just one case, and the NMTs which tried the 12 subsequent cases.<sup>27</sup> The IMT and NMTs were all founded in international agreements rather than in domestic law. As such, they were international courts and not courts of the United States or any other nation state.<sup>28</sup>

Part II provides a broad description of Nazi race theory and the political goals underlying the *Goering* case tried before the IMT and the *Greifelt* case tried before an NMT.<sup>29</sup> Nazi race theory and political goals shaped Nazi abortion policies and practices, which in turn provide the context for understanding the abortion charges, evidence introduced, and prosecution theories of the cases.

Part III deals with the crime of abortion as Allied prosecutors and the IMT handled it in *Goering*.<sup>30</sup> Although abortion was not expressly charged in the *Goering* indictment, the evidence offered and arguments made outlined the basic contours of Nazi abortion policies and the prosecution's theory of the charges and applicable law.

For a number of reasons, Part IV deals with the *Greifelt* case at greater length than Part III deals with the *Goering* case.<sup>31</sup> The *Greifelt* indictment expressly charged abortion as a crime and stated some of the particulars of the prosecution's case, including the legal theories by which the prosecution concluded that abortion was a war crime and crime against humanity.<sup>32</sup> The prosecution and defense also had considerably more evidence of Nazi abortion policies by the time of the *Greifelt* trial than was available at *Goering*.<sup>33</sup> Additionally, the NMT's judgment in *Greifelt* addressed the bases of its decision with regard to abortion in greater detail.<sup>34</sup>

## I. LEGAL FRAMEWORK FOR THE NUREMBERG TRIALS

The IMT and the NMTs were creatures of international law, not of national law. As such, their precedential value should be viewed as that of international courts, not of American courts.

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Frame 0102. See discussion *infra* Part IV.B.2.iv (the language directed that "pressure" was to be applied when mothers did not initiate applications for permission to abort their racially non-valuable children).

26. See discussion *infra* Part IV.D.2.i.

27. See discussion *infra* Part I.

28. See discussion *infra* Part I.

29. See discussion *infra* Part II.

30. See discussion *infra* Part III.

31. See discussion *infra* Part IV.

32. See discussion *infra* Part IV.A.1.

33. See discussion *infra* Part IV.B-C.

34. See discussion *infra* Part IV.F.1-4.



During World War II and soon after it ended, the Allied powers completed three international agreements establishing the basis for the trial of Nazi war criminals. The first was the Declaration on German Atrocities ("Moscow Declaration"), which provided the common legal authority for all 13 international war-crimes trials convened in Nuremberg.<sup>35</sup> The second was the Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis ("London Agreement"), which established the IMT that tried the single case of *Goering*.<sup>36</sup> The third agreement was the Declaration Regarding the Defeat of Germany and the Assumption of Supreme Authority with Respect to Germany ("Berlin Declaration"),<sup>37</sup> which provided for the international occupation government of post-war Germany.<sup>38</sup> Once established, that international government authorized the four major powers to try additional cases. Pursuant to that authority, the United States tried the 12 subsequent cases.<sup>39</sup>

#### A. *The Moscow Declaration*

On November 1, 1943, the United Kingdom, the United States, and the Soviet Union signed the Moscow Declaration, declaring their intent to try Nazi and other German war criminals.<sup>40</sup> Although the Moscow Declaration did not directly establish the Nuremberg tribunals, it established the basic jurisdictional principles for conducting war crimes trials upon the conclusion of hostilities.<sup>41</sup>

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35. Declaration on German Atrocities, Nov. 1, 1943, reprinted in 4 NMT, *supra* note 1, at X [hereinafter Moscow Declaration].

36. Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, and Charter of the International Military Tribunal, Aug. 8, 1945, 59 Stat. 1544, 82 U.N.T.S. 280, reprinted in 1 IMT, *supra* note 1, at 8 [hereinafter London Agreement].

37. *Arrangements for Control of Germany by Applied Representatives*, 12 DEP'T ST. BULL. 1051 (1945), available at <http://www.archive.org/details/departementofstatx1245unit> [hereinafter Berlin Declaration]; Hans Kelsen, *The Legal Status of Germany According to the Declaration of Berlin*, 39 AM. J. INT'L L. 518, 518-27 (1945).

38. Berlin Declaration, *supra* note 37, at 1051.

39. London Agreement, *supra* note 36.

40. Moscow Declaration, *supra* note 35.

41. *Id.* The Declaration states:

Accordingly, the aforesaid three allied Powers, speaking in the interests of the thirty-two [thirty-three] United Nations, hereby solemnly declare and give full warning of their declaration as follows:

At the time of the granting of any armistice to any government which may be set up in Germany, those German officers and men and members of the Nazi party who have been responsible for, or have taken a consenting part in the above atrocities, massacres, and executions, will be sent back to the countries in which their abominable deeds were done in order that they may be judged and punished according to the laws of these liberated countries and of the free governments which will be created therein.

.....  
The above declaration is without prejudice to the case of the major criminals, whose offences have no particular geographical localisation and who will be punished by the joint decision of the Governments of the Allies.

*Id.*

These jurisdictional principles included the principle that the Allies would try, by joint agreement, a category of cases involving major war criminals who had committed crimes having no particular geographical location.<sup>42</sup> A second category of cases, generally involving less important figures who had committed crimes in particular locations, were to be tried in domestic courts of those countries in which the crimes had been committed.<sup>43</sup>

*B. The London Agreement and Charter*

On August 8, 1945, the four major Allied powers executed the London Agreement, thereby establishing the IMT as the organ to try those major figures whose offenses had "no particular geographical location."<sup>44</sup> The London Agreement also affirmed the second principle contained in the Moscow Declaration—war criminals of lesser prominence would be returned to those countries where their crimes had been committed for trial before domestic courts.<sup>45</sup> Additionally, the London Agreement recognized the jurisdiction of "occupation court[s]" to try war criminals.<sup>46</sup> While all courts—be they international or domestic in nature—were to apply international law, only the IMT and the NMTs were creatures of international agreement.<sup>47</sup> Until the Nuremberg trials, war crimes had been tried almost exclusively in national courts.<sup>48</sup>

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42. *Id.*

43. *Id.*

44. The London Agreement stated: "There shall be established after consultation with the Control Council for Germany an International Military Tribunal for the trial of war criminals whose offenses have no particular geographical location whether they be accused individually or in their capacity as members of organizations or groups or in both capacities." London Agreement, *supra* note 36, art. 1. Robert Jackson signed the London Agreement as representative of the United States. *Id.* An analysis of the authority of the President to make international agreements and their nature as law falls beyond the scope of this article. It is assumed here that executive agreements bind the U.S. internationally and that Jackson's delegation of authority was lawful. For a discussion of the status of executive agreements as U.S. law, see RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 303 cmt. g.

45. The London Agreement further provided that "[n]othing in this Agreement shall prejudice the provisions established by the Moscow Declaration concerning the return of war criminals to the countries where they committed their crimes." London Agreement, *supra* note 36, art. 4.

46. The London Agreement stated that "[n]othing in this Agreement shall prejudice the jurisdiction or the powers of any national or occupation court established or to be established in any allied territory or in Germany for the trial of war criminals." *Id.* art. 6.

47. See generally Timothy C. MacDonnell, *Military Commissions and Courts-Martial: A Brief Discussion of the Constitutional and Jurisdictional Distinctions Between the Two Courts*, 2002 ARMY LAW. 19, 19-20 (discussing distinctions between military commissions, courts-martial, and occupation courts that are created by national law and used to try war crimes).

48. Waldemar A. Solf, *War Crimes and the Nuremberg Principle*, in NATIONAL SECURITY LAW 359, 363-64 (John Norton Moore et al. eds., 1990); U.S. DEP'T OF THE ARMY, THE LAW OF LAND WARFARE, FIELD MANUAL 27-10, at 180-81 (1956).

The Allies adopted the Charter of the International Military Tribunal ("London Charter") pursuant to the London Agreement.<sup>49</sup> The London Charter determined the IMT's composition,<sup>50</sup> defined offenses,<sup>51</sup> delegated powers of investigation and prosecution,<sup>52</sup> established the tribunal's powers and procedures,<sup>53</sup> and established punishments.<sup>54</sup> Four judges, one from each of the major Allied powers, comprised the tribunal.<sup>55</sup> Each of the four powers appointed a Chief Prosecutor.<sup>56</sup> The Charter defined the four offenses that the IMT had jurisdiction to try,<sup>57</sup> and it made provisions for declaring organizations to be criminal.<sup>58</sup>

Although it was originally envisioned that the IMT would try more than one case, the United States made it clear before the first trial commenced that it would not participate in any further prosecutions before the IMT.<sup>59</sup> The logistical burdens and procedural difficulties in trying cases before the IMT were simply too great.<sup>60</sup>

### C. *The Berlin Declaration and Control Council Law 10*

Although American lawyers prosecuted *United States v. Greifelt* in the name of the United States before a panel of American judges, it was an international tribunal and not a domestic one.<sup>61</sup> There are several reasons for this conclusion.

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49. Charter of the International Military Tribunal, *reprinted in* 1 IMT, *supra* note 1, at 10 [hereinafter London Charter]. Robert Jackson negotiated the London Charter as representative of the United States. *Id.* at 18. *See also* Hirota v. MacArthur, 335 U.S. 876, 879 (1948).

50. London Charter, *supra* note 49, arts. 2-4.

51. *Id.* art. 6.

52. *Id.* arts. 14-15.

53. *Id.* arts. 16-25.

54. *Id.* arts. 27-28.

55. An alternate judge from each of the four major Allied powers sat at the trial and took part in all deliberations, but did not have a vote. London Charter, *supra* note 49, arts. 2 & 4(a). For an account of the process of selecting the American judges, see TAYLOR, THE ANATOMY OF THE NUREMBERG TRIALS, *supra* note 5, at 94-95.

56. London Charter, *supra* note 49, art. 14. President Truman appointed Associate Justice Robert H. Jackson of the U.S. Supreme Court to serve as the United States' Chief Prosecutor. Exec. Order No. 9547, 3 C.F.R. 378 (1945), *reprinted in* 4 NMT, *supra* note 1, at IX.

57. London Charter, *supra* note 49, art. 6 (conspiracy, crimes against peace, war crimes, and crimes against humanity).

58. *Id.* art. 9.

59. *Id.* art. 5. *See also* TAYLOR, FINAL REPORT, *supra* note 1, at 24-27; TAYLOR, THE ANATOMY OF THE NUREMBERG TRIALS, *supra* note 5, at 287-88.

60. TAYLOR, FINAL REPORT, *supra* note 1, at 24-27; TAYLOR, THE ANATOMY OF THE NUREMBERG TRIALS, *supra* note 5, at 287-88.

61. Taylor explained why the subsequent proceedings named the United States rather than the Control Council as the prosecuting party:

The question whether or not the charges should be laid in the name of the United States presented some difficulties. The definition of the crimes to be punished and the authority to constitute tribunals to try persons so charged were contained in quadripartite enactment partaking of the nature of both statute and treaty. Accordingly, should not the charges have been brought in the name of the Control Council or of the four occupying powers? On the

First, the NMTs owed their origin and jurisdiction to an international agreement (the Berlin Declaration), which established an occupation government for Germany.<sup>62</sup> Second, the NMTs that tried the subsequent cases themselves ruled that they were international courts.<sup>63</sup> Third, on several occasions the U.S. Supreme Court ruled that it lacked jurisdiction to consider petitions for writs of habeas corpus from Nuremberg defendants.<sup>64</sup> The main reason the Court had no jurisdiction was that the NMTs were not courts of the United States.<sup>65</sup>

1. *Control Council Law 10 Enacted by an International Governing Body*

The four major powers established the Allied Control Council—comprised of military representatives from each of those powers—to govern post-war Germany.<sup>66</sup> It enacted Control Council Law No. 10 (“C.C. Law 10”), which authorized the four powers to try war criminals in their respective occupation zones.<sup>67</sup> C.C. Law 10 provided a uniform basis for trying additional major war criminals that the IMT could have tried but did not.<sup>68</sup> The Commander of the American Occupation Zone adopted Ordinance No. 7 to exercise the jurisdiction delegated to him under C.C. Law 10.<sup>69</sup>

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other hand, Control Council Law No. 10 (Art. III) delegated to each of the occupying authorities, within their respective zones, the right to arrest war crimes suspects and to determine who should be brought to trial. Since an indictment is in essence a statement of charges against a designated person or group of persons, and since the selection of defendants was made under the authority of the American Zone Commander, it appeared appropriate to bring the charges in the name of the United States of America.

TAYLOR, FINAL REPORT, *supra* note 1, at 71.

62. Berlin Declaration, *supra* note 37.

63. See TAYLOR, FINAL REPORT, *supra* note 1, at 71. See also discussion *infra* Part I.C.2.

64. See discussion *infra* Part I.C.3.

65. *Id.*

66. Berlin Declaration, *supra* note 37.

67. Punishment of Persons Guilty of War Crimes, Crimes Against Peace and Against Humanity, Control Council Law No. 10 (Dec. 20, 1945) [hereinafter C.C. Law 10], reprinted in 4 NMT, *supra* note 1, at XVIII.

68. The Law states:

In order to give effect to the terms of the Moscow Declaration of 30 October 1943 and the London Agreement of 8 August 1945, and the Charter issued pursuant thereto and in order to establish a uniform legal basis in Germany for the prosecution of war criminals and other similar offenders, other than those dealt with by the International Military Tribunal, the Control Council enacts as follows.

*Id.* pmbl. “The Moscow Declaration ... and the London Agreement ... are made integral parts of this Law.” *Id.* art. I. “Each occupying authority, within its Zone of occupation” had the power to arrest suspects, hold trials, and establish rules of procedure to be followed. *Id.* art. III. C.C. Law 10 affirmed the policy of returning war criminals whose offenses had a particular geographic location to be tried before domestic courts or occupation courts convened by authority of national law. *Id.* arts. III & IV.

69. Organization and Powers of Certain Military Tribunals, Ordinance No. 7 (Oct. 18, 1946) [hereinafter Ordinance No. 7], reprinted in 4 NMT, *supra* note 1, at XXIII. Ordinance No. 7 provided: “The purpose of this Ordinance is to provide for the establishment of military tribunals

Ordinance No. 7 established the NMTs, which were comprised of three or more members (judges), each of whom were admitted to the practice of law in the United States.<sup>70</sup> Additionally, Ordinance No. 7 authorized joint trials<sup>71</sup> with one or more other occupying powers, and authorized one or more of the United Nations to send representatives to participate in the prosecutions.<sup>72</sup> No joint trials were held, however, and the prosecutors were all American citizens except for a French prosecutor who participated in one case.<sup>73</sup>

## 2. *The Nuremberg Military Tribunals' Self-identification*

*Greifelt* was one of the 12 "subsequent proceedings" tried under C.C. Law 10 at Nuremberg in the American zone.<sup>74</sup> The NMT's judgment began by expressly noting that its "constitution, powers, jurisdiction, and functions ... are fully stated in the Judgment of the International Military Tribunal," and the three subsequent cases of *United States v. Brandt*, *United States v. Altstoetter*, and *United States v. Pohl*.<sup>75</sup> *Altstoetter*<sup>76</sup> addressed the issue of whether the NMTs were domestic or international tribunals in nature, concluding that they were international tribunals, as was the IMT.<sup>77</sup>

The Hague Convention Respecting the Laws and Customs of War on Land ("Hague Convention IV (1907)") required occupation forces to ensure that domestic courts continued to operate and that the law of the occupied state continued to be enforced.<sup>78</sup> Arguably, the *Greifelt* defendants were not guilty of

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which shall have power to try and punish persons charged with offenses recognized as crimes in Article II of Control Council Law No. 10 ...." Ordinance No. 7, *supra*, art I.

70. *Id.* art. II(b).

71. *Id.* art. II(c).

72. *Id.* art. III(b).

73. TAYLOR, FINAL REPORT, *supra* note 1, at 29. Taylor reported that the French tried several cases pursuant to C.C. Law 10 in the French Occupation Zone; the British choose to try war criminals at military commissions convened pursuant to royal warrant rather than pursuant to C.C. Law 10; and the Soviet Union apparently tried no one under C.C. Law 10. *Id.* at 7-8.

74. *Id.* at 118.

75. 5 NMT, *supra* note 1, at 88.

76. *United States v. Altstoetter*, 3 NMT, *supra* note 1, at 1. *Altstoetter* became known as the "Justice Case." TAYLOR, FINAL REPORT, *supra* note 1, at 168. It is probably the most famous of the subsequent Nuremberg cases as it was the subject of the motion picture. JUDGMENT AT NUREMBERG (United Artists 1961). The defendants were officials of the Nazi judicial system, and "[t]he nub of the prosecution's charge was that the defendants were guilty of 'judicial murder and other atrocities, which they committed by destroying law and justice in Germany, and then utilizing emptied forms of legal process for persecution, enslavement, and extermination on a vast scale.'" TAYLOR, FINAL REPORT, *supra* note 1, at 169. Sixteen officials were indicted and fourteen tried. *Id.* at 169 n.108.

77. 3 NMT, *supra* note 1, at 984.

78. As it provided, "The provisions contained in the Regulations referred to in Article 1, as well as in the present Convention, do not apply except between Contracting Powers, and then only if all the belligerents are parties to the Convention." Hague Convention (IV), Laws and Customs of War on Land art. 2, Oct. 18, 1907, 36 Stat. 2277, 205 Consol. T.S. 277 [hereinafter Hague Convention IV (1907)].

the crimes alleged because they had not acted contrary to German law.<sup>79</sup> The *Altstoetter* tribunal ruled that it would apply C.C. Law 10, not German law, and justified its ruling by distinguishing normal situations of wartime occupation as contemplated by Hague Convention IV (1907) from the postwar occupation of Germany, where the central government and other governing institutions had totally collapsed.<sup>80</sup> Because of the German government's collapse and the fact that the occupation government received its jurisdiction and powers from an international enactment, the Nuremberg tribunals were international in nature and bound to apply international law, not German law.<sup>81</sup>

The *Altstoetter* tribunal recognized the definition of international crimes as set out in the London Charter and C.C. Law 10 as binding.<sup>82</sup> Therefore, the pronouncements of national courts would not bind the NMTs even though the NMTs were convened in the American Occupation Zone by an American commander, prosecuted in the name of the United States by American prosecutors, and tried before a panel of American judges.<sup>83</sup> The tribunal stated:

Since the IMT Charter and C.C. Law 10 are the products of legislative action by an international authority, it follows of necessity that there is no national constitution of any one state which could be invoked to invalidate the substantive provisions of such international legislation.<sup>84</sup>

Thus, the NMTs are distinguished from domestic military commissions, which, although recognized by international law as legitimate, are created pursuant to national authority.<sup>85</sup> The Moscow Declaration, the London Charter, and C.C. Law 10 all recognized that national tribunals or courts have authority to

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79. The prosecution anticipated and addressed the argument that the Allied occupation government had a duty to enforce German law. 3 NMT, *supra* note 1, at 64.

80. *Id.* at 964. The Tribunal held:

The fact that C.C. Law 10 on its face is limited to the punishment of German criminals does not transform this Tribunal into a German court. The fact that the four powers are exercising supreme legislative authority in governing Germany and for the punishment of German criminals does not mean that the jurisdiction of this Tribunal rests in the slightest degree upon any German law, prerogative, or sovereignty. We sit as a Tribunal drawing its sole power and jurisdiction from the will and command of the Four occupying Powers.

*Id.*

81. The Tribunal held:

The argument that compliance with German law is a defense to the charge rests on a misconception of the basic theory which supports our entire proceedings. The Nuernberg Tribunals are not German courts. They are not enforcing German law. The charges are not based on violation by the defendants of German law. On the contrary, the jurisdiction of this Tribunal rests on international authority. It enforces the law as declared by the IMT Charter and C.C. Law 10 ....

*Id.* at 984.

82. *Id.* at 965.

83. *Id.*

84. *Id.*

85. See MacDonnell, *supra* note 47, at 20 (discussing military commission tribunals).

try war criminals. U.S. law also expressly recognizes the legitimate use of military commissions.<sup>86</sup> In fact, the United States has utilized commissions created under national law throughout its history to try war criminals, to serve as occupation courts, and to impose martial law.<sup>87</sup> Following World War II, the United States used military commissions created under national authority to try German and Japanese war criminals.<sup>88</sup> Because those military commissions were creatures of national law, Congress had the power to provide for judicial review of their judgments even though it chose not to do so.<sup>89</sup> The power of U.S. courts to exercise habeas corpus jurisdiction over foreign defendants tried by military commissions and confined outside the United States was, and continues to be, controversial.<sup>90</sup>

### 3. *The U.S. Supreme Court's Treatment of the NMTs*

Neither the London Charter nor C.C. Law 10 provided for judicial appeal. The London Charter stated that IMT judgments were not subject to judicial appeal, but gave the Control Council power to "reduce or otherwise alter the sentences" so long as it did not increase the severity.<sup>91</sup> The Military Governor in the American Occupation Zone exercised a similar power of review over decisions of the NMTs.<sup>92</sup> Nevertheless, several convicted defendants in the subsequent Nuremberg cases submitted applications of appeal to the U.S.

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86. Although the Uniform Code of Military Justice ("UCMJ") does not create military commissions, two sections of the UCMJ do refer to military commissions and other tribunals:

The provisions of this chapter conferring jurisdiction upon courts-martial do not deprive military commissions, provost courts, or other military tribunals of concurrent jurisdiction with respect to offenders or offenses that by statute or by the law of war may be tried by military commissions, provost courts, or other military tribunals.

10 U.S.C. § 821 art. 21 (2006). The UCMJ expressly provides that the President may prescribe procedures for "courts-martial, military commissions and other military tribunals." 10 U.S.C. § 836 art. 36.

87. See generally Michael O. Lacey, *Military Commissions: A Historical Survey*, 2002 ARMY LAW. 41. See also MacDonnell, *supra* note 47, at 19 (also discussing the different provisions of the U.S. Constitution from which courts-martial and military commissions derive their authority and their respective jurisdictions).

88. See, e.g., *In re Yamashita*, 327 U.S. 1 (1946) (military commission convened in the Philippines); *Johnson v. Eisentrager*, 339 U.S. 763 (1950) (military commission convened in Germany).

89. RICHARD H. FALLON, JR. ET AL., *HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 411 (5th ed. 2003).

90. See, e.g., *In re Yamashita*, 327 U.S. 1; *Madsen v. Kinsella*, 343 U.S. 341, 343 (1952); *Boumediene v. Bush*, 553 U.S. 723, 732-33 (2008).

91. London Charter, *supra* note 49, arts. 26, 29.

92. C.C. Law 10 delegated to zone commanders the power to establish rules of procedure for NMTs. C.C. Law 10, *supra* note 67, art. III.2. Pursuant to that authority, the U.S. zone's military government issued Ordinance No. 7, which provided that the judgments of the NMTs "shall be final and not subject to review," but that the Military Governor had the power to "mitigate, reduce, or otherwise alter the sentence" so long as he did not increase the severity. Ordinance No. 7, *supra* note 69, arts. XV, XVII.

Supreme Court, which the Court treated as motions for leave to file petitions for original writs of habeas corpus.<sup>93</sup> The Supreme Court denied all those petitions, denying all but two of them by a four-four vote of the justices.<sup>94</sup>

Six of the *Greifelt* defendants (Brueckner, Creutz, Hofmann, Huebner, Lorenz, and Schwalm) were among those who applied directly to the U.S. Supreme Court. The Court's Order denying relief in their case was very brief:

Treating the application in each of these cases as a motion for leave to file a petition for an original writ of habeas corpus, leave to file is denied. [Four of the Justices] are of the opinion that there is want of jurisdiction. U.S. Constitution, Article III, § 2, Clause 2; see *Ex parte Betz* and companion cases, all 329 U.S. 672 (1946), *Milch v. United States*, 332 U.S. 789 (1947); *Brandt v. United States*, 333 U.S. 836 (1948); *In re Eichel*, 333 U.S. 865 (1948); *Everett v. Truman*, 334 U.S. 824 (1948).<sup>95</sup>

This cryptic holding created an ambiguity as to the Court's rationale for finding a lack of jurisdiction. One possible rationale was that the U.S. Supreme Court does not have original jurisdiction in habeas actions. The holding in *Betz* supports this rationale, and the Court cited it.<sup>96</sup> In *Betz*, the Court ruled that "[t]he motions for leave to file petitions for writs of habeas corpus are denied for want of original jurisdiction."<sup>97</sup> In *Milch*, *Brandt*, and *Eichel*, however, the Court simply denied the petitions with no reason given.<sup>98</sup> In *Everett*, the Court gave the same reason it gave for the *Greifelt* defendants' denial—"there is want of jurisdiction. U.S. Constitution, Article III, § 2, Clause 2."<sup>99</sup>

A second possible rationale for finding no jurisdiction was that petitioners were foreign nationals being held outside the territory of the United States. The Court's handling of these jurisdictional issues as raised in *In re Yamashita* and *Johnson v. Eisentrager* supports this rationale.<sup>100</sup> However, the denial is best understood as based on a third rationale—that the NMTs were international courts and not courts of the United States, and that therefore, no U.S. court had appellate or habeas jurisdiction to review their decisions. This conclusion is

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93. JOHN ALAN APPLEMAN, *MILITARY TRIBUNALS AND INTERNATIONAL CRIMES* 346-49 (1954).

94. *Id.* at 347.

95. *In re Muhlbauer*, 336 U.S. 964, 964-65 (1949).

96. *Id.* at 965.

97. *Ex parte Betz*, 329 U.S. 672, 672 (1946) (per curiam).

98. *Milch v. United States*, 332 U.S. 789 (1947); *Brandt v. United States*, 333 U.S. 836 (1948); *In re Eichel*, 333 U.S. 865 (1948).

99. *Everett v. Truman*, 334 U.S. 824 (1948) (per curiam).

100. The Supreme Court found jurisdiction over General Yamashita, at least in part because it found that the Philippines were part of the United States: "Yamashita's offenses were committed on our territory, he was tried within the jurisdiction of our insular courts and he was imprisoned within the territory of the United States." *Johnson v. Eisentrager*, 339 U.S. 763, 780 (1950). By contrast, the petitioners in *Eisentrager* "at no relevant time were within any territory over which the United States is sovereign, and the scenes of their offense, their capture, their trial and their punishment were all beyond the territorial jurisdiction of any court of the United States." *Id.* at 778.



based on the U.S. Supreme Court's decision in *Hirota v. MacArthur*,<sup>101</sup> and the U.S. Court of Appeal for the D.C. Circuit's opinion in *Flick v. Johnson*.<sup>102</sup>

Because Justice Robert Jackson had negotiated the London Charter and had served as the U.S. prosecutor in *Goering*, he took no part in the petitions brought to the Supreme Court by Nuremberg defendants.<sup>103</sup> However, Justice Jackson decided it was best that he not remove himself from *Hirota*, a case involving Japanese war criminals tried before the International Military Tribunal for the Far East ("IMTFE").<sup>104</sup> The process by which the IMTFE was constituted and the *Hirota* case convened made it more like the NMT case of *Greifelt* than the IMT case of *Goering*.<sup>105</sup> The Supreme Court ruled that it lacked the power to grant the *Hirota* petitioners the relief requested, but not because it lacked original jurisdiction over habeas petitions, and not because the petitioners were foreign nationals confined outside the United States.<sup>106</sup> Instead, the Supreme Court ruled that the IMTFE sentencing the *Hirota* defendants was "not a tribunal of the United States," and that therefore, the Court lacked jurisdiction to review the defendants' convictions or sentences:

We are satisfied that the tribunal sentencing these petitioners is not a tribunal of the United States. The United States and other allied countries conquered and now occupy and control Japan. General Douglas MacArthur has been selected and is acting as the Supreme Commander for the Allied Powers. The military tribunal sentencing these petitioners has been set up by General MacArthur as the agent of the Allied Powers.

Under the foregoing circumstances the courts of the United States have no power or authority to review, to affirm, set aside or annul the judgments and sentences imposed on these petitioners and for this reason the motions for leave to file petitions for writs of *habeas corpus* are denied.<sup>107</sup>

The main difference between the NMTs and the IMTFE was that in Germany, four commanders—acting as agents of the Allied Powers<sup>108</sup>—enacted C.C. Law 10, which provided for the NMTs, whereas in Japan, MacArthur—acting as the sole agent of the Allied powers—promulgated an order establishing the IMTFE.<sup>109</sup> The IMT, on the other hand, was established directly by an international agreement—the London Charter.<sup>110</sup> Logically, the NMTs—like the IMTFE—were not tribunals of the United States.

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101. 338 U.S. 197 (1949) (per curiam).

102. *Flick v. Johnson*, 174 F.2d 983, 986 (1949).

103. Justice Jackson filed a memorandum in the case explaining why he had not participated in the German cases. *Hirota v. MacArthur*, 335 U.S. 876, 879 (1948).

104. *Id.* at 876-81.

105. *Hirota*, 338 U.S. at 198.

106. *Id.*

107. *Id.*

108. *See supra* Part I.C.1.

109. *Hirota*, 338 U.S. at 198.

110. London Charter, *supra* note 49, art. 1.

Friedrich Flick was tried and convicted by an NMT in Case No. 5.<sup>111</sup> He filed a petition for writ of habeas corpus in the U. S. District Court for the District of Columbia.<sup>112</sup> The district court dismissed the petition for lack of jurisdiction because Flick "[was] located and incarcerated ... in the American Occupation Zone of Germany, which is not part of the United States."<sup>113</sup> The court of appeals affirmed the district court's dismissal for lack of jurisdiction, but did so based on a different rationale:

If the court was not a tribunal of the United States, its actions cannot be reviewed by any court of this country. *Hirota v. MacArthur*, *supra*. If it was an international tribunal, that ends the matter. We think it was, in all essential respects, an international court. Its power and jurisdiction arose out of the joint sovereignty of the Four victorious Powers. The exercise of their supreme authority became vested in the Control Council. That body enacted Law No. 10, for the prosecution of war crimes.<sup>114</sup>

In *Flick*, the court of appeals understood that the rationale for the *Hirota* decision applied equally to a habeas action challenging decisions of the NMTs—neither the NMTs nor the IMTFE were U.S. courts; therefore, it had no jurisdiction over Flick's case.<sup>115</sup>

## II. NAZI RACE THEORY AND GERMANIZATION

The abortion policies followed from Nazi racial theory and were an integral part of a comprehensive plan for Germanization. On the one hand, only those persons with racially valuable Aryan blood had the capacity to be Germanized, as that process was not simply a matter of enculturation. On the other hand, the proliferation of non-Aryans presented a biological threat to Germany. Abortion policies were therefore designed to increase Germany's population by prohibiting abortion of Aryan children and to decrease non-German populations by encouraging abortion of non-Aryan children

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111. 6 NMT, *supra* note 1, at 3.

112. *Ex parte Flick*, 76 F. Supp. 979, 980 (1948).

113. *Id.* at 981.

114. *Flick v. Johnson*, 174 F.2d 983, 985 (1949). The court concluded:

Concededly, the International Military Tribunal, established under the London Agreement, was a court of international character. How, then, can it be said that Military Tribunal IV [NMT] was not of the same character, with its existence and jurisdiction rooted in the sovereignty of the Four Powers, exercised jointly through the supreme governing authority of the Control Council?

*Id.* at 986.

115. *Id.* at 983, 986.

### A. *Nazi Race Theory*

Two concepts were central to Nazi thought: "Race and Lebensraum," also known as "blood and soil."<sup>116</sup> These two concepts provided the motive force and the unifying focus for Nazi policies and actions.<sup>117</sup> Good blood—German blood—demanded suitable living space.<sup>118</sup> Germany had the right to seize territories to its east, exploit their people, and eventually destroy them.<sup>119</sup> The slogan "blood and soil" provides the context for understanding Nazi atrocities, including the promotion of abortion as a means of genocide.

#### 1. *Race or Blood*

The Nazis explained all of life, including law and politics, in terms of race.<sup>120</sup> Their view of race was a curious mixture of naturalism and mysticism.<sup>121</sup> Hitler asserted German racial supremacy based on his belief in a mythical Aryan race that was the fount of all that was good in human culture.<sup>122</sup> According to Hitler, the soul or psyche of the Aryan people was passed through the blood.<sup>123</sup> He believed that because Germans were more truly Aryan than any other people, they were the "Master Race."<sup>124</sup> Over the centuries, the mixture of blood had made it necessary to purify German blood of Slavic, Jewish, and other non-Aryan contamination.<sup>125</sup>

The Nazis imbued the concept of "blood" with beliefs borrowed from the Darwinian principle that the strong would triumph over the weak.<sup>126</sup> German leaders were duty-bound to protect the strong against the weak and to give free

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116. See, e.g., 1 IMT, *supra* note 1, at 31 (Indictment), 138 (Answer to Motion), 175, 180, 238, 248, 269 (Judgment); 5 IMT, *supra* note 1, at 95 (quoting an excerpt from defendant Streicher's *German People's Health Through Blood and Soil*: "One single cohabitation of a Jew with an Aryan woman is sufficient to poison her blood forever."); 18 IMT, *supra* note 1, at 120 (Defendant Rosenberg's counsel in his final speech stated: "In place of Christianity [Rosenberg] strove for an idealistically, racially, and ethically conditioned religion, an emotional religion of blood and soil."); 19 IMT, *supra* note 1, at 495, 499 (U.K. Prosecutor's Final Speech), 540 (French Prosecutor's Final Speech).

117. 4 NMT, *supra* note 1, at 622-23 (Opening Statement).

118. *Id.* at 623 (quoting Heinrich Himmler, Document 2915-PS); 1 IMT, *supra* note 1, at 175; 19 IMT, *supra* note 1, at 495 (quoting Himmler, Document 2915-PS).

119. 19 IMT, *supra* note 1, at 495, 499.

120. See 4 NMT, *supra* note 1, at 622-23 (Opening Statement).

121. 1 IMT, *supra* note 1, at 272 (Judgment); 5 IMT, *supra* note 1, at 375, 376, 378, 408 (French Prosecutor's Opening Speech); 19 IMT, *supra* note 1, at 543, 566 (French Prosecutor's Final Speech); 22 IMT, *supra* note 1, at 299 (French Prosecutor's Final Speech on criminal organizations).

122. 4 NMT, *supra* note 1, at 622 (Opening Statement) (quoting ADOLPH HITLER, MEIN KAMPF 290 (1943)).

123. *Id.* at 622-23 (Opening Statement).

124. 1 IMT, *supra* note 1, at 180; 4 NMT, *supra* note 1, at 623.

125. 1 IMT, *supra* note 1, at 180; 4 NMT, *supra* note 1, at 623.

126. 4 NMT, *supra* note 1, at 623; 5 IMT, *supra* note 1, at 375-76.

reign to natural instincts.<sup>127</sup> They must not merely conquer their enemies; they must destroy them.<sup>128</sup> The weaklings of the world—be they infirm individuals or inferior races—were not to be protected, but further weakened or eliminated.<sup>129</sup> In short, Hitler sought to ensure the “preservation of the favored races in the struggle for life.”<sup>130</sup> This mentality explained why Ohlendorf could freely admit to the murder of 90,000 people,<sup>131</sup> because “for decades the doctrine [was] preached that the Slav race is an inferior race, and Jews not even human.”<sup>132</sup> Through policies designed to strengthen the Germanic race and weaken all others, Hitler and the Nazis hoped that Aryan culture would spread beyond the confines of Germany proper in a new *Pax Germanica*.<sup>133</sup>

Nazi race policy required the identification and reeducation of those who were biologically Germanic so that they could share in the collective German consciousness.<sup>134</sup> The Nazis believed that Germanic people had scattered across Europe and intermingled with other races.<sup>135</sup> They accepted as a matter of faith that, while a family might not show any trace of Germanic ancestry for several generations, a person’s physical characteristics would give evidence that he had Aryan blood.<sup>136</sup> By “re-Germanizing” that person, Germany would be strengthened and the non-German nation from which he came would be

127. 4 NMT, *supra* note 1, at 622 (Opening Statement) (quoting HERMANN RAUSCHNING, *THE VOICE OF DESTRUCTION* 138 (1940)).

128. 19 IMT, *supra* note 1, at 494-95 (U.K. Prosecutor’s Final Speech); 22 IMT, *supra* note 1, at 300 (French Prosecutor’s Final Speech on criminal organizations); 5 NMT, *supra* note 1, at 90 (Judgment).

129. 1 IMT, *supra* note 1, at 247, 272, 301 (Judgment); 4 NMT, *supra* note 1, at 622-23 (Opening Statement).

130. CHARLES DARWIN, *THE ORIGIN OF SPECIES BY MEANS OF NATURAL SELECTION OR THE PRESERVATION OF THE FAVOURED RACES IN THE STRUGGLE FOR SURVIVAL* (D. Appleton & Co. 1897). A French Prosecutor captured this in his Opening Speech:

The natural sciences and the sciences of the mind give birth to absolute relativism; to a deep scepticism [sic] regarding the lasting quality of values on which Western humanism has been nurtured for centuries. A vulgar Darwinism prevails, bewilders, and befuddles the brain. The Germans cease to see in human groups and races anything but isolated nuclei in perpetual struggle with one another.

5 IMT, *supra* note 1, at 375-76.

131. 1 IMT, *supra* note 1, at 235. Ohlendorf was tried, convicted, and sentenced to death by hanging. 4 NMT, *supra* note 1, at 510-11 (convicted), 587 (sentenced).

132. 1 IMT, *supra* note 1, at 248 (Judgment).

133. 4 NMT, *supra* note 1, at 623 (Opening Statement).

134. This shared consciousness provided the basis for the Nazi form of justice in an administrative law state. Statutes prohibiting actions contrary to “sound sentiment of the people” might be a sufficiently precise standard. 3 NMT, *supra* note 1, at 993 (*Altstoetter* Judgment). At the same time, judges knew that they “must judge like the Fuehrer.” *Id.* at 1013. In a sense, Hitler might be viewed not as a dictator in issuing decrees, but as a mediator because he embodied the collective Aryan conscience.

135. 4 NMT, *supra* note 1, at 623-24 (Opening Statement); 5 NMT, *supra* note 1, at 91-92 (Judgment).

136. 4 NMT, *supra* note 1, at 624; 5 NMT, *supra* note 1, at 102, 106, 121.

weakened.<sup>137</sup> Himmler wrote in 1942, "It is not our task to Germanize the East in the old sense, that is to teach the people there the German language and the German law, but to see to it that only people of purely Germanic blood live in the East."<sup>138</sup> Germanization was not simply a matter of biology:

[I]f the physical characteristics were compatible with those of the mythical super race, it meant that sometime in the dim past Nordic blood had forgotten its heritage and become Polonized. Nevertheless, they said, this blood was still valuable blood and could be reclaimed and this Polish family could be Germanized.<sup>139</sup>

The Nazi objective was to recapture Aryan blood<sup>140</sup> and then reawaken the Aryan psyche that lay buried in the mind of Germanic man.<sup>141</sup>

## 2. *Lebensraum or Soil*

The second key concept is that of "*Lebensraum*," or "soil."<sup>142</sup> According to Hitler, the Aryan race was destined to inhabit and rule the entire world, or at least that part of the world whose geography could psychically support the Aryan race.<sup>143</sup> Hitler's land policy focused on the East (Poland and the Soviet Union) rather than Western and Northern Europe.<sup>144</sup> To the East, there lay much more land and what Hitler claimed to be the racially inferior Slavs.<sup>145</sup> Germany could not immediately take over all land lying to the east for the simple reason that there were too few Germans to inhabit that entire territory.<sup>146</sup> Hitler formulated a policy toward the Slavs that differed from his policy toward the Jews.<sup>147</sup> The Slavs' existence was necessary and could be tolerated, at least for the short term.<sup>148</sup> The Nazis would keep them in a weakened and subservient state for exploitation.<sup>149</sup> The Jews, they would remove or simply eliminate.<sup>150</sup>

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137. 4 NMT, *supra* note 1, at 624.

138. 1 IMT, *supra* note 1, at 237 (Judgment); 4 NMT, *supra* note 1, at 623-24 (Opening Statement).

139. 4 NMT, *supra* note 1, at 624-25 (Opening Statement); 5 NMT, *supra* note 1, at 102, 106, 121 (Judgment).

140. 1 IMT, *supra* note 1, at 237 (Judgment).

141. 4 NMT, *supra* note 1, at 625 (Opening Statement).

142. 1 IMT, *supra* note 1, at 175, 190, 224, 225 (Judgment).

143. Closing Brief against Meyer-Hetling, Microfilm Publication M894, *supra* note 15, at Roll 31, Document Page 8, Frame 0639.

144. 1 IMT, *supra* note 1, at 188 (Judgment) (noting that Hitler sought to expand Germany's soil to the East, which included lands "principally of Russia and the border states subjected to her").

145. *Id.* at 237 (Judgment).

146. *Id.*; 4 NMT, *supra* note 1, at 623 (Opening Statement); TAYLOR, THE ANATOMY OF THE NUREMBERG TRIALS, *supra* note 5, at 203.

147. 4 NMT, *supra* note 1, at 613 (Indictment), 626, 637 (Opening Statement).

148. 1 IMT, *supra* note 1, at 237-38.

149. *Id.* (Judgment).

150. *Id.* at 247-48 (Judgment).

The Nazi desire to conquer the East was not simply an imperial land grab or attempt to make good on an historical claim to territory. Only some land was capable of supporting the Germanic people.<sup>151</sup> The concept of soil entailed a mixture of natural and mystical environmentalism.<sup>152</sup> Those Eastern territories would require a certain type of horticultural program:

[We must] interrupt the vastness of our expanses by systematic planting of hedges, trees and shrubs, in order to give the German man the landscape and the feeling of his homeland. We hope that a time will come when the farmer does not think mainly in terms of raw and net profit, the forester not only in terms of cubic meters, but when the ethical values for the Germanic man arising from field and wood and meadow, from tree and shrub, will again enter into their ancient right.<sup>153</sup>

*B. The Germanization Plan*

The Nazis' clear mission, reduced to the simple slogan "blood and soil," gave direction to everything they did. Their "science" did not reside in the realm of the abstract. They implemented their policies through very practical, though diabolical, plans and actions.<sup>154</sup> Many of those actions formed the basis of the criminal charges in *Goering* and *Greifelt*.<sup>155</sup> Each of those actions bore the stamp of "blood and soil." Himmler made this point:

"I am of course not talking about an abstract, unconditional science—just for our purpose this is useless and without value—but the one which sees its purpose in life in the service for the people and in the turning to the forces of blood and soil.

....

It is mandatory in the development of an exhaustive plan, and, within it, the uniform orientation of the will, that planning is homogenously coordinated with the whole construction and administration program and clearly integrated [sic] into the leader principle."<sup>156</sup>

While some of the Nuremberg trials focused on crimes of mass extermination of Jews, Russians, and others,<sup>157</sup> the *Greifelt* case focused on other means employed to weaken or destroy non-Germanic peoples and to strengthen Germanism.<sup>158</sup> As World War II progressed, there was an increasing shortage of manpower in Germany, and even without casualties of war it would have been

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151. See Closing Brief against Meyer-Hetling, Microfilm Publication M894, *supra* note 15, at Roll 31, Document Page 8, Frame 0639.

152. *Id.*

153. *Id.*

154. *Id.* at Frames 0638-39.

155. See discussions *infra* Part III.A.1. (charges against Goering); Part IV.A. (indictment in *Greifelt* case).

156. Closing Brief against Meyer-Hetling, Microfilm Publication M894, *supra* note 15, at Roll 31, Document Page 8, Frame 0638.

157. TAYLOR, FINAL REPORT, *supra* note 1, at 64, 69.

158. 5 NMT, *supra* note 1, at 88-90 (Judgment).

necessary to have an increase in population to inhabit the East.<sup>159</sup> The Nazis encouraged Germans to have large families and designed social institutions and policies to support them in doing so.<sup>160</sup> Therefore, the German courts rigorously enforced the laws prohibiting abortion, at least the abortion of racially valuable children.<sup>161</sup> Once Germany launched World War II, it implemented other policies to augment the Aryan population. The Nazis identified for re-Germanization persons of the Aryan race living among the peoples in the East, including children.<sup>162</sup> If parents in those territories did not give up their children willingly or agree to accompany them to Germany, the children were simply kidnapped.<sup>163</sup> Often, a child's name would be changed<sup>164</sup> and the child would be placed in a German home or orphanage operated by *Lebensborn* ("Well of Life Society" or "Society of Life").<sup>165</sup> Adults identified as ethnic Germans were also deported to Germany for Germanization.<sup>166</sup> Illegitimate children of racial value born to Eastern women employed as slave workers in Germany or the occupied territories provided another source of recaptured Aryan blood.<sup>167</sup>

At the same time the Nazis implemented policies designed to strengthen Germanism, they adopted other policies to weaken or eliminate non-Germanic people.<sup>168</sup> The abortion policies served both purposes. The Nazis preferred that the Eastern workers not become pregnant so that they would not be taken out of the workforce,<sup>169</sup> and they preferred that pregnant women not give birth to children of no racial value because it propagated non-Aryan blood.<sup>170</sup> The Nazis promoted abortion by removing the protection of law from racially non-valuable unborn children in Poland and Germany.<sup>171</sup> They also took measures to identify

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159. See 4 NMT, *supra* note 1, at 635 (Opening Statement) (including quoted statement from Himmler discussing how German SS members should have at least four children and that four sons per family was optimal).

160. *Id.* (Opening Statement); TAYLOR, THE ANATOMY OF THE NUREMBERG TRIALS, *supra* note 5, at 203.

161. Closing Brief on the Organization of the Main Staff Office and against Greifelt, Cruetz, Meyer-Hetling, Schwarzenberger, Huebner [hereinafter Closing Brief on RuSHA, Greifelt et al.], Microfilm Publication M894, *supra* note 15, at Roll 31, Document page 33, Frame 0363. The prosecution stated: "[A]bortions were prohibited in Germany under Article 218 of the German Penal Code. After the Nazis came to power this law was enforced with great severity." *Id.* as reprinted in 4 NMT, *supra* note 1, at 1077.

162. 4 NMT, *supra* note 1, at 610 (Indictment), 626 (Opening Statement); 5 NMT, *supra* note 1, at 112-16 (Judgment).

163. 4 NMT, *supra* note 1, at 610 (Indictment); 5 NMT, *supra* note 1, at 112-16 (Judgment).

164. 19 IMT, *supra* note 1, at 493-94 (U.K. Prosecutor's Closing Argument); 4 NMT, *supra* note 1, at 678 (Opening Statement).

165. 4 NMT, *supra* note 1, at 636 (Opening Statement); 5 NMT, *supra* note 1, at 113 (Judgment).

166. 4 NMT, *supra* note 1, at 635 (Opening Statement); 5 NMT, *supra* note 1, at 90, 93 (Judgment).

167. 4 NMT, *supra* note 1, at 613 (Indictment).

168. *Id.* at 613-16.

169. 8 IMT, *supra* note 1, at 133 (U.S.S.R.'s Prosecutor's evidence of crimes against humanity).

170. See, e.g., 4 NMT, *supra* note 1, at 687 (Opening Statement).

171. See discussion *infra* Parts IV.B.1. (policy in Poland); IV.B.2. (policy for Eastern workers in Germany).

pregnant workers and to encourage or pressure them into making use of the abortion services the Nazis provided.<sup>172</sup>

The Nazis implemented several other Germanization policies to prevent the birth of racially non-valuable children and to preserve non-German women in the labor force. Nazi authorities punished non-Germans for having sexual intercourse with Germans.<sup>173</sup> Non-German women who became pregnant often faced three prospects: abortion, loss of their children, or internment in a concentration camp.<sup>174</sup> The Nazis also prohibited marriage of non-Germans to each other, and in some cases compelled sterilization.<sup>175</sup>

After conquering countries to the east, the Nazis began their long-range plan to completely inhabit those territories with Germans.<sup>176</sup> Some Slavs were to be utilized for the short term as slave labor, and their property was plundered.<sup>177</sup> Germanism was thereby strengthened and the Slavic population weakened. The policy of weakening the Slavs took several additional forms. Slavs were to receive only a very rudimentary education,<sup>178</sup> their natural leadership was to be eliminated,<sup>179</sup> and they were to live in conditions of severe privation.<sup>180</sup> Homosexual conduct was not to be punished,<sup>181</sup> Slavs were to be taught the divine law of obedience to Germans,<sup>182</sup> and Eastern workers were to be deported to Germany to provide slave labor as domestics, agriculture laborers, and factory workers.<sup>183</sup> This enabled Germany to keep its war machine running.<sup>184</sup>

Closely related to the racial cleansing policies was the Nazi internal eugenics program, which targeted its victims not because they were of inferior racial stock but because they were infirm or inferior in some other way.<sup>185</sup> The euthanasia program targeted those who posed an internal threat to Germany, including the insane, the mentally feeble and retarded, the physically infirm, and the handicapped.<sup>186</sup> These Germans were "useless eaters," mouths that consumed but produced nothing, thereby threatening the Aryan race by draining its resources.<sup>187</sup> No longer would they be objects of special care and protection,

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172. 5 NMT, *supra* note 1, at 109-12 (Judgment).

173. *Id.* at 116-20 (Judgment). For this crime, non-German men might receive "special treatment," a Nazi euphemism for death by hanging. *Id.* at 117, 120 (Judgment).

174. *Id.* at 109, 119 (Judgment).

175. *Id.* at 123 (Judgment).

176. 1 IMT, *supra* note 1, at 237.

177. *Id.* at 237, 238, 240-41 (Judgment).

178. 5 NMT, *supra* note 1, at 92, 96 (Judgment).

179. 19 IMT, *supra* note 1, at 496 (U.K. Prosecutor's Final Speech).

180. *Id.* at 472, 491, 495 (U.K. Prosecutor's Final Speech).

181. 5 NMT, *supra* note 1, at 96 (Judgment).

182. *Id.*

183. 1 IMT, *supra* note 1, at 243 (Judgment); TAYLOR, THE ANATOMY OF THE NUREMBERG TRIALS, *supra* note 5, at 24.

184. 1 IMT, *supra* note 1, at 243 (Judgment).

185. 1 IMT, *supra* note 1, at 247, 267, 301 (Judgment); TAYLOR, THE ANATOMY OF THE NUREMBERG TRIALS, *supra* note 5, at 271.

186. 5 IMT, *supra* note 1, at 362 (U.K. Prosecutor's evidence against Frick).

187. 1 IMT, *supra* note 1, at 247, 301 (Judgment).



because the strong were not to lay the groundwork for their own ruin by allowing the weak to flourish.

### III. ABORTION AND THE IMT

Next to Hitler, Herman Goering was the most prominent Nazi in Germany.<sup>188</sup> He became a leader in the Nazi Party early in its history.<sup>189</sup> As Commander-in-Chief of the Luftwaffe (Air Force), Goering played a key role in planning for and executing crimes against peace and committing atrocities against civilians and prisoners of war.<sup>190</sup> The trial before the IMT began on November 20, 1945, and concluded October 1, 1946.<sup>191</sup>

The structures of the indictment and judgment in *United States v. Goering* were similar. Both began by recounting Nazi policies and other high-level criminality.<sup>192</sup> Next, the indictment linked some of its general allegations to individual defendants, and the judgment linked some of its general findings to individual defendants.<sup>193</sup> The indictment placed allegations against individual defendants in an appendix that followed 41 pages of general criminal allegations.<sup>194</sup> The judgment pronounced findings as to individual defendants following 105 pages of findings describing atrocities of the "Nazi Regime."<sup>195</sup> The indictment and judgment focused on the German state's expansive course of criminal conduct and not only on the discrete criminal acts of individual defendants.<sup>196</sup> Thus, *Goering* was not a traditional war-crimes trial.

#### A. *The Indictment in Goering*

Major components of the *Goering* indictment included the four counts that constituted international crimes, a lengthy summary of factual allegations regarding the counts, and the sources of law upon which those counts were based. Certain defenses raised at trial shed special light on the nature of crimes against humanity and membership in criminal organizations as they relate to the crime of abortion.

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188. *Id.* at 279 (Judgment).

189. *Id.*

190. *Id.* at 279-82 (Judgment).

191. *See supra* note 1.

192. *See* 1 IMT, *supra* note 1, at 29-68 (Indictment), 174-253 (Judgment).

193. *Id.* at 68-79 (Indictment), 279-341 (Judgment).

194. *Id.* at 27-68 (Indictment).

195. *Id.* at 174-279 (Judgment).

196. The focus on criminal policies rather than on traditional war crimes was reflected in the very nature of three of the four counts (conspiracy, crimes against peace, crimes against humanity) and in the crime of membership in a criminal organization. *See* London Charter, *supra* note 49, art. 6.

1. *The Counts*

The *Goering* indictment included all four crimes defined in the London Charter<sup>197</sup>—conspiracy,<sup>198</sup> crimes against peace,<sup>199</sup> war crimes,<sup>200</sup> and crimes against humanity.<sup>201</sup> The indictment also included three appendices containing particulars with regard to the criminal responsibility of named individuals,<sup>202</sup> describing the activities of groups alleged to be criminal organizations,<sup>203</sup> and identifying treaties violated in the commission of crimes against peace.<sup>204</sup> Although the IMT was not tasked with trying individual defendants for membership in criminal organizations, it was tasked with trying several organizations and declaring whether they were criminal.<sup>205</sup> At trial, in presenting and arguing its case, the prosecution treated abortion as a crime against humanity, a war crime, and an activity marking a criminal organization.<sup>206</sup> The

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197. The Charter states:

The following acts, or any of them, are crimes coming within the jurisdiction of the Tribunal for which there shall be individual responsibility:

(a) *CRIMES AGAINST PEACE*: namely, planning, preparation, initiation or waging of a war of aggression, or a war in violation of international treaties, agreements or assurances, or participation in a Common Plan or Conspiracy for the accomplishment of any of the foregoing;

(b) *WAR CRIMES*: namely, violations of the laws or customs of war. Such violations shall include, but not be limited to, murder, ill-treatment or deportation to slave labor or for any other purpose of civilian population of or in occupied territory, murder or ill-treatment of prisoners of war or persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns or villages, or devastation not justified by military necessity;

(c) *CRIMES AGAINST HUMANITY*: namely, murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war, or persecutions on political, racial, or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated.

*Id.*

198. 1 IMT, *supra* note 1, at 29 (Count One, Common Plan or Conspiracy).

199. *Id.* at 42 (Count Two, Crimes Against Peace).

200. *Id.* (Count Three, War Crimes).

201. *Id.* at 65 (Count Four, Crimes Against Humanity).

202. *Id.* at 68 (Appendix A. Statement of Individual Responsibility for Crimes Set Out in Counts One, Two Three, and Four).

203. *Id.* at 80 (Appendix B. Statement of Criminality of Groups and Organizations).

204. *Id.* at 84 (Appendix C. Charges and Particulars of Violations of International Treaties, Agreements, and Assurances Caused by the Defendants in the Course of Planning, Preparing and Initiating War).

205. In fact, the London Charter states: "At the trial of any individual member of any group or organization the Tribunal may declare (in connection with any act of which the individual may be convicted) that the group or organization of which the individual was a member was a criminal organization." London Charter, *supra* note 49, art. 9. See also 1 IMT, *supra* note 1, at 41, 42, 65, 67 (Indictment) (discussing the "Individual, Group and Organization Responsibility for" the relevant offenses).

206. See discussion and accompanying notes, *infra* Parts III.B. & C.

conspiracy charges and crimes against peace charges had no direct relevance to the crime of abortion.<sup>207</sup>

War crimes and crimes against humanity are not completely distinct categories of crimes. They are alike in that both war crimes and crimes against humanity include offenses against persons and liberty, and they differ in that war crimes additionally include offenses against property.<sup>208</sup> Acts of murder, torture, and kidnapping—and policies promoting those acts—may therefore constitute both war crimes and crimes against humanity.<sup>209</sup> In *Goering*, evidence of war crimes often served as evidence of crimes against humanity, because both crimes included many of the same specific criminal activities.<sup>210</sup>

A second difference is that by their very nature, war crimes are committed only during wartime, whether against enemy combatants, noncombatants, or property.<sup>211</sup> Domestic courts—usually courts-martial or military commissions—try defendants and assess culpability in much the same way that regular criminal courts operate, using regular criminal law doctrines.<sup>212</sup> Generally, individuals are tried for discrete criminal acts as principals or accomplices.<sup>213</sup>

A third difference is that war crimes were long recognized under international law prior to World War II, but crimes against humanity were not.<sup>214</sup> The concept of crimes against humanity in conjunction with conspiracy was conceived as a means to reach Nazi defendants for crimes committed against other Germans both before and during the war.<sup>215</sup> The Nuremberg tribunals,

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207. The prosecution failed to introduce evidence of abortion on the conspiracy charge, and the IMT interpreted the indictment as limiting the applicability of the crime of conspiracy to crimes against peace. 1 IMT, *supra* note 1, at 226 (Judgment); TAYLOR, *THE ANATOMY OF THE NUREMBERG TRIALS*, *supra* note 5, at 79-80, 492, 582. The charge of crimes against peace had no direct relevance to the crime of abortion, as it would have been extremely difficult to show how prewar abortion policies contributed to planning to wage wars of aggression. By the IMT's interpretation of the London Charter, it had no jurisdiction over prewar crimes unless linked to planning and preparation for crimes against peace. 1 IMT, *supra* note 1, at 249, 254 (Judgment); TAYLOR, *THE ANATOMY OF THE NUREMBERG TRIALS*, *supra* note 5, at 35-36, 76.

208. This is reflected in the London Charter's definition of those two crimes. London Charter, *supra* note 49, art. B.

209. 1 IMT, *supra* note 1, at 254 (Judgment); 19 IMT, *supra* note 1, at 468 (U.K. Prosecutor's Final Speech); de Vabres, *supra* note 4, at 228.

210. 1 IMT, *supra* note 1, at 226-28 (Judgment).

211. 3 IMT, *supra* note 1, at 92 (U.K. Prosecutor's Opening Speech). Compare the definitions of "War Crimes" and "Crimes Against Humanity" as set out in the London Charter, *supra* note 49, art. 6.

212. 1 IMT, *supra* note 1, at 220-21 (Judgment); 3 IMT, *supra* note 1, at 92 (U.K. Prosecutor's Opening Speech); 5 IMT, *supra* note 1, at 370-71 (French Prosecutor's Opening Speech); TAYLOR, *THE ANATOMY OF THE NUREMBERG TRIALS*, *supra* note 5, at 4.

213. Otto Kranzbuhler, *Nuremberg Eighteen Years Afterwards*, 14 DEPAUL L. REV. 333 (1965), reprinted in *PERSPECTIVES ON THE NUREMBERG TRIAL*, *supra* note 4, at 433, 434, 441.

214. 1 IMT, *supra* note 1, at 253-55 (Judgment).

215. Colonel Murray Bernays, a lawyer in the personnel branch of the Army General Staff, proposed using the charge of conspiracy to reach prewar crimes the Nazis had committed against German Jews. If waging aggressive war was a crime against peace, then conspiring to wage a war of aggression—which entailed prewar planning—was also a crime. In a similar fashion, linking the wartime commission of crimes against humanity to prewar crimes against humanity would

however, rejected extending the concept of crimes against humanity as a means to reach prewar crimes committed against German nationals.<sup>216</sup>

Even though a primary purpose for conceiving the concept of crimes against humanity was thwarted at Nuremberg, the concept served other purposes of immense importance in those trials. It is useful to think of crimes against humanity as war crimes committed on a vast scale.<sup>217</sup> The vastness of the scale is due to the fact that crimes against humanity are committed not so much by individuals acting contrary to law and policy, but rather they are crimes planned, encouraged, or ordered at the highest levels, as a matter of state policy.<sup>218</sup> This highlights the fourth and most important difference between crimes against humanity and traditional war crimes. The prosecution of crimes against humanity need not focus on the commission of standard criminal acts at particular times and places by particular persons.<sup>219</sup> Rather, the focus is on defendants at high levels of government who have had a hand in fashioning the state policies and implementing them.<sup>220</sup> The end of reaching high-level policy makers might be reached through standard criminal law doctrines such as attempts, accessory liability, and conspiracy, but with much greater difficulty. In prosecuting crimes against humanity it was unnecessary to prove that any particular person committed any particular abortion, or that there was a direct causal link between the abortion policies and any discrete act of abortion.<sup>221</sup> In other words, the concept of crimes against humanity facilitated the prosecution of those responsible for formulating and implementing policies that affected hundreds of thousands of victims over vast areas. This theory of criminal liability corresponded to the primary jurisdictional parameter of the Nuremberg

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arguably give an international tribunal jurisdiction over prewar crimes committed against German nationals. TAYLOR, *THE ANATOMY OF THE NUREMBERG TRIALS*, *supra* note 5, at 35-36, 76.

216. The conspiracy count eventually adopted was limited to the commission of crimes against peace. London Charter, *supra* note 49, art. 6. At least, that was the interpretation the IMT placed on article 6, despite the fact that the indictment was drafted as alleging the crimes of conspiracy to commit crimes against humanity. 1 IMT, *supra* note 1, at 226 (Judgment), 41 (Indictment). Prewar crimes against humanity committed against Germans were subject to the IMT's jurisdiction only if it were proved that they were a necessary part of planning or conspiring to commit crimes against peace. This, the prosecution was unable to prove. 1 IMT, *supra* note 1, at 249, 254 (Judgment); TAYLOR, *THE ANATOMY OF THE NUREMBERG TRIALS*, *supra* note 5, at 76, 583.

217. 2 IMT, *supra* note 1, at 145 (U.S. Prosecutor's Opening Speech); 3 IMT, *supra* note 1, at 92 (U.K. Prosecutor's Opening Speech).

218. 2 IMT, *supra* note 1, at 65, 99, 129, 142, 145 (U.S. Prosecutor's Opening Speech); 19 IMT, *supra* note 1, at 470 (U.K. Prosecutor's Final Speech), 535, 548, 564 (French Prosecutor's Final Speech).

219. 5 IMT, *supra* note 1, at 371, 400-401 (French Prosecutors' Opening Speeches); 19 IMT, *supra* note 1, at 400 (U.S. Prosecutor's Final Speech); TAYLOR, *THE ANATOMY OF THE NUREMBERG TRIALS*, *supra* note 5, at 498-99, 575.

220. 1 IMT, *supra* note 1, at 43 (Indictment); 2 IMT, *supra* note 1, at 99, 142 (U.S. Prosecutor's Opening Speech); 19 IMT, *supra* note 1, at 535, 548, 564 (French Prosecutor's Final Speech); TAYLOR, *THE ANATOMY OF THE NUREMBERG TRIALS*, *supra* note 5, at 488-99.

221. 5 IMT, *supra* note 1, at 400-01 (French Prosecutors' Opening Speeches); 4 IMT, *supra* note 1, at 609-10 (Indictment); TAYLOR, *THE ANATOMY OF THE NUREMBERG TRIALS*, *supra* note 5, at 575.

tribunals—to try only those criminals whose acts had no particular geographical nexus.<sup>222</sup>

## 2. *Defenses*

The Nazi defendants raised several general defenses to the charge of crimes against humanity. Chief among them was the claim that prosecution of activities declared to be crimes *ex post facto* violated one of the most fundamental principles of law.<sup>223</sup> The defendants were not alone in voicing this criticism of the proceedings.<sup>224</sup> Nevertheless, the suggestion that the defendants had no fair notice of the criminal nature of acts of murder, torture, and kidnapping was a hard sell. Everyone knows these activities are criminal, and it was not unfair to prosecute individual defendants for crimes against humanity, even though the crimes bore an unfamiliar name or incorporated an arguably novel theory of accomplice liability.<sup>225</sup> And it hardly seems unjust to prosecute high-level officials who conceive and promulgate such policies as building concentration camps along with the guards who operate them.<sup>226</sup>

The *ex post facto* argument had greater cogency with regard to the crime of membership in a criminal organization.<sup>227</sup> While the concept of crimes against humanity was designed to facilitate the prosecution of policy-makers for official state action, the concept of a crime of membership in a criminal organization was designed to facilitate the prosecution of hundreds of thousands of Germans who played a significant role in Nazi atrocities committed during the war.<sup>228</sup> The problems associated with prosecuting individuals for membership in a criminal organization were manifold.<sup>229</sup> These problems included the danger of eliminating the requirements of *scienter*, of a sufficient nexus between an accused and consummated criminal acts, and of proportionality in sentencing.<sup>230</sup>

Because neither the IMT nor NMT based the criminal liability of individuals for abortion simply on membership in a criminal organization that encouraged or

222. London Agreement, *supra* note 36, pmbl.

223. See, e.g., 1 IMT, *supra* note 1, at 168-69 (Motion Adopted by all Defense Counsel), 219 (Judgment addressing the *ex post facto* issue); 19 IMT, *supra* note 1, at 52-53 (Defense Counsel Argument).

224. TAYLOR, THE ANATOMY OF THE NUREMBERG TRIALS, *supra* note 5, at 51, 550-51; Georg Schwarzenberger, *The Judgment of Nuremberg*, 21 TUL. L. REV. 329 (1947), reprinted in PERSPECTIVES ON THE NUREMBERG TRIAL, *supra* note 4, at 167, 180.

225. 1 IMT, *supra* note 1, at 219 (Judgment); 3 IMT, *supra* note 1, at 144 (U.K. Prosecutor's Opening Speech); 5 IMT, *supra* note 1, at 423 (French Prosecutor's Opening Speech); TAYLOR, FINAL REPORT, *supra* note 1, at 219-20.

226. See 1 IMT, *supra* note 1, at 234-36; 251-52 (Judgment).

227. TAYLOR, THE ANATOMY OF THE NUREMBERG TRIALS, *supra* note 5, at 35, 41; de Vabres, *supra* note 4, at 251-58.

228. 1 IMT, *supra* note 1, at 255-57 (Judgment); 8 IMT, *supra* note 1, at 353-56, 371 (U.S. Prosecutor's Final Speech on Criminal Organizations); TAYLOR, THE ANATOMY OF THE NUREMBERG TRIALS, *supra* note 5, at 35-36.

229. TAYLOR, THE ANATOMY OF THE NUREMBERG TRIALS, *supra* note 5, at 35-36, 41, 75, 276-85.

230. *Id.*

conducted abortions, these problems had limited relevance for prosecuting the crime of abortion. The prosecution did not argue that individual defendants were criminally responsible for the crimes of abortion simply because they were members of an organization involved in abortion. However, the IMT's declaration that the Political Leadership Corps of the Nazi Party was a criminal organization—based in part on its role in effecting Nazi abortion policies—was extremely important.<sup>231</sup> That declaration reflected the IMT's judgment that abortion was a crime even if criminal responsibility could not be placed on any particular individual on trial.

The focus of the prosecutors' efforts and the tribunals' attention was not upon abortion doctors and other lower-level Nazi personnel but upon high-level policymakers and government officials who removed the protection of law from unborn children.<sup>232</sup>

The portions of the judgments relating to the crime of abortion in both *Goering* and *Greifelt* focused exclusively on written policies and high-level policymakers and officials.<sup>233</sup> The focus on high-level actors reflected the objective of exposing the immensity of Nazi atrocities and the horror resulting from them.<sup>234</sup>

Other defenses that the Nazi defendants raised—official and sovereign immunity—were much more easily disposed of once the concept of crimes against humanity was accepted, because the concept of crimes against humanity involved by its very nature criminal acts committed at high decision-making levels.<sup>235</sup> Likewise, the defense that high-level policy decisions are non-justiciable political questions fell by the wayside.<sup>236</sup> Although using the concept of crimes against humanity to extend international law jurisdiction to include peacetime crimes against one's own nationals was unsuccessful at Nuremberg, it gained growing acceptance in the decades following World War II.<sup>237</sup> Extending

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231. 1 IMT, *supra* note 1, at 260 (Judgment).

232. *Id.*; 5 IMT, *supra* note 1, at 332 (Bormann policy); 6 IMT, *supra* note 1, at 212 (Berlin Order); 8 IMT, *supra* note 1, at 132 (Gestapo); 11 IMT, *supra* note 1, at 540-43 (Rosenburg); 19 IMT, *supra* note 1, at 496-98 (U.K. Prosecutor's Closing Argument).

233. 1 IMT, *supra* note 1, at 260, 263, 340 (Judgment); 5 IMT, *supra* note 1, at 95-96, 101, 109-12 (Judgment).

234. 1 IMT, *supra* note 1, at 226-28 (Judgment); 5 IMT, *supra* note 1, at 370 (French Prosecutor's Opening Speech); 22 IMT, *supra* note 1, at 171-72 (U.K. Prosecutor's Final Speech); TAYLOR, *THE ANATOMY OF THE NUREMBERG TRIALS*, *supra* note 5, at 575; de Vabres, *supra* note 4, at 262.

235. The London Charter preempted the defense of official immunity: "The official position of defendants, whether as Heads of State or responsible officials in Government departments, shall not be considered as freeing them from responsibility or mitigating punishment." London Charter, *supra* note 49, art. 7. C.C. Law 10 anticipated the defense of official immunity: "The official position of any person, whether as Head of State or as a responsible official in a Government Department, does not free him from responsibility for a crime or entitle to mitigation of punishment." C.C. Law 10, *supra* note 67, art. II.4.(a).

236. 19 IMT, *supra* note 1, at 462-66. See generally C.C. Law 10, *supra* note 67, art. II.4.(a).

237. TAYLOR, *THE ANATOMY OF THE NUREMBERG TRIALS*, *supra* note 5, at 22, 28, 35, 76; de Vabres, *supra* note 4, at 238; RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 703 cmt. a (1987).

the concept of crimes against humanity to reach policymakers for decisions made during peacetime that impacted their own nationals has far-reaching implications.<sup>238</sup>

If a nation's crimes against its own nationals are violations of international law and not simply domestic matters, then military intervention by other nations or international bodies is justified and the offenders may be tried in international courts.<sup>239</sup> Extending the concept of crimes against humanity to peacetime changed the very nature of international law because the principle of non-intervention into the domestic affairs of foreign countries had been a cornerstone of traditional international law.<sup>240</sup>

### 3. *Particular Allegations with Regard to the Counts*

The indictment in *Goering* was lengthy, setting forth with considerable particularity the facts upon which the four counts were based.<sup>241</sup> However, the indictment contained no express references to Nazi abortion policies or activities.<sup>242</sup>

The Allied prosecutors expressly reserved the right to prove additional particular criminal acts that fell within the general allegations of the indictment.<sup>243</sup> This reservation was necessary for a number of reasons. The most obvious reason, and probably most important, was that the Allies had secured little evidence of any crimes prior to the end of World War II.<sup>244</sup> In fact, the prosecution continuously collected and translated captured German documents for use during the course of the *Goering* trial.<sup>245</sup> For example, one of the most important and detailed pieces of evidence regarding German abortion policy, Document D-884, either was not discovered or was not brought to the IMT's

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238. Andrew Clapham, *Issues of Complexity, Complicity, and Complementarity: From the Nuremberg Trials to the Dawn of the New International Criminal Court*, in FROM NUREMBERG TO THE HAGUE: THE FUTURE OF INTERNATIONAL CRIMINAL JUSTICE 30, 43, 45, 47, 13 (Philippe Sands ed. 2003); de Vabres, *supra* note 4, at 238; Guenael Mettraux, *Judicial Inheritance: The Value and Significance of the Nuremberg Trial to Contemporary War Crimes Tribunals*, in PERSPECTIVES ON THE NUREMBERG TRIAL, *supra* note 4, at 598, 606-07; RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES §§ 402, 404, 423, 431.

239. 19 IMT, *supra* note 1, at 472 (U.K. Prosecutor Final Speech); RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES §§ 402, 404, 431; Clapham, *supra* note 238, at 30, 43, 45, 47. See generally James Crawford, *The Drafting of the Rome Statute*, in FROM NUREMBERG TO THE HAGUE, *supra* note 238, at 109-56.

240. See generally 1 L. OPPENHEIM, INTERNATIONAL LAW: A TREATISE 221-34 (3d ed. 2005); John Norton Moore, *The Use of Force in International Relations: Norms Concerning the Initiation of Coercion*, in NATIONAL SECURITY LAW 85, 151-54 (John Norton Moore et al. eds., 1990).

241. 1 IMT, *supra* note 1, at 27-68 (Indictment).

242. *Id.*

243. *Id.* at 44 (Indictment).

244. 2 IMT, *supra* note 1, at 100 (U.S. Prosecutor's Opening Speech); TAYLOR, THE ANATOMY OF THE NUREMBERG TRIALS, *supra* note 5, at 27, 47, 49, 57, 64, 85, 96-98.

245. TAYLOR, FINAL REPORT, *supra* note 1, at 17-18; TAYLOR, THE ANATOMY OF THE NUREMBERG TRIALS, *supra* note 5, at 48-49, 64, 85, 98.

attention until the latter part of the trial.<sup>246</sup> That may explain why there were no particular allegations of the crime of abortion made in the indictment.<sup>247</sup>

Only as the trial progressed did it become clear which of the counts and appendices to the indictment the Allied prosecutors thought encompassed the crime of abortion. The prosecution first presented its case on the charges of conspiracy (Count One) and crimes against peace (Count Two and Appendix C).<sup>248</sup> It introduced no evidence of abortion when presenting its case on either of the first two counts.<sup>249</sup> Prosecutors followed with the introduction of evidence of war crimes (Count Three),<sup>250</sup> crimes against humanity (Count Four),<sup>251</sup> individual responsibility (Appendix A),<sup>252</sup> and group criminality (Appendix B).<sup>253</sup> The prosecution's case with regard to Counts Three and Four and Appendices A and B included abundant evidence of Nazi abortion policies and practices.<sup>254</sup>

246. 42 IMT, *supra* note 1, at 25, 36 (Neave Report); 20 IMT, *supra* note 1, at 61-62 (U.K. Prosecutor introduces Document D-884).

247. Other reasons include the fact that the evidence of war crimes was so voluminous that it could not all be included in the indictment; time to complete such a monumental task was limited; and the common law countries and civil law countries reached a compromise in terms of pleadings—the indictment is more detailed than is typical of common-law pleading, but does not include copies of all the evidence to be presented as is typical of civil-law countries. TAYLOR, *THE ANATOMY OF THE NUREMBERG TRIALS*, *supra* note 5, at 35, 117.

248. See 2 IMT, *supra* note 1, at 162-63; 3 IMT, *supra* note 1, at 90 (U.S. presentation of evidence on conspiracy), 152-54; 4 IMT, *supra* note 1, at 17 (U.K. presentation of evidence of crimes against peace); TAYLOR, *THE ANATOMY OF THE NUREMBERG TRIALS*, *supra* note 5, at 80, 145, 191, 200.

249. See sources cited *infra* note 254.

250. Only some of the particular categories of war crimes applied to civilian victims and they basically overlapped with crimes against humanity. 1 IMT, *supra* note 1, at 43, 51, 62, 63 (noting particular categories of war crimes were "(A) Murder and Ill-Treatment of Civilian Populations of or in Occupied Territory and on the High Seas," "(B) Deportation for Slave Labor and for Other Purposes of the Civilian Populations of and in Occupied Territories," "(H) Conscription of Civilian Labor," and "(J) Germanization of Occupied Territory").

251. *Id.* at 66. Crimes against humanity overlapped with the war crimes allegations. Most of the categories of war crimes against civilians—including Crimes against Peace, War Crimes, and Crimes against Humanity—were folded into one category of crimes against humanity—“(A) Murder, Extermination, Enslavement, Deportation, and Other Inhumane Acts Committed against Civilian Populations Before and During the War.” *Id.*

252. *Id.* at 68-79 (Appendix A listed all 22 defendants with a brief description and allegation of their individual responsibility).

253. *Id.* at 80-84 (Appendix B listed groups or organizations accused of being criminal in nature, along with a description of each organization with general allegations of criminal activities). The indictment linked the allegations of war crimes and crimes against humanity to group responsibility: “Reference is hereby made to Appendix B of this Indictment for a statement of the responsibility of the groups and organizations named herein as criminal groups and organizations for the offense set forth in this Count Four of the Indictment.” *Id.* at 67. The significance of this linkage became apparent in the Tribunal’s Judgment, which specifically addressed Nazi abortion policy as a criminal activity marking the Political Leadership Corps as a criminal organization. See *id.* at 259-60.

254. 5 IMT, *supra* note 1, at 173 (U.S. case on individual guilt), 332-33 (U.K. case on individual guilt); 6 IMT, *supra* note 1, at 170, 212-13 (French case on war crimes); 7 IMT, *supra* note 1, at 547 (U.S.S.R. case on crimes against humanity); 8 IMT, *supra* note 1, at 133, 310-11 (U.S.S.R. case on crimes against humanity); 11 IMT, *supra* note 1, at 542-43, 546 (U.S. cross-



#### 4. *Sources of International Law*

There was another important component of the indictment—a list of the sources of authority in international law upon which the prosecution relied in making its allegations of war crimes and crimes against humanity:

Such murders and ill-treatment were contrary to [1] international conventions, in particular Article 46 of the Hague Regulations, 1907, [2] the laws and customs of war, [3] the general principles of criminal law as derived from the criminal laws of all civilized nations, [4] the internal penal laws of the countries in which such crimes were committed, and [5] Article 6 (b) of the Charter.<sup>255</sup>

Any allegation or finding that abortion was a crime necessarily entailed the conclusion that it was prohibited in one or more of these sources of international law. Given the nature of the crime of abortion, the implication is that the prosecution and the IMT believed that abortion was a crime under all five sources of law governing the proceedings. The first three sources of international law listed—conventions, laws and customs of war, and general principles of criminal law as derived from the criminal laws of all civilized nations—are essentially the three primary sources of international law recognized in Article 38 of the Statute of the International Court of Justice.<sup>256</sup>

The defendants argued before the IMT that Hague Convention IV (1907) did not apply.<sup>257</sup> That treaty was operative upon the condition that all countries involved in the war were parties to the treaty, yet not all countries involved in World War II were.<sup>258</sup> Most notably, the Soviet Union was not a party.<sup>259</sup> The IMT dispensed with the defendants' argument by ruling that even if some treaties were not technically applicable, identical rules were binding as a matter of customary law.<sup>260</sup> For the most part, the prosecution made no attempt to prove that particular activities were proscribed by custom or principles of law common to all nations.<sup>261</sup> There was little doubt that the wide array of Nazi atrocities were criminal as a matter of both customary law and common principles.<sup>262</sup>

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examination of defendant Rosenberg); 19 IMT, *supra* note 1, at 498-99 (U.K. Prosecutor's Final Speech); 20 IMT, *supra* note 1, at 61-62 (Cross-examination of defense witness); 22 IMT, *supra* note 1, at 193-94 (U.K. Prosecutor's Final Speech), 252-53 (U.S. Prosecutor's Final Speech); 42 IMT, *supra* note 1, at 25, 35-37 (Neave Report); Document D-884, *supra* note 13, at 1019-23 (Abortion Policy in Baden-Alsace); Document R-36, *supra* note 12, at 53 (Markull letter with abortion policy in the Eastern occupied territories).

255. 1 IMT, *supra* note 1, at 44; 4 NMT, *supra* note 1, at 617-18. These sources track with the indictment in *Greifelt*.

256. Statute of the International Court of Justice art. 38, June 26, 1945, 59 Stat. 1055, T.S. No. 993.

257. 1 IMT, *supra* note 1, at 253 (Judgment).

258. Hague Convention (IV), *supra* note 78, art. 2.

259. *Id.*

260. 1 IMT, *supra* note 1, at 253-54.

261. *See id.*

262. *See id.*

The other two sources of law cited in the indictment—internal penal law of the countries in which such crimes were committed and Article 6(b) of the London Charter—were questionable. The basis for international law norms is generally considered to be agreement between or among nations, either express (as with treaties) or implied (as with custom and general principles of law common to all civilized nations).<sup>263</sup> But internal penal laws and the London Charter had their origin in positive law, the first of a single state, the second of an international body.<sup>264</sup> The indictment most likely included “internal penal laws,” in part to refute the argument that trial for crimes against humanity violated the principle of *ex post facto*. Defendants had fair notice that their actions were criminal. Listing internal penal laws as applicable at Nuremberg also assumed a congruence between international and domestic law norms.<sup>265</sup> A similar assumption about the law of the Charter was expressly stated—it was congruent with the other sources of international law.<sup>266</sup>

Some assertions the IMT and prosecution made regarding the Nuremberg proceedings created the appearance of *ex post facto* violations.<sup>267</sup> At the same time the prosecution argued that the *ex post facto* principle had not been violated, it heralded Nuremberg as the dawning of a new era in international law.<sup>268</sup> This tension was never satisfactorily resolved. The *Goering* prosecution thereby gave added credibility to the defendants’ argument that the crimes with which they were charged violated the *ex post facto* prohibition. The prosecutors offered several different arguments to resolve this tension, but no clear or consistent general philosophy of law or specific philosophy of international law was manifest in the prosecution’s presentation of its case.<sup>269</sup> Some evidence supports the claim that Nuremberg marked a return to natural law jurisprudence, which is capable of providing baseline principles common to all legal systems.<sup>270</sup> There is a far stronger case to be made, however, that the Nuremberg prosecutors never divorced themselves from the sociological and positivistic schools of jurisprudence.<sup>271</sup>

263. J.L. BRIERLY, *THE LAW OF NATIONS: AN INTRODUCTION TO THE LAW OF INTERNATIONAL PEACE* 51 (Oxford University Press 6th ed. 1963).

264. 1 IMT, *supra* note 1, at 218 (Judgment).

265. *Id.* at 226-57.

266. *Id.* at 218, 219 (Judgment).

267. *Id.* at 219 (Judgment); 2 IMT, *supra* note 1, at 99 (U.S. Prosecutor’s Opening Speech); 3 IMT, *supra* note 1, at 104 (U.K. Prosecutor’s Opening Speech).

268. 1 IMT, *supra* note 1, at 221, 256 (Judgment); 19 IMT, *supra* note 1, at 398 (U.S. Prosecutor’s Final Speech); 22 IMT, *supra* note 1, at 172 (U.K. Prosecutor’s Final Speech).

269. 2 IMT, *supra* note 1, at 99, 143-44, 147 (U.S. Prosecutor’s Opening Speech); 3 IMT, *supra* note 1, at 92-94, 104, 106 (U.K. Prosecutor’s Opening Speech); 5 IMT, *supra* note 1, at 370, 372 (French Prosecutor’s Opening Speech).

270. 2 IMT, *supra* note 1, at 143 (U.S. Prosecutor’s Opening Speech); 19 IMT, *supra* note 1, at 433-34 (U.K. Prosecutor’s Closing Speech); Document D-884, *supra* note 13, at 95 (U.K.’s Shawcross Closing Address).

271. 1 IMT, *supra* note 1, at 253 (Judgment); 5 IMT, *supra* note 1, at 369-70 (French Prosecutor’s Opening Speech); 19 IMT, *supra* note 1, at 399 (U.S. Prosecutor’s Closing Speech), 466, 472 (U.K. Prosecutor’s Closing Speech), 530 (French Prosecutor’s Closing Speech); TAYLOR, *THE ANATOMY OF THE NUREMBERG TRIALS*, *supra* note 5, at 297.

The IMT itself ultimately justified its decision on several issues by a positivist appeal to the law of the London Charter as its ultimate binding authority.<sup>272</sup> Of course, this approach to jurisprudence loaned credence to the defendants' claim that Nuremberg was little more than a demonstration of "victor's justice."<sup>273</sup>

#### B. *The Evidence of Abortion Crimes Produced at Trial*

Prosecutors introduced evidence and addressed matters related to the crime of abortion in several different forms during the *Goering* trial. There was evidence of voluntary abortions and forced abortions. The prosecution teams from each of the four Allied powers introduced evidence, or cross-examined witnesses using evidence, of Nazi abortion policies or activities. Prosecutors drew that evidence into their closing arguments.

##### 1. *Forced Abortion*

The Nazis committed forced abortions in three different ways identified at trial. They forced early term abortions on Jewish women.<sup>274</sup> Some children were involuntarily aborted or incidentally aborted in the course of involuntary medical experiments conducted on their mothers.<sup>275</sup> Others were aborted, in effect, as a result of executions of pregnant women.<sup>276</sup> French and Soviet lawyers introduced this evidence as part of their prosecution of Count Three (war crimes)<sup>277</sup> and Count Four (crimes against humanity).<sup>278</sup>

The French prosecutors had primary responsibility for presenting evidence of war crimes, and as part of the case they introduced the testimony of a French witness who spent three years in German concentration camps.<sup>279</sup> Among the atrocities she witnessed were those in the *Revier*, the part of a concentration camp in which the sick and infirm were placed.<sup>280</sup> She described the treatment of Jewish women and their babies who were forcibly aborted or killed upon birth.<sup>281</sup>

272. 1 IMT, *supra* note 1, at 254 (Judgment).

273. Microfilm Publication M894, *Final Plea of Hildebrandt*, *supra* note 15, at Microfilm Roll 33, Document Page 40, Frame 0453, as reprinted in 5 NMT, *supra* note 1, at 66-67.

274. 6 IMT, *supra* note 1, at 212.

275. 8 IMT, *supra* note 1, at 310.

276. 5 IMT, *supra* note 1, at 173.

277. See 5 IMT, *supra* note 1, at 399 through 7 IMT, *supra* note 1, at 145 (French Prosecutor presents evidence of war crimes).

278. 7 IMT, *supra* note 1, at 146 (U.S.S.R. Prosecutor begins presenting evidence of crimes against humanity); TAYLOR, *THE ANATOMY OF THE NUREMBERG TRIALS*, *supra* note 5, at 79-80.

279. 6 IMT, *supra* note 1, at 203-05.

280. *Id.* at 209.

281. An excerpt of the witness's testimony:

M. DUBOST: In the *Revier* did you see any pregnant women?

MME. VAILLANT-COUTIER: Yes. The Jewish women, when they arrived in the first months of pregnancy, were subjected to abortion. When their pregnancy was near the end, after confinement, the babies were drowned in a bucket of water. I know that because I

The Soviet prosecutors had primary responsibility for presenting the case on crimes against humanity.<sup>282</sup> They read into the trial record portions of a report prepared by the Extraordinary State Commission of the Soviet Union on crimes in Oswieczim involving forced abortion or abortions resulting from forced medical experiments.<sup>283</sup> The Soviet prosecutors introduced other evidence regarding the treatment of pregnant women and newborn children. While Jewish women and their unborn children were treated as non-human and simply murdered, other non-Aryans were treated as subhuman, and were allowed to live, although they suffered great deprivations.<sup>284</sup>

As part of its case in proving individual responsibility of particular defendants for the commission of war crimes and crimes against humanity, a United Kingdom prosecutor read into the record the affidavit of a Czech doctor.<sup>285</sup> He found that many of the women he examined who had been executed had been pregnant at the time of their executions.<sup>286</sup>

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worked in the Revier and the woman who was in charge of that task was a German midwife, who was imprisoned for having performed illegal operations. After a while another doctor arrived and for 2 months they did not kill the Jewish babies. But one day an order came from Berlin saying that again they had to be done away with....

....  
M. DUBOST: You have told us about the Jewish mothers. Were there other mothers in your camp?

MME. VAILLANT-COUTURIER: Yes, in principle, non-Jewish women were allowed to have their babies, and the babies were not taken away from them; but conditions in the camp being so horrible, the babies rarely lived for more than 4 or 5 weeks.

*Id.* at 212-13.

282. TAYLOR, *THE ANATOMY OF THE NUREMBERG TRIALS*, *supra* note 5, at 79.

283. The report stated:

Experiments on women were carried out in the hospital blocks of the Oswieczim Camp. Up to four hundred women were detained simultaneously in Block 10 of the camp, and experiments on sterilization were carried out on them by means of X-rays and subsequent removal of the ovaries, experiments in engrafting cancer in the neck of the uterus and forced abortion, and on testing countermeasures against injuries to the uterus by X-ray.

8 IMT, *supra* note 1, at 310.

284. A portion of one witness's testimony included:

MR. COUNSELLOR SMIRNOV: Please go on.

SHMAGLEVSKAYA: I noticed then a woman in the last month of pregnancy. It was obvious from her appearance. This woman, together with the others, had to walk 10 kilometers to the place of work and there she toiled the whole day, shovel in hands digging trenches. She was already ill and she asked the German superintendent, a civilian, for permission to rest. He refused, laughed at her, and together with another SS man, started beating her. He scrutinized her work very strictly. Such was the situation of all the women who were pregnant. And only during the very last minutes were they permitted to stay away from work. The newborn children, if Jewish, were immediately put to death.

*Id.* at 318.

285. 5 IMT, *supra* note 1, at 167 (Dr. Franz Blaha).

286. Dr. Blaha recounted:

## 2. *Nazi Policies in the Balkans—Voluntary or Forced?*

The Soviet prosecutors presented documentary evidence of Nazi abortion policies.<sup>287</sup> As written, those policies were ambiguous as to whether abortions were to be committed only voluntarily. The documents' wording indicated that women were to be encouraged to have abortions, but that if they demonstrated reluctance, pressure was to be applied.<sup>288</sup> Whether voluntary or involuntary, the Soviet prosecutor made it clear that abortion was a crime against the child and not the mother alone.<sup>289</sup> He introduced no evidence of the actual treatment the mothers and their children received under those policies, or of the kind of pressure exerted on them.<sup>290</sup> Even if no physical threats were made or physical coercion used, the conditions under which these women lived and worked—and the likelihood that their children, if born, would be placed in orphanages—would have been additional powerful inducements for the women to consent to abortion.<sup>291</sup>

The Soviet prosecution detailed crimes committed against children.<sup>292</sup> The crimes were unbelievably horrifying; still, the prosecutors portrayed the abortion policy as the height of depravity in the Nazi treatment of children.<sup>293</sup> Introducing a directive from the Administration of Food and Agriculture, entitled "Treatment of Pregnant Women of Non-Germanic Origin," the Soviet prosecutor stated that "in their hatred of the Slav race, the German fascist criminals even *attempted to murder* babes in the womb."<sup>294</sup> He went on to read a portion of the policy directive into the record:

"There has recently been a considerable increase in the birth rate among women of non-Germanic origin. Difficulties have arisen in consequence, not only in connection with the use of these people for labor but, to a greater

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In April 1945 a number of prominent people were shot who had been kept in the bunker. They included two French generals, whose names I cannot remember; but I recognized them from their uniform. I examined them after they were shot. In 1944 and 1945 a number of women were killed by hanging, shooting, and injections. I examined them and found that in many cases they were pregnant.

*Id.* at 173. This testimony has special significance for subsequent human rights treaties that prohibit the execution of women who are pregnant. It is apparent that this prohibition is for the protection of a human life that is innocent and distinct from the mother's. "5. Sentence of death shall not be imposed for crimes committed by persons below eighteen years of age and shall not be carried out on pregnant women." International Covenant on Civil and Political Rights art. 5, Dec. 19, 1966, 999 U.N.T.S. 171, U.N. GAOR, 21st Sess., U.N. Doc. A/6316, available at [http://treaties.un.org/doc/Treaties/1976/03/19760323%2006-17%20AM/Ch\\_IV\\_4p.pdf](http://treaties.un.org/doc/Treaties/1976/03/19760323%2006-17%20AM/Ch_IV_4p.pdf).

287. 7 IMT, *supra* note 1, at 540, 547.

288. *Id.* at 547.

289. *Id.*

290. *Id.* at 540-47.

291. *See id.*

292. *Id.*

293. *Id.* at 547.

294. *Id.* (emphasis added).

extent, with a danger of a social-political nature, which should not be underestimated."

I omit one paragraph and quote further:

"The simplest method for overcoming these difficulties would be to inform, as soon as possible, the institutions which employ them for labor, of the pregnancy of the non-Germanic women."

I draw your special attention to the last sentence, "These institutions must *attempt to compel* the women to get rid of their children by resorting to abortion."<sup>295</sup>

The Soviet prosecutor also read into the trial record extracts from a report of the Yugoslav Republic entitled "Forced Labor of Civilians," which dealt with abortion policy in Slovenia.<sup>296</sup> That evidence reflected the same ambiguity with respect to the voluntariness of the abortions being promoted, and the same dual purpose for promoting abortions among non-Aryan peoples—reduce their numbers and keep them available for labor:

[E]very case of pregnancy of non-German women was to be reported, and in all such cases these women *were to be obliged to have* their child "removed by operation in a hospital." The announcement itself explains that in cases when non-German women give birth to their children this "creates difficulties for their use in work," and besides, it is also "a danger for the population policy." Furthermore, this announcement states that the Office of Labor Service *should try to influence* these women to commit an abortion.<sup>297</sup>

### 3. Abortion Policy in the Eastern Occupied Territories

Allied prosecutors introduced Document R-36, which outlined Nazi population control policies (including an abortion policy) that were to be implemented in the Occupied Eastern Territories.<sup>298</sup> That document was of

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295. *Id.* (emphasis added).

296. 8 IMT, *supra* note 1, at 131.

297. *Id.* at 133 (emphasis added).

298. Document R-36, *supra* note 12, at 53; 5 IMT, *supra* note 1, at 332-33 (mentioning Document R-36 for the first time in the trial). A U.K. Prosecutor's comments indicated that the Tribunal was already quite familiar with the document. He stated:

The Tribunal is well acquainted with this document, for it has been referred to several times in these proceedings, and knows that this is an official memorandum of the Ministry for Occupied Eastern Territories, dated 19 August 1942, which states that the repressive views of the Defendant Bormann with respect to the inhabitants of the Eastern areas actually determined German occupational policies in the East. The Tribunal recalls the now almost notorious quotation from this Document R-36, which purports to paraphrase and constitute the essence of Bormann's views with respect to German occupational policy in the East. So often has it been quoted that I shall resist the temptation to repeat it ....

*Id.* at 332. The Prosecutor was not actually able to resist the temptation and essentially quoted it. *See id.* at 332-33.

particular importance, if not fascination, for participants in the *Goering* case.<sup>299</sup> The section of the document containing the abortion policy was quoted several times during trial:

"The Slavs are to work for us. In so far as we don't need them, they may die. They should not receive the benefits of the German public health system. We do not care about their fertility. *They may practice abortion and use contraceptives*; the more the better. We don't want them educated; it is enough if they can count up to 100. Such stooges will be the more useful to us. Religion we leave to them as a diversion. As to food, they will not get any more than is absolutely necessary. We are the masters; we come first."<sup>300</sup>

Document R-36 was a memorandum that Dr. Markull wrote and forwarded on August 19, 1942, through the chain of command to his superior, Alfred Rosenberg, who was Minister of the Occupied Eastern Territories.<sup>301</sup> Rosenberg's superior was Martin Bormann.<sup>302</sup> As Secretary to the Fuhrer, Bormann answered only to Hitler.<sup>303</sup> Rosenberg and Bormann were the only individual defendants on trial in *Goering* linked to the abortion policy, and prosecutors established that link through Dr. Markull's memorandum.<sup>304</sup>

Dr. Markull expressed his objections to the principles established for the administration of the Occupied Eastern Territories that Bormann set out in a letter dated July 23, 1942.<sup>305</sup> Dr. Markull also expressed his objections to Rosenberg's apparent concurrence with those principles, citing a letter Rosenberg wrote to Hitler on August 11, 1942.<sup>306</sup> In that letter to Hitler, not only did Rosenberg express his agreement with Bormann's policy, but Rosenberg also told Hitler that he had put those policies into practice even before Bormann issued his directive.<sup>307</sup> The Markull memorandum is remarkable for a number of reasons: its identification of the population policy that Germany was pursuing, the fact that Markull would so directly criticize his superiors who were two of the most powerful men in Nazi Germany, the rationale for opposing not only the immediate policy but also the Nazi Party's Master Race doctrine,<sup>308</sup> and the

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299. *Id.* at 332-33.

300. *Id.* (emphasis added); 19 IMT, *supra* note 1, at 498-99 (U.K. Prosecutor's Closing Speech).

301. 28 IMT, *supra* note 1, at 81 (Defense Counsel Final Speech); 21 IMT, *supra* note 1, at 468 (Defense Counsel Final Speech).

302. *See* 11 IMT, *supra* note 1, at 541.

303. 1 IMT, *supra* note 1, at 338; TAYLOR, THE ANATOMY OF THE NUREMBERG TRIALS, *supra* note 5, at 87.

304. 5 IMT, *supra* note 1, at 332-33 (discussing Bormann); 11 IMT, *supra* note 1, at 541-50 (discussing Rosenberg). *See also* Document R-36, *supra* note 12, at 53 (Markull's memorandum).

305. Document R-36, *supra* note 12, at 52.

306. *Id.* at 58.

307. *Id.* at 52.

308. Markull warned:

If this policy is continued, there will be a catastrophe.—These sharp practices will attain nothing except to make the Ukrainians hate us. Our position here is already lost, etc.

statement that among Germans there was general opposition to the Bormann policies.<sup>309</sup>

Rosenberg took the witness stand in his own defense, and American prosecutor Thomas Dodd<sup>310</sup> cross-examined Rosenberg as to his agreement with, and role in implementing, the policies Dr. Markull criticized in Document R-36.<sup>311</sup> Rosenberg admitted writing the August 11 letter to Hitler in which he expressed his wholehearted support for Bormann's policies.<sup>312</sup> Rosenberg claimed, however, that he did not really agree with those policies or implement them, and he tried to explain the language away.<sup>313</sup> He testified that he wrote to Hitler simply to placate him because Hitler suspected that Rosenberg was too humane in his administration of the Occupied Eastern Territories.<sup>314</sup>

Dodd next reread the by-then-familiar language of R-36 into the record as part of his cross-examination of Rosenberg:

"The Slavs are to work for us. Insofar as we do not need them, they may die. Therefore, compulsory vaccination and German health services are superfluous. The fertility of the Slavs is undesirable. *They may use contraceptives or practice abortion*; the more the better. Education is dangerous. It is enough if they can count up to 100."<sup>315</sup>

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For the rest the only effect of the false concepts of the Master Race is to relax the discipline of our officials.

*Id.* at 55.

309. Markull advised:

Finally among the District Commissioners at least 80% oppose [Bormann's policy]. In many conferences with the General Commissioners they emphasized that the population ought to be treated decently and with understanding, that its cultural gifts were surprisingly high, that its labor efficiency was considerable, that we however were about to throw away a precious stock of gratitude, affection and confidence.

*Id.*

310. Thomas Dodd became a U.S. Senator from Connecticut, and his son Christopher followed in his footsteps. CHRISTOPHER J. DODD, *LETTERS FROM NUREMBERG: MY FATHER'S NARRATIVE OF A QUEST FOR JUSTICE* (2007). Senator Dodd's book includes an excerpt from his father's cross-examination of Rosenberg on April 17, 1946, but does not include the part dealing with the crime of abortion. *Id.* at 52-53. He describes the importance of the trials in his father's life:

I could turn to many other examples from the transcripts of my father's work at Nuremberg. Suffice it to say that when he looked back on it, he considered his tenure there as the single most important body of work he produced in his lifetime. He pointed with pride to the trial's outcome—that in trying nearly two dozen defendants for such horrible crimes, distinctions were made between them, and they received a variety of sentences. This was a testimony to the trial's fairness and thoroughness.

*Id.* at 59.

311. 11 IMT, *supra* note 1, at 541-50.

312. *Id.* at 541, 545-46.

313. *Id.* at 541, 545-48.

314. *Id.* at 546.

315. *Id.* at 542-43 (emphasis added).



Then Dodd questioned Rosenberg specifically regarding his support of, and involvement in, the Nazi abortion policy contained in Document R-36:

MR. DODD: ... You had written a letter in answer to the Bormann letter, hadn't you?

ROSENBERG: Yes, that is correct.

MR. DODD: And you had agreed with these—if I may use the term—*shocking suggestions* of Bormann? In your letter you had agreed with these shocking suggestions of Bormann? "Yes" or "no"?

ROSENBERG: I wrote an appeasing letter so that I could bring about a pause in the constant pressure under which I was kept, and I would like to anticipate and say that my activity, and the decrees which I issued after this letter, did not change in any way; but, on the contrary, decrees were issued setting up a school system and for the further continuation of health control. I will discuss it further in my reply.

MR. DODD: You wrote this letter to the Fuhrer; you did not write it to Bormann, did you? Your answer went to Hitler?

ROSENBERG: I wrote my reply to the Fuhrer, yes.

MR. DODD: And you were appeasing the Fuhrer as well, were you, when you mouthed back the phrases such as are repeated in this letter about the *use of contraceptives and abortion*?

ROSENBERG: No; besides ...

MR. DODD: Wait until I finish. I was saying, in your letter to the Fuhrer you wrote back those horrid suggestions of Bormann, didn't you—those *nasty, horrid suggestions* of Bormann, I might say? You wrote them to Hitler?<sup>316</sup>

Rosenberg's only defense with regard to his tie to Bormann's abortion policy set out in Document R-36 was that he disagreed with it.<sup>317</sup> He did not argue that the policy was not criminal, nor did he rely on the defense that it simply reflected a policy of voluntary abortion.<sup>318</sup> Nor did the prosecutor portray the abortion policies referred to in the Markull memorandum as involving force against the mother.<sup>319</sup> In fact, he characterized the policies, including the promotion of abortion, as "nasty, horrid suggestions."<sup>320</sup>

#### 4. *Abortion Policy in Baden-Alsace*

The second of the two most important documents introduced in *Goering* as evidence of the crime of abortion was Document D-884, dated March 28, 1944.<sup>321</sup> It set out Nazi abortion policies and procedures to be applied in dealing with foreign pregnant workers in the territory of Baden-Alsace.<sup>322</sup> It constituted

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316. *Id.* at 545-46 (emphasis added).

317. *Id.* at 541, 545-46.

318. *See generally id.* at 541-50.

319. *Id.*

320. *Id.* at 546.

321. Document D-884, *supra* note 13, at 1018.

322. *Id.* at 1018-23.

evidence that the Political Leadership Corps of the Nazi Party was a criminal organization.<sup>323</sup>

Fairly early in the trial, the Allies had presented evidence of group criminality against seven Nazi organizations, including the Political Leadership Corps.<sup>324</sup> However, the London Charter required that appropriate notice be given to members of the accused groups so that they would have an opportunity to present evidence that the groups to which they had belonged were not criminal.<sup>325</sup> In October 1945, the IMT ordered that notice be given to members of indicted organizations and by February 8, 1946, some 47,114 applications to be heard had been submitted.<sup>326</sup> Eventually, there were more than 110,000 applications.<sup>327</sup>

The tribunal could not possibly hear all of them or review all relevant evidence. Consequently, the IMT appointed Lieutenant Colonel A.M.S. Neave, to head a Commission to collect evidence, hear witnesses, and recommend to the IMT witnesses and evidence that it personally should hear and consider.<sup>328</sup> The Commission questioned witnesses about Document D-884 and included summaries of the testimony of three of those witnesses in the Neave Report.<sup>329</sup>

Reference to Document D-884 first appeared in the record near the end of the trial, when the IMT was considering defendants' evidence on the issue of criminal organizations.<sup>330</sup> Document D-884 addressed the general problem of pregnancies arising from sexual intercourse between Germans and foreign workers.<sup>331</sup> There were several particular problems—What to do with German males who had abused a supervisory relationship over foreign workers? What to do with the foreign workers who became pregnant? What to do with racially valuable children born to these women? What to do with racially non-valuable children born to the women? What procedures ought to be followed before granting a woman permission to have an abortion?<sup>332</sup>

If a foreign female worker was taken advantage of by a German male, she could be placed in temporary protective custody and transferred to another place to work, or she could be sent to a concentration camp.<sup>333</sup> A German male who seriously violated his supervisory or disciplinary duties could be precluded from having further oversight of female workers, or he could be otherwise dealt with by the state police.<sup>334</sup> It is difficult to know whether there were any concerns for

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323. See generally *id.*

324. 4 IMT, *supra* note 1, at 17-526; TAYLOR, THE ANATOMY OF THE NUREMBERG TRIALS, *supra* note 5, at 203-07.

325. London Charter, *supra* note 49, at art. 9; 1 IMT, *supra* note 1, at 97-101 (Tribunal's Order to give notice); TAYLOR, THE ANATOMY OF THE NUREMBERG TRIALS, *supra* note 5, at 502-03.

326. 42 IMT, *supra* note 1, at 2 (Neave Report).

327. *Id.*

328. *Id.* Neave was a British member of the General Secretariat of the Tribunal. 1 IMT, *supra* note 1, at 2.

329. 42 IMT, *supra* note 1, at 25, 35, 36 (Neave Report).

330. 20 IMT, *supra* note 1, at 61-62 (U.K. Prosecutor's cross-examination).

331. *Id.* at 61.

332. See Document D-884, *supra* note 13, at 1019-23.

333. *Id.* at 1019.

334. *Id.*

the women other than keeping them in the work force and preventing the contamination of Aryan blood with non-Aryan blood.

The policy required all pregnancies of Eastern workers to be reported to the proper Nazi Party authorities.<sup>335</sup> The authorities then conducted racial examinations of the mothers and putative fathers, which served two purposes. The first purpose was to determine which children's home the child would be assigned to if born.<sup>336</sup> Racially non-valuable children born to foreign workers were to be placed in homes for foreign children, but there were separate homes for children who were racially valuable.<sup>337</sup> The second purpose was to determine whether the mother would be granted permission to abort her unborn child.<sup>338</sup> Only women who carried racially non-valuable children were granted permission to abort them.<sup>339</sup> D-884 set out the application procedures for abortions:

The procedure for an application for abortion is once more explained below:

1. The factories report *all* cases of pregnancy to the competent *Labor Office*.
2. The Labor Office reports the case to the Youth Office [Jugendamt] in order to establish paternity. If the sire is a German or of related (Germanic) race, the Youth Office reports the case to the Health Office [Gesundheitsamt].
3. The Health Office carries out an examination to determine health and hereditary health and submits a report (with photo). The Health Office passes the matter on to the "Commissioner of the Reich Commissar for the Consolidation of German Race."
4. The latter makes his findings according to the directives of the Reichsfuehrer SS. The Race and Settlement chief deals with the racial investigations.<sup>340</sup>

The testimony of the three witnesses contained in the Neave Commission Report confirmed the fact that these policies were disseminated down to the levels of Gauleiter and Kreisleiter.<sup>341</sup> In their testimony, the witnesses variously deplored the order,<sup>342</sup> denied having any part in implementing the policy,<sup>343</sup> or claimed that the abortions were permitted only upon a woman's application.<sup>344</sup>

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335. *Id.* at 1020.

336. *Id.*

337. *Id.*

338. *Id.*

339. *Id.*

340. *Id.*

341. Gauleiters and Kreisleiters were Nazi Party officials over geographical regions and counties. 1 IMT, *supra* note 1, at 257.

342. According to the Neave Report:

Various documents were put in by the Prosecution showing that decrees were sent to the Political Leaders relative to the harsh treatment of foreign laborers. WAHL [a Gauleiter] said [that] he knew of certain decrees regarding the harsh treatment of Polish laborers, but generally they were not treated any differently than other foreign workers. In fact SAUCKEL issued innumerable orders that they were to be well treated. A letter dated in 1944 from the

A chart included in Document D-884 and sent to the Gau Staff Office Strasburg, dated May 13, 1944, reported 13 pregnancies, 12 abortions, and 4 children in industrial settings and 14 pregnancies, 3 abortions, and 44 children in agricultural settings.<sup>345</sup> Document D-884 also included a more detailed and extensive chart that reported statistics from 39 districts.<sup>346</sup> The chart reported 663 births, 314 pregnancies and 42 abortions.<sup>347</sup> Those statistics justify an inference that the abortions, even if not totally free of some element of duress, were for the most part voluntary in practice as well as in the wording of the policy document.

C. *Prosecution's Theory of the Case*

Allied prosecutors found it necessary to answer allegations that the concepts of conspiracy, crimes against peace, crimes against humanity, and membership in a criminal organization were unwarranted innovations to international law. The concept of war crimes, on the other hand, was well-recognized, so the prosecution's final statement on war crimes consisted mainly of a summary of the evidence, including the evidence of abortion policies. There were no allegations regarding the criminality of abortion that needed to be addressed. The prosecution also summarized abortion policies in its final statement on membership in criminal organizations. Although the concept of criminal membership was contested, the treatment of abortion as a crime was not seriously challenged. The parties apparently assumed that the criminality of abortion was a given.

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Gaustabsamtleiter of Baden regarding abortions to be carried out on foreign women workers was also introduced. All the witnesses deplored this order and denied having carried it out.

42 IMT, *supra* note 1, at 35.

343. "In cross-examination [Else Paul] admitted that the Frauenschaft [two million member Nazi women's organization] supported the party and its principles. Shown Document 884-D, pertaining to regulations concerning the pregnancy of foreign women workers, she admitted that Frauenschaft were on the distribution list." *Id.* at 25 (Neave Report).

344. The Neave Report also documents:

The witnesses admitted that they knew of the existence of Document 884-D referred to, concerning the abortions practiced on foreign female laborers. KUEHL [a Kreisleiter], however, said that such abortions were permitted only if the woman herself signed an application for one. It was agreed that party officials received information copies of this directive. Far from persecuting or ill-treating foreign workers, the witness as Kreisleiter and Ortsgruppenleiter received directives from SAUCKEL which requested decent treatment and rations for foreign labor and he was active in enforcing such regulations.

*Id.* at 36-37.

345. Document D-884, *supra* note 13, at 1023.

346. *Id.* at 1021-22.

347. *Id.*

### 1. *Guilt of Individual Defendants*

Although numerous innovative concepts of the Nuremberg proceedings came under wide-ranging criticism, the treatment of abortion as a war crime was virtually free of that kind of controversy or objection.<sup>348</sup> That fact is reflected in the focus and content of the closing argument of the United Kingdom's Chief Prosecutor, Sir Hartley Shawcross. He delivered the primary argument regarding the guilt of individual defendants and defended the legality of the theories upon which the charges were based.<sup>349</sup>

Shawcross devoted considerable attention to countering the allegation that trial for conspiracy and crimes against peace violated the *ex post facto* principle.<sup>350</sup> By its very nature, the charge of crimes against peace had little relevance to the crime of abortion.<sup>351</sup> The conspiracy charge likewise had little relevance to the crime of abortion due to the manner in which the case was prosecuted, and due to the tribunal's interpretation of the Charter.<sup>352</sup>

Shawcross also addressed the concept of crimes against humanity. One of the main criticisms of the concept was that it was being used in conjunction with the charge of planning wars of aggression in order to hold the Nazis liable for crimes committed against other Germans prior to World War II.<sup>353</sup> That would extend the jurisdiction of international law and tribunals to reach domestic matters. Shawcross's response to that criticism also had limited relevance for the crime of abortion because the evidence presented at trial for the most part did not involve prewar abortion policies or activities.<sup>354</sup> Shawcross did not address the concept of group criminality in his closing because the trial of the alleged criminal groups was not yet completed.<sup>355</sup> The prosecution argument with regard to criminal organizations was delivered later in the trial by other prosecutors.<sup>356</sup>

Virtually all nations recognized that a wide range of war crimes could be prosecuted lawfully without being subject to the criticisms noted above.<sup>357</sup> Acknowledging that fact, Shawcross focused most of his argument related to war

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348. See, e.g., TAYLOR, *THE ANATOMY OF THE NUREMBERG TRIALS*, *supra* note 5, at 36 (conspiracy), 75, 104 (membership in a criminal organization), 66-67, 166 (crimes against peace); Francis Biddle, *The Nurnberg Trial*, 33 VA. L. REV. 679 (1947), *reprinted in* PERSPECTIVES ON THE NUREMBERG TRIAL, *supra* note 4, at 200, 211 (crimes against humanity).

349. 19 IMT, *supra* note 1, at 433-529.

350. 3 IMT, *supra* note 1, at 106 (Opening Speech); 19 IMT, *supra* note 1, at 448-62 (Final Speech).

351. 19 IMT, *supra* note 1, at 448-54.

352. See *supra* notes 207, 216.

353. See Egon Schwelb, *Crimes Against Humanity*, 23 BRIT. Y.B. INT'L L. 178 (1946), *reprinted in* PERSPECTIVES ON THE NUREMBERG TRIAL, *supra* note 4, at 120, 121.

354. See 19 IMT, *supra* note 1, at 433-529.

355. Shawcross's Final Speech was delivered on July 26, 1946. 19 IMT, *supra* note 1, at 433. However, the IMT did not begin hearing evidence on the charge of membership in Criminal Organization until July 30, 1946. 20 IMT, *supra* note 1, at 21.

356. See 22 IMT, *supra* note 1, at 170-365 (Final Speeches on criminal organizations).

357. See generally Hague Convention IV (1907), *supra* note 78; 19 IMT, *supra* note 1, at 466-529.

crimes on recounting evidence introduced at trial and connecting the evidence to individual defendants.<sup>358</sup> He included the evidence of individual responsibility for abortion in the section of his argument dealing with the murder of civilians and the "belligerent occupation of the [conquered] territories."<sup>359</sup> He specifically addressed Document R-36, which implicated Bormann and Rosenberg, and he quoted from it as evidence of Nazi genocide:

The Nazis also used various biological devices, as they have been called, to achieve genocide. They deliberately decreased the birthrate in the occupied countries by sterilization, castration, and abortion, by separating husband from wife and men from women and obstructing marriage. I quote:

"We are obliged to depopulate"—said Hitler to Rauschning—"as part of our mission of preserving the German population. We shall have to develop a technique of depopulation...."

You have seen Neurath's use of this biological device in his plan for Czechoslovakia. Listen to Bormann's directives for the Eastern territory summarized by one of Rosenberg's subordinates. I quote:

"The Slavs are to work for us. Insofar as we do not need them, they may die. Therefore, compulsory vaccination and German health services are superfluous. The fertility of the Slavs is undesirable. They *may use contraceptives or practice abortion*; the more the better. Education is dangerous. It is enough if they can count up to a hundred. At best an education which produces useful stooges for us is admissible."<sup>360</sup>

## 2. *Criminal Organizations and Groups*

Near the very end of the *Goering* trial, the prosecution made additional closing arguments on the issue of criminal organizations.<sup>361</sup> British and American prosecutors pointed to Document D-884 in their closing arguments on the criminality of the Political Leadership Corps of the Nazi Party.<sup>362</sup> The British prosecutor referred to Document D-884 in large measure to prove that Nazi Party members, down to the Gauleiter and Kreisleiter levels, had been involved in the Nazi Party's criminal activities.<sup>363</sup> Although his argument focused on proving levels of responsibility in the Nazi party, it assumed that the abortion policies set out in Document D-884 were criminal in nature:

Lastly, upon this aspect of the case, you will remember the instructions issued by the Gauamtsleiter from Strasbourg in the Gau Baden-Alsace. Foreign women

358. See 19 IMT, *supra* note 1, at 466-529 (U.K. Prosecutor's Final Speech on Count Three (war crimes) and Count Four (crimes against humanity)).

359. *Id.* at 494-501.

360. *Id.* at 498-99 (emphasis added).

361. 22 IMT, *supra* note 1, at 170-365.

362. *Id.* at 193-94 (U.K. Prosecutor's Final Speech), 253 (U.S. Prosecutor Dodd's Final Speech on Criminal Organizations).

363. *Id.* at 192-95.

workers induced to sexual intercourse by Germans were to be taken temporarily into protective custody and then sent to another place of work. "In other cases the foreign female worker will be sent to a concentration camp for women" (D-884A). Their children, if they were racially satisfactory and hereditarily healthy, were to be seized from them immediately after birth to "go to homes for foreign children to be looked after by the National Socialist welfare organization."

....  
"As far as I can find out up to now"—reports the Kreisleiter of Villingen—there have been about 21 pregnancies; of these four abortions are said to have been carried out, during which two of the women died. Of the remaining 17 births, five were still-born. Welfare by the NSV has not taken place anywhere" (D-884A).<sup>364</sup>

Thomas Dodd, the U.S. prosecutor who had cross-examined Rosenberg on his involvement in the abortion policies outlined in Document R-36, argued that the policies were a criminal activity.<sup>365</sup> He stated: "With a crassness unknown to ordinary domestic animal care, directives providing for the abortion of female laborers were distributed to Gauleiter and Kreisleiter and their staffs."<sup>366</sup> Dodd's choice of words suggests that he interpreted the policies as providing for voluntary rather than forcible abortion. One would expect stronger language of condemnation for the practice of forced abortions.

Dr. Robert Servatius, who was assigned to conduct the defense of the Political Leadership Corps, argued that abortions were committed only upon the application and consent of the women.<sup>367</sup> Of course, the prosecutors had not argued otherwise regarding Documents R-36 and D-884.<sup>368</sup> It is unclear whether Dr. Servatius considered voluntariness an absolute defense or simply a matter in mitigation. He argued that

[w]ith reference to the interruption of pregnancy in foreign female workers, it is shown from the "Confidential Information of the Party Chancellery" of 9 December 1943 that such interference was only carried through at the express wish of the person concerned. The list annexed to the document also shows that interference was the exception (Affidavit Haller 56a).<sup>369</sup>

The prosecution did not respond to that argument by asserting that the policy called for forcible abortion or that forcible abortions were imposed.<sup>370</sup> Nor did the prosecution counter by arguing that voluntary abortion is a crime.<sup>371</sup>

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364. *Id.* at 193-94.

365. *Id.* at 253.

366. *Id.* Dodd's Final Speech is reprinted in NAZI CONSPIRACY AND AGGRESSION Supp. A, *supra* note 12, at 263. His statement with regard to abortion contains a footnote to Document D-884. 22 IMT, *supra* note 1, at 276.

367. 21 IMT, *supra* note 1, at 472.

368. See 22 IMT, *supra* note 1, at 253-76.

369. 21 IMT, *supra* note 1, at 472.

370. See 22 IMT, *supra* note 1, at 253-76.

371. See *id.*

Most likely, the prosecution understood the defense counsel's argument to be one in mitigation or one simply not meriting a response.

### 3. *Sources of Law*

There remains the question of identifying the particular source of international law that makes or identifies abortion as a crime. The indictment listed five sources of international law governing war crimes and crimes against humanity that were binding on the IMT—treaty, custom, general principles of law, domestic law, and the London Charter.<sup>372</sup> The prosecution cited no treaty provision that particularly identified abortion as a crime.<sup>373</sup> Nor did it provide evidence of an international custom expressly recognizing abortion as a crime.<sup>374</sup> The same was true regarding general principles of law common to civilized nations—no attempt was made to prove that most civilized nations protected unborn children by criminalizing abortion.<sup>375</sup> Nor did the prosecutors cite the domestic law of the nations in which the abortions were performed, or language of the London Charter.<sup>376</sup>

By the close of World War II, most countries still criminalized abortion.<sup>377</sup> German and Polish law treated abortion as a crime.<sup>378</sup> Undoubtedly, the prosecutors simply assumed that the unborn children of Slavs and Jews were human beings just as their mothers were. Unjustified killing of a human being is criminal homicide.<sup>379</sup> It was no more necessary to prove that a treaty or custom particularly identified Slavs and Jews as human beings than it was to prove that their unborn children were human beings. It was implicitly recognized. The prosecution did expressly identify abortion as one of the biological devices that the Nazi's used to commit genocide.<sup>380</sup>

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372. See discussion *supra* Part III.A.4.

373. See 1 IMT, *supra* note 1, at 44 (mentioning "murders and ill-treatment" in reference to treaties, but not abortion specifically).

374. See *id.* (mentioning "murders and ill-treatment" in reference to international custom, but not abortion specifically).

375. See *id.* (mentioning "murders and ill-treatment" in reference to general international common law, but not abortion specifically).

376. See *id.* (mentioning "murders and ill-treatment" in reference to the domestic law of the nations in which the abortions were performed, and in reference to the London Charter, but not abortion specifically).

377. Wikipedia, History of Abortion, [http://en.wikipedia.org/wiki/History\\_of\\_abortion](http://en.wikipedia.org/wiki/History_of_abortion) (last visited Mar. 8, 2011). See *infra* note 494 (Polish abortion statute) and note 495 (German abortion statute).

378. See *infra* note 494 (Polish abortion statute) and note 495 (German abortion statute).

379. See BLACK'S LAW DICTIONARY 802-04 (9th ed. 2009) (defining homicide).

380. 19 IMT, *supra* note 1, at 498.



D. *The IMT's Judgment*

In its judgment, the IMT did not expressly address the evidence of forcible abortions.<sup>381</sup> Those acts would have clearly constituted war crimes, at least against the mothers. The IMT may have thought there was insufficient proof linking those acts to particular defendants or organizations. An additional factor was that the evidence of Nazi atrocities was so voluminous that it simply was not feasible to identify every violation of every one of the counts.<sup>382</sup>

The tribunal's judgment also failed to make any express reference to the documents that the Soviets presented regarding abortion practices in the Balkans.<sup>383</sup> It may have chosen not to include that evidence for either of the reasons identified above. It may also have been reluctant to rely on documents produced by victim nations, especially when there was ample evidence of abortion policies in the Nazis' own documents.

1. *Abortion as a War Crime and Crime Against Humanity*

In its judgment, the IMT summarized evidence related to Counts Three and Four under the titles of *War Crimes and Crimes against Humanity* and *Murder and Ill-treatment of Civilian Population*, citing article 46 of Hague Convention IV (1907) as applicable law.<sup>384</sup> As to those counts, the tribunal quoted from the Markull memorandum (Document R-36) that set out Nazi population-control policies for the Eastern Occupied Territories.<sup>385</sup> The IMT specifically identified Bormann and Rosenberg, two of the *Goering* defendants, as criminally implicated by the memorandum:

In August 1942 the policy for the Eastern Territories as laid down by Bormann was summarized by a subordinate of Rosenberg as follows:

"The Slavs are to work for us. Insofar as we do not need them, they may die. Therefore, compulsory vaccination and German health services are superfluous. The fertility of the Slavs is undesirable."<sup>386</sup>

The judgment quoted the language, which set out a general principle of Nazi population policy: "The fertility of the Slavs is undesirable."<sup>387</sup> It did not include in the quotation any other language from Document R-36, including the

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381. The IMT judgment only mentioned abortion once, and it did not address evidence of such in detail. See 1 IMT, *supra* note 1, at 260.

382. Before addressing the evidence of war crimes and crimes against humanity, the IMT stated: "The evidence relating to War Crimes has been overwhelming, in its volume and its detail. It is impossible for this Judgment adequately to review it, or to record the mass of documentary and oral evidence that has been presented." *Id.* at 226.

383. See discussion *supra* Part III.B.2.

384. 1 IMT, *supra* note 1, at 226-28, 232-43.

385. *Id.* at 237.

386. *Id.*

387. *Id.*

specific language related to the promotion of abortion and contraceptives.<sup>388</sup> It is improbable that the IMT omitted that portion of the quotation because it did not think abortion was a war crime or a crime against humanity, since it expressly included abortion in the part of the judgment identifying the Political Leadership Corps of the Nazi Party as a criminal organization.<sup>389</sup> The IMT likely quoted the general population policy as encompassing the particular activities and policies identified in Document R-36.

## 2. *Abortion Activities as a Mark of a Criminal Organization*

The IMT expressly identified the abortion policy as an activity that marked the Political Leadership Corps as a criminal organization.<sup>390</sup> Bormann was the head of the Political Leadership Corps.<sup>391</sup> He established the abortion policy for the Eastern territories, as was clear from Document R-36.<sup>392</sup> The portion of the judgment declaring the Political Leadership Corps to be a criminal organization referenced the policy that appeared in Document D-884:

Under Saukel's directive the Leadership Corps was directly concerned with the treatment given foreign workers, and the Gauleiters were specifically instructed to prevent "politically inept factory heads" from giving "too much consideration to the care of Eastern workers." The type of question which was considered in their treatment included reports by the Kreisleiters on pregnancies among the female slave laborers, which would result in an abortion if the child's parentage would not meet the racial standards laid down by the SS and usually detention in a concentration camp for the female slave laborer.<sup>393</sup>

The patterns reflected in Document D-884 and in evidence prosecutors subsequently introduced in the *Greifelt* trial were similar.<sup>394</sup> Worker pregnancies were to be reported to the German authorities.<sup>395</sup> Women carrying racially valuable children were not permitted to have abortions, but women carrying racially non-valuable children could apply to have abortions and permission would be granted.<sup>396</sup> Children born were placed in different orphanages depending on their racial value.<sup>397</sup> By encouraging women to have abortions, they were kept in the labor force and the non-Aryan population was held in check without creating any unnecessary animosity from workers.<sup>398</sup>

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388. 11 IMT, *supra* note 1, at 542-43 (reading Document R-36 during testimony: "They may use contraceptives or practice abortion, the more the better.").

389. 1 IMT, *supra* note 1, at 260.

390. *Id.*

391. *Id.* at 257.

392. 11 IMT, *supra* note 1, at 542-43.

393. 1 IMT, *supra* note 1, at 260.

394. See discussion *supra* Parts III.B.4, IV.B.2.ii.

395. 4 NMT, *supra* note 1, at 687; Document D-884, *supra* note 13, at 1020.

396. 4 NMT, *supra* note 1, at 686; Document D-884, *supra* note 13, at 1020.

397. 4 NMT, *supra* note 1, at 688-89; Document D-884, *supra* note 13, at 1020.

398. 4 NMT, *supra* note 1, at 687; Document D-884, *supra* note 13, at 1020.

The role of the Race and Settlement Main Office ("RuSHA") as racial examiner in the implementation of Nazi abortion policies was identified in Document D-884.<sup>399</sup> RuSHA was a department of the SS which the IMT also declared to be a criminal organization.<sup>400</sup> The judgment expressly identified RuSHA as an agency that the SS utilized "in carrying out schemes for Germanization of occupied territories according to the racial principles of the Nazi Party."<sup>401</sup>

It is not hard to imagine the situational pressures an Eastern worker enslaved in Germany or one of the occupied territories would experience that would induce her to opt for an abortion. Nor is it hard to imagine that the pressure placed on her would be considerably more than husbands, parents, boyfriends and others in contemporary society might place on her. Although this passage from the judgment referring to Nazi abortion policies focused on the ill-treatment of women, it referred to the mothers and fathers as the "child's parentage."<sup>402</sup> And while the judgment did not assert that abortions were physically forced upon these women, it certainly portrayed the situational duress in which they were placed.<sup>403</sup> Even when abortions are free of coercion, the woman, unlike the abortion doctor, is usually viewed as much a victim as a perpetrator of the crime.<sup>404</sup> In this wartime context, it was even more likely that she was viewed as a victim.

399. Document D-884, *supra* note 13, at 1020.

400. 1 IMT, *supra* note 1, at 270.

401. *Id.* Himmler headed the "SS," which is the common designation for the *Die Schutzstaffeln der Nationalsozialistischen Deutschen Arbeiterpartei*. The SS Central Organization had 12 main offices and was involved in wide-ranging criminal activities, including planning for wars of aggression and committing atrocities against Jews, slave laborers, and prisoners of war. *Id.* at 268-73.

402. *Id.* at 260. This is consistent with language in The Convention on the Rights of the Child which states: "Bearing in mind that, as indicated in the Declaration of the Rights of the Child, 'the child, by reason of his physical and mental immaturity, needs special safeguards and care, including appropriate legal protection, before as well as after birth.'" Convention on the Rights of the Child, pmbl., G.A. Res. 44/25, Annex, U.N. GAOR, 44th Sess., Supp. No. 49, U.N. Doc. A/44/49, at 167 (Sept. 2, 1990).

403. 1 IMT, *supra* note 1, at 260 (noting the terrible conditions in which women were forced to live).

404. *Gonzales v. Carhart*, 550 U.S. 124, 159 (2007) (discussing the "bond of love the mother has for her child" and the depression that may follow an abortion procedure). For discussion of the view that abortions cause psychological problems in mothers who receive them, see, e.g., BRENDA MAJOR ET AL., REPORT OF THE APA TASK FORCE ON MENTAL HEALTH AND ABORTION (2008), available at <http://www.apa.org/pi/women/programs/abortion/index.aspx>; The Royal College of Psychiatrists, Position Statement on Women's Mental Health in Relation to Induced Abortion (Mar. 14, 2008), <http://www.rcpsych.ac.uk/member/currentissues/mentalhealthandabortion.aspx> ("The specific issue of whether or not induced abortion has harmful effects on women's mental health remains to be fully resolved. The current research evidence base is inconclusive—some studies indicate evidence of no harm, whilst other studies identify a range of mental disorders following abortion."). C. Everett Koop researched this topic during the 1980s and his research and correspondence is available at the U.S. National Library of Medicine website. See, e.g., National Institutes of Health, The C. Everett Koop Papers: Reproduction and Family Health, <http://profiles.nlm.nih.gov/QQ/Views/Exhibit/narrative/abortion.html> (last visited Mar. 3, 2011).

But the judgment did not cite evidence, other than the factors constituting situational duress, that the Nazi's used coercion to induce abortions,<sup>405</sup> and the IMT did not base its judgment on the premise that the abortions were forced.<sup>406</sup> Nor did the prosecution argue that the abortion policies and practices that constituted criminal activity under the charge of criminal organizations involved involuntary abortion.<sup>407</sup>

Represented by their prosecutorial teams, the four Allied powers recognized that abortion was a crime.<sup>408</sup> This is apparent from the evidence they offered and the arguments that they made. It seems simply to have been a given that the withdrawal of the protection of law from unborn children and the promotion of abortion by Nazi officials was a war crime, a crime against humanity, and an activity that marked the Political Leadership Corps of the Nazi Party as a criminal organization. This may not be a given today, but it seems certainly to have been the case at the dawning of the modern era of international human rights.

The London Charter and the judgment of the IMT were particularly important developments in international law because the United Nations General Assembly ("General Assembly") affirmed "the principles of international law recognized by the Charter of the Nuremberg Tribunal and the judgment of the Tribunal."<sup>409</sup> The General Assembly also created a committee on the codification of international law to formulate an International Criminal Code, which was to include "the principles recognized in the Charter of the Nürnberg Tribunal and in the judgment of the Tribunal."<sup>410</sup>

#### IV. ABORTION AND THE NMT

Following the *Goering* case, NMTs tried less important Nazi defendants in 12 trials. They tried each defendant on one or more of the four counts that formed the basis of the IMT indictment, and they were essentially bound by the same law as the IMT. The *Greifelt* defendants raised most of the same defenses that the *Goering* defendants had raised. The prosecution in *Greifelt* introduced much more evidence of Nazi abortion policies and practices than had the prosecution in the *Goering* case, but while the amount of evidence was greater in

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For more on the topic, see generally Wikipedia, Abortion and Mental Health, [http://en.wikipedia.org/wiki/abortion\\_and\\_mental\\_health](http://en.wikipedia.org/wiki/abortion_and_mental_health) (last visited Mar. 3, 2011).

405. 1 IMT, *supra* note 1, at 260 (mentioning abortion for the only time in the judgment, but no mention of overt coercion).

406. *Id.* (mentioning abortion for the only time in the judgment, but not in the context of forcible abortion).

407. *Id.* (mentioning abortion for the only time in the judgment, but not mentioning involuntary abortions). See generally 19 IMT, *supra* note 1, at 397-618 (closing statements).

408. See discussion *supra* Part III.B (discussing the prosecution's various references to abortion as a crime).

409. Affirmation of the Principles of International Law Recognized by the Charter of the Nürnberg Tribunal, G.A. Res. 95(I), U.N. Doc. A/RES/95(I) (Dec. 11, 1946).

410. *Id.*

*Greifelt*, the basic contours of the Nazi policies and the prosecution's theory of criminality remained the same.

The fourteen *Greifelt* defendants were arraigned on October 10, 1947, about one year after the *Goering* case concluded.<sup>411</sup> Sentences were imposed on March 10, 1948.<sup>412</sup> All of the defendants were officers in one of four different SS organizations involved in implementing Nazi population policies.<sup>413</sup> Ulrich Greifelt, Chief of the Main Staff Office of the Reich Commissioner for the Strengthening of Germanism ("RKFDV") with responsibilities for overseeing several other offices including RuSHA, was the principal defendant in the case. Because of the prominent role that RuSHA had in effecting Nazi population policies, *U.S. v. Greifelt* is also known as the "RuSHA Case."<sup>414</sup>

#### A. *The Indictment in Greifelt*

Three counts comprised the *Greifelt* indictment: crimes against humanity, war crimes, and membership in a criminal organization.<sup>415</sup> There were no counts of crimes against peace or conspiracy. The definitions for crimes against humanity and war crimes in C.C. Law 10 were similar to those in the London Charter.<sup>416</sup> C.C. Law 10 criminalized membership in organizations that the IMT had declared to be criminal.<sup>417</sup> Two significant differences existed between C.C.

411. 4 NMT, *supra* note 1, at 599-600.

412. *Id.*; TAYLOR, FINAL REPORT, *supra* note 1, at 178-79.

413. *Id.* at 177-78.

414. 4 NMT, *supra* note 1, at 599-600. The Indictment began by listing the defendants with military rank and positions held in one of four SS organizations. *Id.* at 608-09. The *Greifelt* defendants were not members of organizations that actually provided or paid for abortion services. The organizations that appeared to be responsible for providing abortion services were the Medical Chamber and RSHA. This conclusion is based on the prominent position each had in various prosecution exhibits and the claim made by Greifelt. Final Plea of Greifelt, *microformed on Microfilm Publication M894*, *supra* note 15, Roll 33, Document Page 59, Frame 0265. See also 1 IMT, *supra* note 1, at 291 (noting that RSHA is an abbreviation for "Reich Security Head Office").

415. 4 NMT, *supra* note 1, at 608, 609-17 (Count One, Crimes Against Humanity), 617-18 (Count Two, War Crimes), 618 (Count Three, Membership in Criminal Organization).

416. See *infra* note 417 (providing C.C. Law No. 10's definition of "War Crimes" and "Crimes Against Humanity"); *supra* note 197 (providing the London Charter's definition of "War Crimes" and "Crimes Against Humanity").

417. C.C. Law No. 10 provided the following definitions:

1. Each of the following acts is recognized as a crime:

(a) *Crimes against Peace*....

(b) *War Crimes*. Atrocities or offences against persons or property constituting violations of the laws or customs of war, including but not limited to, murder, ill treatment or deportation to slave labour or for any other purpose, of civilian population from occupied territory, murder or ill treatment of prisoners of war or persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns or villages, or devastation not justified by military necessity.

(c) *Crimes against Humanity*. Atrocities and offences, including but not limited to murder, extermination, enslavement, deportation, imprisonment, torture, rape, or other inhumane acts committed against any civilian population, or persecutions on political, racial or religious grounds whether or not in violation of the domestic laws of the country where perpetrated.

Law 10 and the IMT Charter regarding jurisdiction and accomplice culpability. C.C. Law 10 provided a comprehensive list of activities and conditions that constituted accomplice culpability,<sup>418</sup> and it expressly extended jurisdiction to cover crimes committed against one's own nationals.<sup>419</sup> The *Greifelt* indictment also identified the applicable sources of international law to be applied; those sources were nearly identical to the sources listed in the *Goering* indictment.<sup>420</sup>

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(d) Membership in categories of a criminal group or organization declared criminal by the International Military Tribunal.

C.C. Law 10, *supra* note 67, art. II. See *supra* note 197 (London Charter's definition of the offenses). Because of the similarity of terms, and the fact that C.C. Law 10 acknowledged that the Moscow Declaration and London Charter were integral parts of it, the definitions of crimes must be construed consistently. C.C. Law 10, *supra* note 67, art. I.

418. C.C. Law No. 10 states:

2. Any person without regard to nationality or the capacity in which he acted, is deemed to have committed a crime as defined in paragraph 1 of this Article, if he was (a) a principal or (b) was an accessory to the commission of any such crime or ordered or abetted the same or (c) took a consenting part therein or (d) was connected with plans or enterprises involving its commission or (e) was a member of any organization or group connected with the commission of any such crime or (f) with reference to paragraph 1 (a), if he held a high political, civil or military (including General Staff) position in Germany or in one of its Allies, co-belligerents or satellites or held high position in the financial, industrial or economic life of any such country.

*Id.* art. II.

419. Telford Taylor wrote: "But the concept of 'crimes against humanity' comprises atrocities ... which are crimes against international law even when committed by nationals of one country against their fellow nationals or against those of other nations irrespective of belligerent status." TAYLOR, FINAL REPORT, *supra* note 1, at 65. However, the NMTs left unresolved the question of whether the count of crimes against humanity could be used to reach prewar crimes committed against German nationals. Taylor's Final Report explained:

The major question of whether atrocities committed in peacetime by a government against its own citizens in the course of religious, racial, or political persecutions are offenses against international penal law was considered far more searchingly by several of the Law No. 10 tribunals than by the IMT. No definitive precedent was established; in the two cases in which the indictment presented this question the tribunals ruled that the language of Control Council Law No. 10 did not comprehend the crimes charged.

*Id.* at 108. However, when the issue was raised collaterally in two other cases, an NMT stated that crimes against humanity could reach prewar crimes if "the State involved, owing to indifference, impotency, or complicity, has been unable or has refused to halt the crimes and punish the criminals." *Id.* at 108-09 (quoting *United States v. Ohlendorf*, which is commonly referred to as the "Einsatz case"). The NMT went even further in the "Justice case":

"The force of circumstance, the grim fact of worldwide interdependence, and the moral pressure of public opinion have resulted in international recognition that certain crimes against humanity committed by Nazi authority against German nationals constituted violations not alone of statute but also of common international law."

*Id.* at 109 (quoting *United States v. Altstoetter*).

420. 4 NMT, *supra* note 1, at 617 (sources of international law relevant to crimes against humanity), 618 (sources of international law relevant to war crimes). See discussion *infra* Parts

# 1. *Count One—Crimes Against Humanity*

Count One (crimes against humanity) comprised 75% of the indictment.<sup>421</sup> It began with general allegations of activities constituting crimes against humanity (paragraphs 1 and 2) and then identified the implicated SS organizations, giving a general description of their activities, their relationship to one another, and the defendants' roles in those organizations (paragraphs 3 through 10).<sup>422</sup> Next, the indictment listed and described in greater detail particular activities that comprised crimes against humanity (paragraphs 11 through 22), including:

11. Kidnapping of alien children ....
12. Abortions ....
13. Taking away infants of Eastern workers ....
14. Punishment for sexual intercourse with Germans ....
15. Hampering reproduction of enemy nationals ....
16. Forced evacuation and resettlement of populations ....
17. Forced Germanization of enemy nationals ....
18. Slave labor ....
19. Conscription of non-Germans ....
20. Plunder ....
21. Persecution and extermination of Jews ....
22. ... "Euthanasia Program" ....<sup>423</sup>

The prosecution charged in paragraphs 2(b), 4, and 12 that abortion constituted a crime against humanity. Paragraph 2(b) stated that "[e]ncouraging and compelling abortions on Eastern workers for the purpose of preserving their working capacity as slave labor and weakening of Eastern nations" was part of a systematic program of genocide.<sup>424</sup> Paragraph 4 alleged that the Staff Main Office of RKFDV (headed by Greifelt) engaged in several criminal activities, including "*participation in the performance of abortion on Eastern workers.*"<sup>425</sup> Paragraph 12 contained the most detailed allegations of German abortion policies as a crime against humanity:

12. *Abortions.* All known cases of pregnancy among deported Eastern slave workers were submitted to RuSHA. Examinations were conducted of the racial characteristics of the expectant mother and father. In the majority of instances, where the racial examinations yielded negative results showing that the expected child was not of "racial value", the Eastern women workers were *induced or forced* to undergo abortions. When the expected child was found to be of "racial value" it

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IV.A.4. (discussing the *Greifelt* Indictment list); IV.F.3. (sources listed in the *Greifelt* Judgment); *supra* Part III.A.3. (discussing the *Goering* Indictment list).

421. 4 NMT, *supra* note 1, at 609-17.

422. *Id.* at 609-13.

423. *Id.* at 613-17.

424. *Id.* at 610 (emphasis added).

425. *Id.* at 611 (emphasis added).

was taken shortly after birth, as described below in paragraph 13. The desired results of this systematic program of abortions were immediately to keep the women available as labor, and ultimately to reduce the populations of the Eastern nations. Abortions on Polish women in the General Government were also *encouraged* by the withdrawal of abortion cases from the jurisdiction of the Polish courts. The defendants Greifelt, Creutz, Meyer-Hetling, Schwarzenberger, Hofmann, Hildebrandt, Schwalm, Huebner, Lorenz, and Brueckner are charged with special responsibility for and participation in these crimes.<sup>426</sup>

Considered together, paragraphs 2(b), 4, and 12 of Count One provided the basic conceptual framework for analyzing the evidence presented, arguments made, and judgment rendered as to the crime of abortion. The first component of the conceptual framework was the distinction between voluntary and involuntary abortion. Paragraph 2(b) drew this distinction through use of the language, "encouraging and compelling."<sup>427</sup> Paragraph 12 similarly distinguished "induced" and "forced" abortions and further alleged that defendants "[e]ncouraged" abortions in Poland.<sup>428</sup> The prosecution alleged that both voluntary and involuntary abortions were crimes.<sup>429</sup> The indictment itself provided limited particulars regarding the manner in which abortions were allegedly compelled or forced; however, it did generally describe the oppressive context in which the abortion policies were administered.<sup>430</sup>

An important issue at trial was the question of whether abortions conducted with the mother's consent were international crimes.<sup>431</sup> Both voluntary and involuntary abortions may have been criminal in nature, and both were crimes under German and Polish law, but were both punishable under international law as crimes against humanity?<sup>432</sup> Implicit in charging voluntary abortion as a crime is the premise that unborn children are human beings and that abortion is therefore a crime against the unborn child. The prosecution expressly argued during the course of the trial that abortion is a crime against the unborn child.<sup>433</sup>

The second component of the conceptual framework was the identification of the three means by which the Nazis encouraged abortion. Paragraph 4 identified the most direct means of encouragement—actually providing abortion services.<sup>434</sup> Paragraph 12 detailed two additional means of encouraging abortions, both of which entailed a failure to extend the protection of law to

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426. *Id.* at 613-14 (emphases added).

427. *Id.* at 610.

428. *Id.* at 613.

429. *Id.* at 687.

430. *Id.* at 609-13.

431. See 5 NMT, *supra* note 1, at 112. See also discussion *infra* Parts IV.B.2.iv, IV.C.2, IV.E.2.

432. See *infra* note 494 (Polish abortion statute) and *infra* note 495 (German abortion statute).

433. Closing Brief on the Organization of the Main Race and Settlement Office, and Against Hofmann, Hildebrandt, Schwalm, Huebner, *microformed on Microfilm Publication M894, supra* note 15, at Roll 31, Document Page 33, Frame 0363 [hereinafter Closing Brief on RuSHA, Hofmann et al.]. See also discussion *infra* Part IV.D.2.i.

434. 4 NMT, *supra* note 1, at 611 (Indictment).



unborn children.<sup>435</sup> First, Nazi officials withheld protection of law when they refused to punish the abortion of racially non-valuable children of Eastern workers brought into Germany.<sup>436</sup> Second, the Nazis removed protection of law when they prohibited enforcement of abortion laws in occupied Poland.<sup>437</sup> Although it was clear that the German government provided abortion services and funded private abortion providers, the indictment and the trial focused on the failure to extend the protection of law to unborn children in Germany and Poland.<sup>438</sup>

## 2. *Count Two—War Crimes*

Count Two (war crimes) comprised less than 10% of the indictment (paragraphs 24 and 25).<sup>439</sup> After making very general allegations of activities constituting war crimes, Count Two simply incorporated by reference the particular allegations made in paragraphs 11 through 21 of Count One (crimes against humanity).<sup>440</sup> Therefore, virtually the same allegations that formed the bases for crimes against humanity formed the bases for war crimes.

## 3. *Count Three—Membership in a Criminal Organization*

Count Three of the indictment (membership in a criminal organization), paragraph 26, charged all but one of the 14 defendants with membership in the SS, an organization the IMT had declared to be criminal.<sup>441</sup> Himmler was the Reich Leader of the SS as well as the RKFDV, which was a part of the SS.<sup>442</sup> Himmler appointed Greifelt to head the Staff Main Office of the RKFDV.<sup>443</sup> The RKFDV worked closely with other SS offices to effect Nazi population policies.<sup>444</sup> Those offices included the Office for the Reparation of Germans ("VoMi"), RuSHA, and the Well of Life Society (*Lebensborn*).<sup>445</sup> The 13 *Greifelt* defendants charged and convicted of membership in a criminal organization held office in at least one of these four SS organizations.<sup>446</sup>

The consequences of conviction for membership in the SS would have been far-reaching had defendants been held guilty of all offenses, including abortion, committed by the SS.<sup>447</sup> The definition of the offense of membership in a

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435. *Id.* at 613-14.

436. *Id.* at 613. See also discussion *infra* Parts IV.B.2, IV.D.3.ii.

437. 4 NMT, *supra* note 1, at 613. See also discussion *infra* Parts IV.B.1, IV.D.3.i.

438. 4 NMT, *supra* note 1, at 613; Closing Brief on RuSHA, Hofmann et al., Microfilm Publication M894, *supra* note 15, at Roll 31, Document Page 33, Frame 0363.

439. 4 NMT, *supra* note 1, at 617-18.

440. *Id.* at 618.

441. See *id.* See also 1 IMT, *supra* note 1, at 268-73 (Judgment).

442. 4 NMT, *supra* note 1, at 611.

443. *Id.*

444. *Id.* at 612.

445. *Id.* at 611-12.

446. *Id.* at 608-09.

447. C.C. Law 10, *supra* note 67, art. II.3.

criminal organization lacked a *mens rea* element both for simple membership and for an individual's guilt for crimes committed by the organization or its other members.<sup>448</sup> C.C. Law 10 defined the crime simply as "[m]embership in categories of a criminal group or organization declared criminal by the International Military Tribunal."<sup>449</sup> As for the issue of accomplice culpability, C.C. Law 10 provided that a defendant who proved to be a member of a criminal organization was deemed to have committed any crimes with which that organization was connected.<sup>450</sup>

In *Goering*, the IMT had held that culpability for the crime of membership required individual "knowledge of the criminal purposes or acts of the organization."<sup>451</sup> The *Greifelt* tribunal acknowledged the applicability of the IMT standard, finding the 13 defendants guilty of membership in the SS "under the conditions defined and specified by the judgment of the International Military Tribunal."<sup>452</sup> In other words, the NMT convicted only those who held membership in the SS knowing that the SS had criminal purposes or that it was engaged in criminal activities.

The NMT did not clarify the necessary level of *mens rea* for a finding of guilt with regard to crimes committed by the SS or by other members of the SS. Had the *Greifelt* tribunal applied C.C. Law 10, Article II.2.(e) as written, it would have found 13 defendants guilty of abortion because they were members of the SS, and because departments of the SS were connected with the commission of abortions.<sup>453</sup> Instead, the NMT convicted only two of the defendants, Richard Hildebrandt and Otto Hofmann.<sup>454</sup> Other *Greifelt* defendants who were also members of the SS had knowledge that it was involved in implementing Nazi abortion policies; yet they were not convicted.<sup>455</sup> Thus, a defendant's membership in the SS knowing that the SS was committing abortion was not sufficient to find him guilty of abortion. The *Greifelt* tribunal convicted only

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448. *Id.* art. II.2.

449. *Id.* art. II.1.(d).

450. C.C. Law 10 states in relevant part:

2. Any person without regard to nationality or the capacity in which he acted, is deemed to have committed a crime as defined in paragraph 1 [crimes against peace, war crimes, and crimes against humanity] of this Article, if he ... (e) was a member of any organization or group connected with the commission of any such crime ....

*Id.* art. II.2.

451. 1 IMT, *supra* note 1, at 256 (each finding of guilt to Count Three in the Judgment).

452. 5 NMT, *supra* note 1, at 155 (Judgment).

453. *Id.* at 154-64 (Judgment). For example, Meyer-Hetling was convicted of membership in the SS, but the tribunal stated:

He is charged, for instance, with such criminal activities as kidnapping alien children, abortions on Eastern workers, and hampering reproduction of enemy nationals. Yet in thousands of pages of documentary and oral evidence, there is not a single syllable of evidence even remotely connecting him with any of these activities.

*Id.* at 156 (Judgment).

454. *Id.* at 160-62 (Judgment).

455. See *infra* Part IV.E.1 and notes 741-743.

those two defendants whose involvement in implementing Nazi abortion policies was more substantial.<sup>456</sup>

#### 4. *Sources of International Law*

The final paragraph of Count One (paragraph 23) in *Greifelt* identified the sources of international law applicable to crimes against humanity.<sup>457</sup> It was essentially the same list of sources that appeared in the IMT indictment and judgment in *Goering*.<sup>458</sup> The main differences were that the *Greifelt* indictment identified a more exhaustive list of treaty provisions violated, and it identified C.C. Law 10 by name, rather than the London Charter, as an applicable source of law in the case:

23. The acts and conduct of the defendants set forth in this count were committed unlawfully, willfully, and knowingly and constitute violations [1] of international conventions, particularly of Articles 4, 5, 6, 7, 23, 43, 45, 46, 47, 52, and 56 of the Hague Regulations, 1907, and of Articles 2, 3, 4, 9, and 31 of the Prisoner of War Convention (Geneva, 1929), [2] of the laws and customs of war, [3] of the general principles of criminal law as derived from the criminal laws of all civilized nations, [4] of the internal penal laws of the countries in which such crimes were committed, and [5] of Article II of Control Council Law No. 10.<sup>459</sup>

Count Two of the indictment (paragraph 25) identified those same sources of international law as equally applicable to war crimes.<sup>460</sup>

The only two provisions of Hague Convention IV (1907) that had direct relevance to the abortion charges were articles 43 and 46.<sup>461</sup> Article 43 had particular relevance with regard to the abortion of children in occupied Poland.<sup>462</sup> Article 43 required an occupying power to enforce the laws of an occupied country unless absolutely prevented.<sup>463</sup> The indictment alleged that when occupying Poland, the Nazis not only refused to enforce Polish abortion laws, but also prohibited the Poles from enforcing them.<sup>464</sup> Article 46 protected "[f]amily

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456. 5 NMT, *supra* note 1, at 155-64 (Judgments).

457. 4 NMT, *supra* note 1, at 617 (Indictment).

458. See discussion *supra* Part III.A.3. The *Goering* judgment identified essentially the same sources, except for internal penal laws. 1 IMT, *supra* note 1, at 218-24.

459. 4 NMT, *supra* note 1, at 617 (Indictment).

460. *Id.* at 618 (Indictment).

461. Hague Convention IV (1907), *supra* note 78, Annex, Sec. III, arts. 43 & 46.

462. Article 43 stated:

The authority of the legitimate power having in fact passed into the hands of the occupant, the latter shall take all the measures in his power to restore, and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country.

*Id.* art. 43.

463. *Id.*

464. 4 NMT, *supra* note 1, at 613 (Indictment).

honour and rights" including "the lives of persons" and provided a basis for the charges of abortion whether committed in Germany, Poland, or elsewhere.<sup>465</sup>

The *Goering* defendants had argued that Hague Convention IV (1907) was not binding because some of the states involved in World War II were not parties to that treaty.<sup>466</sup> In response, the IMT held that the Hague Convention codified customary laws of war and that its essential provisions were therefore binding on all states.<sup>467</sup> The prosecution took that same position in *Greifelt*.<sup>468</sup>

The prosecution in *Greifelt* did not attempt to prove that criminalization of abortion was a general principle of criminal law common to civilized nations,<sup>469</sup> but it apparently assumed that all civilized nations criminalized voluntary and involuntary abortion.

The prosecution invoked internal penal law, in part to counter the anticipated defense that it was unjust to prosecute defendants for crimes against humanity because that crime previously had not been recognized in international law.<sup>470</sup> The Polish<sup>471</sup> and German<sup>472</sup> statutes criminalizing abortion were well known to the defendants and played an important role in the *Greifelt* case.<sup>473</sup>

Article II of C.C. Law 10 provided nothing additional of particular relevance to the abortion charge.<sup>474</sup>

#### B. Prosecution Evidence of Abortion Crimes Presented at Trial

Hitler never repealed the laws criminalizing abortion that predated his rise to power, but the Nazis did promote abortion prior to World War II for eugenic<sup>475</sup>

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465. Hague Convention IV (1907), *supra* note 78, Annex, Sec. III, art. 46.

466. 1 IMT, *supra* note 1, at 253 (Judgment).

467. *Id.* at 253-54.

468. 5 NMT, *supra* note 1, at 53-54 (Prosecution Closing Statement).

469. Nor did the tribunal expressly state that abortion was a general principle of law common to civilized nations. 5 NMT, *supra* note 1, at 153-54 (Judgment).

470. See, e.g., Hildebrandt testimony: "[I]nterruption of pregnancy ... is or was never considered as murder, but it was considered a special violation against life.... Up to now nobody had the idea to see in this interruption of pregnancy a crime against humanity." Microfilm Publication M894, *supra* note 15, at Roll 6, Document Page 4023, Frame 0216, as reprinted in 4 NMT, *supra* note 1, at 1090.

471. Prosecution Exhibit No. 468, Document No. NO-3089(b), Microfilm Publication M894, *supra* note 15, at Roll 16, Document Pages 2-4, Frames 096-098. See also *infra* note 494 (providing the relevant text of the Polish statute).

472. Prosecution Exhibit No. 466, Document No. NO-5130, Microfilm Publication M894, *supra* note 15, at Roll 16, Document Page 1, Frame 0092. See also *infra* note 495 (providing the relevant text of the German statute).

473. Prosecution Exhibit No. 468, Document No. NO-3089(b), Microfilm Publication M894, *supra* note 15, at Roll 16, Document Pages 2-4, Frames 096-098. See also *infra* note 494 (providing the relevant text of the Polish statute); *infra* note 495 (providing the relevant text of the German statute); Prosecution Exhibit No. 466, Document No. NO-5130, Microfilm Publication M894, *supra* note 15, at Roll 16, Document Page 1, Frame 0092.

474. See 4 NMT, *supra* note 1, at XVIII-XIX (Control Council Law No. 10).

475. John Hunt, *Perfecting Humankind: A Comparison of Progressive and Nazi Views on Eugenics, Sterilization, and Abortion*, VIII LIFE AND LEARNING 1, 7 (Proceedings of the Eighth University Faculty for Life Conference 1998).

and health purposes.<sup>476</sup> After the war started, the Nazis expanded their abortion policy for the further purposes of racial cleansing and keeping Eastern women in the labor force.<sup>477</sup> The Nazi abortion policies targeted the racially non-valuable children of pregnant women who lived in occupied Poland or who were brought into Germany to work.<sup>478</sup>

Paragraph 12 of the indictment distinguished between the Nazi abortion program as formulated and implemented in Poland from that formulated and implemented for Eastern workers deported to Germany.<sup>479</sup> The prosecution organized its evidence and introduced it at trial based on that distinction.<sup>480</sup> The bulk of the prosecution's evidence related to the abortion program as it was implemented with regard to Eastern workers in Germany,<sup>481</sup> but it was not simply the sheer bulk of evidence or geography that distinguished the policies in Poland from those in Germany.

The situation with regard to Poland was such that the Nazi abortion policy as contemplated and implemented there was clearly voluntary in nature. The Nazis simply removed the protection of Polish law from unborn children whose mothers wanted to abort their pregnancies without any aid or other encouragement from the government.<sup>482</sup>

The situation in Germany as it related to Eastern workers was more complicated. The Nazis did not allow mothers to abort racially valuable children; yet they removed the protection of law from those unborn children who were not racially valuable and encouraged their mothers to abort them.<sup>483</sup> There was no evidence that abortions performed on Eastern workers in Germany were physically compelled, but the policy called for the use of pressure when women did not request or freely consent to abortions.<sup>484</sup> Additionally, the general living and working conditions in wartime Germany—especially given the Nazis' general reputation—created an oppressive environment that no doubt strongly affected many women's decisions.<sup>485</sup>

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476. Prosecution Exhibit No. 478, Document No. NO-4369, Microfilm Publication M894, *supra* note 15, at Roll 16, Document Page 2, Frame 0126. The Reich Medical Chamber issued a directive prior to 1936 that covered "interruption[s] of pregnancy" for health purposes. *Id.*

477. 19 IMT, *supra* note 1, at 498-99 (U.K. Prosecutor's Closing Speech).

478. See *infra* Part IV.B.2.i-ii.

479. See *supra* Part IV.A.1.

480. One prosecution exhibit comprised of four separate documents dealt with removal of the protection of law from unborn children in Poland. Prosecution Exhibit No. 468, Document No. NO-3089 (a) and (b), Microfilm Publication M894, *supra* note 15, at Roll 16, Document Pages 1-4, Frames 0095-0098. Several other prosecution exhibits dealt with abortion of children of Eastern workers, primarily in Germany. Prosecution Exhibits Nos. 469-494, Microfilm Publication M894, at Roll 16, Frames 0092-0094, 0099-0187, as reprinted in 4 NMT, *supra* note 1, at 1077-89.

481. 4 NMT, *supra* note 1, at 1077-89.

482. See *infra* Part IV.B.1.

483. See *infra* Part IV.B.2.i-iii.

484. See *infra* Part IV.B.2.iv.

485. See *infra* Part IV.D.1.

### 1. *The Nazi Abortion Policy in Poland*

Early in the war, the Nazis circulated a treatise containing population policies for occupied Poland.<sup>486</sup> Those policies included the promotion of birth control, the public sale of contraceptives and abortion services, and the decriminalization of abortion and homosexuality.<sup>487</sup> The section of the treatise entitled "The treatment of Poles and Jews in the remaining Poland" stated:

"All measures serving birth control are to be admitted or to be encouraged. Abortion must not be punishable in the remaining territory. Abortives and contraceptives may be publicly offered for sale in every form without any police measures being taken. Homosexuality is to be declared as not punishable. Institutes and persons who make a business of performing abortions should not be prosecuted by the police."<sup>488</sup>

Himmler received a copy of this treatise as early as November 25, 1939, and he responded by issuing a directive entitled "Reflections on the Treatment of People of Alien Races in the East."<sup>489</sup> Dr. Conti, the Reich Health Leader, sent a letter dated March 9, 1942, to Himmler triggering the abortion policy's actual implementation in Poland.<sup>490</sup> He reported that the Polish courts in occupied Poland were severely punishing Polish abortionists for performing, and Polish women for having, abortions in violation of Poland's Criminal Code.<sup>491</sup> Conti wrote that it was desirable that as many Polish women as possible abort their pregnancies, and he recommended that Germany strip the Polish courts of their power to punish abortion:

[A]bortions carried out there by Poles and Polish women are being punished especially severely by Polish courts. Even though the Polish Criminal Code provides severe punishment for cases of abortion, it does appear that the Polish courts are now intentionally meting out the maximum penalties provided for under that particular law for reasons of nationalism. A procedure of that sort, however, is not in the interest of Germany, it rather is desirable from our point of view, that as many Polish women as possible have abortions carried out or carry them out themselves. In order to achieve that purpose, *I consider it essential, that the right to punish abortions be removed from the Polish courts*, since that presents the sole possibility of proceeding in the desired manner.

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486. 5 NMT, *supra* note 1, at 91-96 (Judgment).

487. *Id.* at 95-96.

488. *Id.*

489. *Id.* at 91, 96.

490. Prosecution Exhibit No. 468, Document No. NO-3089(a), Microfilm Publication M894, *supra* note 20, at Roll 16, Document Page 1, Frame 0095.

491. *Id.* See *infra* note 494 (providing the relevant text of the Polish statute).

Heil Hitler!<sup>492</sup>

Himmler responded promptly and enthusiastically to Dr. Conti's recommendation in a letter dated March 21, 1942, and stated that he had already taken action to implement the recommendation:

I received your letter of 9 March 1942. I absolutely agree with your opinion, that *abortions carried out on Polish women should not be punished at all*. On these lines, I wrote to the Higher SS and Police Leader, SS-Obergruppenfuehrer Krueger. Heil Hitler!<sup>493</sup>

The prosecution exhibit containing the Conti and Himmler correspondence included a copy of the Polish abortion statute.<sup>494</sup> The Polish statute was similar to the German abortion statute<sup>495</sup> in that it criminalized voluntary and involuntary abortion but punished involuntary abortion more severely.<sup>496</sup>

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492. Prosecution Exhibit No. 468, Document No. NO-3089(a), Microfilm Publication M894, *supra* note 15, at Roll 16, Document Page 1, Frame 0095 (emphasis added).

493. *Id.* at Frame 096 (emphasis added).

494. The Polish Criminal Code stated in part:

Art. 231. Any woman, who induces abortion of her foetus, or who has abortion induced by another person, shall be punished by imprisonment not to exceed 3 years.

Art. 232. Any person who induces abortion of the foetus *with the permission* of the pregnant woman, or who aids her in inducing abortion, shall be punished by imprisonment not to exceed 5 years.

Art. 233. [exceptions for the woman's health and pregnancy resulting from certain criminal acts]

Art. 234. Any person, who induces abortion of the foetus *without the consent* of the pregnant woman, shall be punished by imprisonment not to exceed 10 years.

*Id.* at Frames 096-097 (emphases added).

495. The German Criminal Code stated in part:

Article 218:

A woman who kills her foetus either in the womb or by abortion or permits the killing by another person, is to be punished with imprisonment.

Likewise is to be punished another person who kills a foetus either in a woman's womb or by abortion.

The attempt is punishable also.

A person who performs the act as outlined in paragraph 2 without consent of the pregnant woman or professionally, is to be punished with penal servitude. The same punishment is to be inflicted on a person who provides a pregnant woman professionally with drugs or instruments for the purpose of the abortion of a foetus. Under alleviating circumstances, the punishment is to be imprisonment of not less than three months.

Prosecution Exhibit No. 466, Document No. NO-5130, Microfilm Publication M894, *supra* note 15, at Roll 16, Document Page 1, Frame 0092.

496. Prosecution Exhibit No. 468, Document No. NO-3089(b), Microfilm Publication M894, *supra* note 15, at Roll 16, Document Pages 2-4, Frames 096-098.

## 2. *The Nazi Abortion Program in Germany*

The amount of evidence regarding abortion policies implemented in Germany was much greater than the evidence of policies implemented in Poland. Much of the evidence consisted of policy directives issued from the highest levels of the Nazi hierarchy, and most of it related to treatment of pregnant Eastern workers in Germany. RuSHA had a prominent role in implementing detailed policies designed to identify unborn children who were racially valuable. The Nazis gave permission only to mothers of racially non-valuable children to have abortions.

### *i. RuSHA's role in Nazi eugenics policies*

RuSHA was a key SS agency in the Nazi eugenics program because it conducted racial examinations.<sup>497</sup> In order to reclaim valuable blood, the Nazis had to be able to distinguish Aryan blood from non-Aryan blood, and RuSHA provided the expertise for making that determination.<sup>498</sup> The IMT had adjudged the SS to be a criminal organization,<sup>499</sup> and RuSHA was an office of Himmler's SS dating from 1934.<sup>500</sup> Prior to World War II, RuSHA was concerned primarily with internal matters of the SS.<sup>501</sup> It conducted racial and health examinations and genealogical studies to ensure that SS men and their brides were of good racial stock, since they were to form the elite within the Nazi Party.<sup>502</sup> RuSHA was also responsible for educating SS personnel in Nazi ideology.<sup>503</sup>

As World War II progressed, RuSHA's role expanded.<sup>504</sup> Its services were indispensable to the implementation of Hitler's blood-and-soil policy of strengthening Germanism and weakening non-Aryan peoples.<sup>505</sup> Many decisions depended on RuSHA's racial determination—Whom should the Nazis deport to Germany for Germanization? Whom should they kidnap? Whom would they permit to abort their children and whom would they not? Whom would they allow to marry? Whom should they enslave? Whom could they conscript into

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497. 5 NMT, *supra* note 1, at 101 (Judgment).

498. *Id.*

499. 1 IMT, *supra* note 1, at 268-73 (Judgment).

500. Closing Brief on RuSHA and Hofmann et al., Microfilm Publication M894, *supra* note 15, at Roll 31, Document Page 1, Frame 0331.

501. 4 NMT, *supra* note 1, at 634 (Prosecution Opening Statement); 5 NMT, *supra* note 1, at 101 (Judgment).

502. 4 NMT, *supra* note 1, at 634 (Prosecution Opening Statement); 5 NMT, *supra* note 1, at 101 (Judgment).

503. Closing Brief on RuSHA and Hofmann et al., Microfilm Publication M894, *supra* note 15, at Roll 31, Document Page 2, Frame 0332.

504. 4 NMT, *supra* note 1, at 634 (Prosecution Opening Statement); 5 NMT, *supra* note 1, at 101 (Judgment).

505. 4 NMT, *supra* note 1, at 634-35 (Prosecution Opening Statement); 5 NMT, *supra* note 1, at 101 (Judgment).



the German Army?<sup>506</sup> Those whom RuSHA rejected "automatically went into the discard, which might be the Government General, an abortion mill, or the dreaded Gestapo."<sup>507</sup>

In performing racial screenings, RuSHA had to work closely with other SS organizations,<sup>508</sup> including the SS Reich Security Main Office ("RSHA"),<sup>509</sup> an organization distinct from RuSHA; VoMi which resettled peoples; and *Lebensborn*, which raised children of valuable blood and supported German mothers.<sup>510</sup> As Chief of the Main Staff Office of the RKFDV, Greifelt was responsible for overseeing the activities of VoMi, *Lebensborn*, and RuSHA and coordinating their activities with RSHA's.<sup>511</sup> The prosecution did not allege that any of the *Greifelt* defendants were members of RSHA.<sup>512</sup> Given the nature of RuSHA's role in the Nazi abortion program as racial examiner, neither it nor any of its members were accused of actually performing abortions.<sup>513</sup>

ii. *Abortion policy toward Eastern workers*

Within months of establishing an abortion policy for occupied Poland, Himmler addressed the problem of children of mixed Germanic and non-Germanic parentage. The problem arose in a variety of contexts—German women raped by Polish soldiers,<sup>514</sup> non-German women impregnated by German soldiers or fellow workers,<sup>515</sup> and German women impregnated by non-German workers.<sup>516</sup> The problem of mixed parentage arose both inside Germany and in

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506. 4 NMT, *supra* note 1, at 611-16 (Indictment), 686-87 (Prosecution Opening Statement); 5 NMT, *supra* note 1, at 101 (Judgment).

507. Closing Brief on RuSHA and Hofmann et al., Microfilm Publication M894, *supra* note 15, at Roll 31, Document Page 5, Frame 0335.

508. 4 NMT, *supra* note 1, at 612 (Indictment), 686-87 (Prosecution Opening Statement).

509. 4 NMT, *supra* note 1, at 612 (Indictment); Closing Brief on RuSHA and Hofmann et al., Microfilm Publication M894, *supra* note 15, at Roll 31, Document Pages 4-5, Frames 0334-0335; Closing Brief Against Hildebrandt, Microfilm Publication M894, *supra* note 15, at Roll 31, Document Page 3, Frame 0269.

510. 4 NMT, *supra* note 1, at 611-12 (Indictment), 633-36 (Prosecution Opening Statement).

511. 4 NMT, *supra* note 1, at 610-11 (Indictment). In large measure, Greifelt oversaw RSHA and RuSHA. *Id.* Greifelt was not found guilty of the crime of abortion. 5 NMT, *supra* note 1, at 155 (Judgment).

512. See 4 NMT, *supra* note 1, at 610-11 (Indictment).

513. 4 NMT, *supra* note 1, at 611-16 (Indictment), 686-87 (Prosecution Opening Statement).

514. A letter dated November 25, 1939, from the manager of the Pomeranian home to the Executive Chairman of the Lebensborn Society, provided evidence of early wartime abortion policy. The Lebensborn Society provided shelters for homeless or displaced Germanic women and children and orphanages for children of Aryan blood. The Pomeranian home reported that several of the women were pregnant after being raped. Two women gave birth to children while at the home, while three others had abortions. The home, which apparently found it necessary to justify its actions in a report to the chancellery of the Fuehrer, stated: "Abortions were carried out on three women because they had been made pregnant by Polish soldiers." Prosecution Exhibit No. 467, Document No. NO-1370, Microfilm Publication M894, *supra* note 15, at Roll 16, Document Pages 1-2, Frames 0093-0094.

515. 4 NMT, *supra* note 1, at 686 (Prosecution Opening Statement).

516. *Id.*

occupied countries.<sup>517</sup> Germany did not repeal the abortion laws in Germany or the laws of the occupied countries.<sup>518</sup> Application of Himmler's policies extended to Eastern workers residing in occupied territories, but the focus at trial was on those workers living in Germany.<sup>519</sup>

*a. Himmler established the basic abortion policies (1942-43)*

Himmler's letter of October 9, 1942, established basic principles for dealing with children of Germanic, non-Germanic, and mixed parentage, and the Nazis implemented that basic policy framework with some modifications throughout the war.<sup>520</sup> If a child had at least one Germanic parent, it was to be raised as a German either in a home or an orphanage for German children.<sup>521</sup> If a child had two non-Germanic parents it was to be raised in a separate orphanage for non-Germans.<sup>522</sup> If, based on an examination of the parents, a child was determined before birth to be of no racial value, it could be aborted even if a parent were a German national.<sup>523</sup> Conversely, a racial examination might identify a child of two non-German parents as being racially valuable and therefore suitable for Germanization.<sup>524</sup> The letter stated:

All children which were born of German women or girls, fathered by Poles or other foreigners, should remain with their mothers and be brought up by them .... In a considerable number of cases did I take advantage of the power, vested in me by the Fuhrrer, to have the pregnancy of expectant mothers interrupted if the father was a particularly inferior foreigner....

...[C]hildren ... conceived by foreign women by foreign men ... can be placed there [in a children's home] and the mother is saved as a worker for Germany.... [T]he mother, the child and the father ought to be examined ... [and] where there is actually excellent blood, we shall try to keep mother and child in Germany.

...In all cases where foreign women conceive children from German men ... mother and child are registered by us and in such cases where their racial value had been established all endeavours should be made to bring them to Germany, or keep them in Germany. I approve of the establishment of a children's home for such children ....

....  
Heil Hitler!<sup>525</sup>

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517. *Id.*

518. *Id.*

519. *Id.* at 686-87.

520. Prosecution Exhibit No. 475, Document No. NO 5007, Microfilm Publication M894, *supra* note 15, at Roll 16, Document Pages 1-2, Frames 0116-0117.

521. *Id.*

522. *Id.*

523. *Id.*

524. *Id.*

525. *Id.*

Five months later, on March 26, 1943, Himmler promulgated another directive that marked an important development in Nazi abortion policy.<sup>526</sup> The directive followed what was disturbing news for Himmler—SS men in occupied territories were getting Eastern workers pregnant.<sup>527</sup> That would leave good blood in other countries that could someday rise up against Germany. Rather than placing the child of a German father and non-German mother in a German orphanage, Nazi policy decreed that the child should be aborted unless the mother was also found to be of good racial stock.<sup>528</sup> The order stated:

[W]here pregnancy is caused by sexual intercourse between a member of the SS or the Police and a non-German woman, residing in the occupied Eastern territories, an interruption of pregnancy is to be *carried out positively* by the competent physician of the SS or the Police, unless that woman is of good stock, which is to be ascertained in advance in every case.

The Russian physicians or the Russian Medical Association, which must not be informed of this order, are to be told in individual cases, that the pregnancy is being interrupted for reasons of social distress. It must be explained in such a way, that no conclusions to the existence of a definite order may be drawn.<sup>529</sup>

The directive did not clarify the phrase “to be carried out positively,” but it does not appear to have marked a change in subsequent directives or implementing instructions regarding the necessity of having the mothers’ consent. The most reasonable interpretation of the phrase is that Nazi officials would take the more proactive approach of encouraging abortion by making it available, rather than the approach of simply not enforcing the law. If women were being physically forced to have abortions, it seems unlikely that such a fact could have been kept from the Russian doctors who were involved.

*b. Conti and Kaltenbrunner’s implementing instructions (1943)*

On March 11, 1943, Dr. Conti decreed in his Order No. 4/43 “that in the case of Eastern female workers, pregnancy may be interrupted if the pregnant woman so desires.”<sup>530</sup> Surprisingly, the prosecution did not introduce Conti’s Order No. 4/43 into evidence; instead, it was Hildebrandt who introduced it as his exhibit.<sup>531</sup> The basic thrust of this order was that the laws in Germany punishing abortion should not be enforced against Eastern workers.<sup>532</sup> Kaltenbrunner issued implementing instructions for Order No. 4/43 by his own

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526. Prosecution Exhibit No. 469, Document No. NO-1622, Microfilm Publication M894, *supra* note 15, at Roll 16, Document Page 1, Frame 0099.

527. *Id.*

528. *Id.*

529. *Id.* See also 5 NMT, *supra* note 1, at 109 (Judgment) (quoting the same language).

530. Prosecution Exhibit No. 470, Document No. NO-3520, Microfilm Publication M894, *supra* note 15, at Roll 16, Document Page 1, Frame 0100.

531. Hildebrandt Document Number 112, Microfilm Publication M894, *supra* note 15, at Roll 27, Document Page 71, Frame 0367.

532. *Id.*

"Secret" order dated June 9, 1943, entitled "Interruption of Pregnancy of Eastern Female Workers."<sup>533</sup> A woman could not abort her child without the approval of the deputy of the Reich Commissar for the Strengthening of Germanism.<sup>534</sup> Both the mother and the father were to be examined.<sup>535</sup> Local officials could approve abortions on their own authority only if the father was of a foreign race.<sup>536</sup> Kaltenbrunner reasserted that there was to be no criminal prosecution of abortions performed pursuant to those instructions:

Concerning the request of the Eastern female worker, the office for expert opinion for abortion is the locally competent medical office. The office for expert opinion is bound in its decision by the consent of the deputy of the Reich Commissar for the Strengthening of Germanism: when his consent has been granted it authorizes the abortion.

....

In those cases [in which the father is non-Germanic] the office for expert opinion will ... not obtain the consent of the Higher SS and Police Leader as Deputy of the Reich Commissar for the Strengthening of Germanism, but may order the abortion on its own authority.

...Obtaining the consent of the Higher SS- and Police Leader as Deputy of the Reich Commissar for the Strengthening of Germanism is, according to this, necessary only in the cases in which it is maintained or is probable that the father was a German or a member of an ethnically related (Germanic) race.

...[A] racial examination of the pregnant woman and the father is to be carried out by the RuS.-Fuehrer. If it is found by this racial examination that a racially valuable is to be expected, then the consent for abortion is to be denied. If on the basis of the racial examination the offspring is expected not to be racially valuable, the consent for abortion is to be granted.<sup>537</sup>

Kaltenbrunner issued a second order the same day with virtually identical content.<sup>538</sup>

Dr. Conti further promulgated the abortion policy by a directive dated June 22, 1943.<sup>539</sup> He made it clear that in cases involving Eastern workers and non-German fathers, approval of Higher SS and Police Leaders for abortions was no

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533. Prosecution Exhibit No. 470, Document No. NO-3520, Microfilm Publication M894, *supra* note 15, at Roll 16, Document Pages 1-2, Frames 0100-0101. During the war Kaltenbrunner at various times held the offices of (1) Higher SS and Police Leader, (2) Chief of the Security Police and SD, and (3) Head of the Reich Security Head Office (RSHA). 1 IMT, *supra* note 1, at 291 (Judgment).

534. Prosecution Exhibit No. 470, Document No. NO-3520, Microfilm Publication M894, *supra* note 15, at Roll 16, Document Pages 1-2, Frames 0100-0101.

535. *Id.*

536. *Id.*

537. *Id.*

538. Prosecution Exhibit No. 471 (b), Document No. L-8, Microfilm Publication M894, *supra* note 15, at Roll 16, Document Pages 3-5, Frames 0104-0106.

539. Prosecution Exhibit No. 471(c), Document No. L-8, Microfilm Publication M894, *supra* note 15, at Roll 16, Document Page 6, Frame 0107.

longer necessary.<sup>540</sup> If the father was Germanic, however, an examination still had to be performed.<sup>541</sup> Germanic fathers included men who were ethnic "German, Fleming, Dutch, Danish, Norwegian, Swede, Finn, Estonian, Latvian, or Swiss."<sup>542</sup> If it was determined that such a child would be of no racial value, higher headquarters would have to approve an abortion.<sup>543</sup> Conti stated that these policies applying to Eastern workers would be equally applicable to Polish women applying for interruption of pregnancy.<sup>544</sup>

Kaltenbrunner's directive of August 1, 1943, also applied the abortion policy to Polish women.<sup>545</sup> If those women made a good racial impression, they would not be allowed to obtain abortions.<sup>546</sup> A secret directive dated December 19, 1944, from RuSHA's Office for Racial Matters, extended the policies' coverage to include married and unmarried women alike.<sup>547</sup>

*c. Further refinements of the procedures (1944)*

During 1943, the basic abortion policies regarding Eastern workers and implementing instructions were in place.<sup>548</sup> However, additional directives issued in 1944 specified in greater detail procedures to be followed. These reinforced the importance of following procedures and identifying pregnant workers early in their pregnancies. For example, one directive dated January 17, 1944 amended an earlier directive and stressed the importance of immediate compliance with orders.<sup>549</sup> This directive stated:

All cases of pregnancy established on Eastern workers and Poles have to be reported to this office immediately together with the exact personal data of the

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540. *Id.*

541. Prosecution Exhibit No. 471(b), Document No. L-8, Microfilm Publication M894, *supra* note 15, at Roll 16, Document Page 4, Frame 0105.

542. Prosecution Exhibit No. 482, Document No. NO-3288, Microfilm Publication M894, *supra* note 15, at Roll 16, Document Page 1, Frame 0140.

543. Prosecution Exhibit No. 471 (b), Document No. L-8, Microfilm Publication M894, *supra* note 15, at Roll 16, Document Page 4, Frame 0105.

544. Prosecution Exhibit No. 471(c), Document No. L-8, Microfilm Publication M894, *supra* note 15, at Roll 16, Document Page 7, Frame 0108.

545. Prosecution Exhibit No. 472, Document No. NO-1384, Microfilm Publication M894, *supra* note 15, at Roll 16, Document Page 1, Frame 0111, *reprinted in* 4 NMT, *supra* note 1, at 1079-80.

546. *Id.*

547. The directive stated:

[T]here is no reason to increase the biological strength of an alien people against the desire of the members of its own people. Therefore, this is the directive to the RuS field leaders to deal with applications of married Polish women and female Eastern workers in the same way as with those of single women ....

Prosecution Exhibit No. 480, Document No. NO-3556, Microfilm Publication M894, *supra* note 15, at Roll 16, Document Page 1, Frame 0135.

548. *See supra* Part IV.B.2.ii.b.

549. Prosecution Exhibit No. 477, Document No. NO-4140, Microfilm Publication M894, *supra* note 15, at Roll 16, Document Page 1, Frame 0123.

Eastern worker or Pole and the begetter .... In every case the written consent of the pregnant woman with the interruption of the pregnancy has to be provided. If the consent is refused, an appropriate note has to be attached.

These reports are now to be sent immediately and without exception to this office in order to avoid delay as in most of the cases the pregnancy has advanced so far that an immediate interception sooner necessary [sic].<sup>550</sup>

In a circular letter dated January 20, 1944, Kaltenbrunner gave additional instructions implementing one of his previous letters that was not introduced as evidence at trial.<sup>551</sup> He emphasized the importance of "exact compliance" with his decree in providing for the care of Eastern workers and their children.<sup>552</sup> The RuS Field Leaders were to decide if children already born were racially desirable and suitable for Germanization.<sup>553</sup> He also addressed services necessary for processing examinations of those women applying for abortions.<sup>554</sup> He briefly described the procedures:

In cases of Eastern female workers ... pregnancy will be interrupted upon the request of the pregnant woman. The following procedure will be observed for the disposition of such requests.

The application is to be addressed to the Office of the Consultant for Pregnancy Interruption of the Medical Chamber competent for such cases. This office will contact the deputy of the Reich Commissar for Strengthening of Germanism. Upon approval of this office, of the request for pregnancy interruption, the Office of the Consultant makes the decision and appoints a physician to carry out the operation.<sup>555</sup>

Differences in procedure were still to be followed, depending upon whether the putative father was German or non-German and whether a non-German woman made a good racial impression.<sup>556</sup>

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550. *Id.*

551. Prosecution Exhibit No. 478, Document No. NO-4369, Microfilm Publication M894, *supra* note 15, at Roll 16, Document Page 1, Frame 0125.

552. *Id.*

553. *Id.*

554. *Id.* at Document Page 2, Frame 0126.

555. *Id.* at Document Pages 2-3, Frames 0126-0127.

556. The directive further stated:

The Reich Commissioner has ordered that the approval by the Office of the Reich Commissar for Strengthening of Germanism abortion in the cases of Eastern workers is to be taken as of granted in those cases in which the father of the child is of an alien race (not German).

The obtaining of the approval of the Higher SS- and Police Leader as deputy of the Reich Commissioner for Strengthening of Germanism is thereby requisite only in those cases in which it is claimed or is probable, that the father of the child is a German or of German descent (from a Germanic race).

....

However, the Offices of the Consultants for interruption of pregnancy of the Medical Chamber are instructed to secure the approval of the Higher-SS-and Police Leader for the

d. *Evidence of abortions performed*

The prosecution introduced excerpts from a register of abortions performed on Eastern workers in Oberfranken.<sup>557</sup> The register included the date of request; the requesting physician; the name of the pregnant woman and father (if known), and their dates of birth, nationality, and place of employment; the date the abortion was approved; the date of the abortion; and name of the doctor who committed the abortion.<sup>558</sup> There were 52 name entry lines in the register, with the first entry dated May 5, 1943, and the last dated January 1, 1945.<sup>559</sup> The nationalities of virtually all mothers and fathers were Polish or Eastern European.<sup>560</sup> Based on their names, the nationality of all the doctors appears to be German.<sup>561</sup>

The prosecution also introduced seven additional exhibits that were requests for abortions, but those applications were signed not by the pregnant women but rather by doctors, government officials, or employers.<sup>562</sup> The implication was that the applications for abortions were not voluntarily made by the pregnant women.

The prosecution evidence on the abortion charges in *Greifelt* was comprised almost exclusively of government documents, but did include affidavits of four individuals involved in the racial inspection portions of the abortion program.<sup>563</sup> One of the affiants was Fritz Schwalm, a *Greifelt* defendant who was acquitted of

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interruption of pregnancy, without regard to the ethnic descent of the father, in those cases in which the Polish woman, in the opinion of the Office of Consultants, makes a good impression from a racial standpoint.

*Id.* at Document Page 3, Frame 0127.

557. Prosecution Exhibit No. 484, Document No. NO-3454, Microfilm Publication M894, *supra* note 15, at Roll 16, Document Pages 1-9, Frames 0143-0151.

558. *Id.* at Document Page 2, Frame 0144.

559. *Id.* at Document Pages 2-8, Frames 0144-0150.

560. *Id.*

561. *Id.*

562. Prosecution Exhibit 485, Document No. NO-3550, Microfilm Publication M894, *supra* note 15, at Roll 16, Document Page 1, Frame 0152; Prosecution Exhibit No. 486, Document No. NO-3084, Microfilm Publication M894, *supra* note 15, at Roll 16, Document Pages 1-7, Frames 0153-0159; Prosecution Exhibit No. 487, Document No. NO-3534, Microfilm Publication M894, *supra* note 15, at Roll 16, Document Page 1, Frame 0160; Prosecution Exhibit No. 488, Document No. NO-3523, Microfilm Publication M894, *supra* note 15, at Roll 16, Document Pages 1-2, Frame 0161-0162; Prosecution Exhibit No. 489, Document No. NO-3517, Microfilm Publication M894, *supra* note 15, at Roll 16, Document Pages 1-2, Frames 0163-0164; Prosecution Exhibit No. 490, Document No. NO-3518, Microfilm Publication M894, *supra* note 15, at Roll 16, Document Pages 1-3, Frames 0165-0167; Prosecution Exhibit No. 491, Document No. NO-3513, Microfilm Publication M894, *supra* note 15, at Roll 16, Document Pages 1-2, Frame 0168-0169, *reprinted in* 4 NMT, *supra* note 1, at 1084-85.

563. Prosecution Exhibit No. 493, Document No. NO-4823, Microfilm Publication M894, *supra* note 15, at Roll 16, Document Page 3, Frame 0173; Prosecution Exhibit No. 493, Document No. NO-5110, Microfilm Publication M894, *supra* note 15, at Roll 16, Document Page 2, Frame 0176; Prosecution Exhibit No. 494, Document No. NO-5127, Microfilm Publication M894, *supra* note 15, at Roll 16, Document Page 1, Frame 0178; Prosecution Exhibit No. 494, Document No. NO-5126, Microfilm Publication M894, *supra* note 15, at Roll 16, Document Pages 1-2, Frames 0181-0182.

the abortion charges because he was not sufficiently involved.<sup>564</sup> His affidavit stated that the program was carried out in accordance with the official directives.<sup>565</sup> The other three affiants were not *Greifelt* defendants.<sup>566</sup> Their statements also supported the assertion that the abortion program was administered in compliance with the official directives.<sup>567</sup>

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564. 5 NMT, *supra* note 1, at 162 (Judgment).

565. For example Schwalm stated:

According to Article 218 of the Reich Legal Code, abortions were forbidden in Germany. In spite of that, a pregnant Eastern worker could apply for interruption of pregnancy. It was the duty of the racial examiner to have the woman and also the father, if he could be found, appear before him, to examine them in regards to their race, and to decide in accordance with the applying regulations, whether the expected child was racially valuable and therefore should be preserved for the German people, whether it could be born, or whether the application for abortion should be approved.

Prosecution Exhibit No. 493, Document No. NO-4823, Microfilm Publication M894, *supra* note 15, at Roll 16, Document Page 3, Frame 0173.

566. Prosecution Exhibit No. 493, Document No. NO-5110, Microfilm Publication M894, *supra* note 15, at Roll 16, Document Page 2, Frame 0176; Prosecution Exhibit No. 494, Document No. NO-5127, Microfilm Publication M894, *supra* note 15, at Roll 16, Document Page 1, Frame 0178; Prosecution Exhibit No. 494, Document No. NO-5126, Microfilm Publication M894, *supra* note 15, at Roll 16, Document Pages 1-2, Frames 0181-0182; 4 NMT, *supra* note 1, at 607.

567. Georg Roedel, a racial examiner stated:

If a female Eastern worker was made pregnant by a German, then she had the right to apply for an interruption of pregnancy. This application could not be approved immediately but had to be forwarded to the RuS Leader, who then stated his opinion on the matter whether the Reich and the German people were interested in this child. If there was any interest, then the application was not approved and the child was handed over to the German nation for custody. In negative cases i.e. if the child presumably be of alien race, approval for an abortion would be given. The woman concerned made the application in her respective camp. The Health Office at the time reported to us that they were in possession of an application for an abortion; I then examined the woman and the man and decided whether the expected child would be a desirable or an undesirable offspring.

Prosecution Exhibit No. 493, Document No. NO-5110, Microfilm Publication M894, *supra* note 15, at Roll 16, Document Page 2, Frame 0176. Walter Spoehring, also a racial examiner stated:

In cases of so-called abortions performed on Eastern female workers, the person in question applied for abortion with the competent physician and subsequently I had to make a racial examination. I had two alternatives; either the child was racially valuable from my point of view or it was not; and it was my duty to decide, whether or not any objection on my part existed to the abortion. I can no longer remember individual cases; however, there were several instances of both cases. If pregnancy was too far advanced and children of alien race were born, they were placed in the home for the care of foreign children. I do not know what happened to them.

Prosecution Exhibit No. 494, Document No. NO-5127, Microfilm Publication M894, *supra* note 15, at Roll 16, Document Page 1, Frame 0178. Franz Vietz, a Leader in Race and Settlement matters in the administrative district of Vistula stated:

If there was sexual intercourse between a German man and a Polish woman and that Polish woman became pregnant, the district physicians ... were under orders to consult the competent Leader in Race and Settlement matters or the racial examiner when such a woman would come to have an abortion, and to have the racial examiner decide, whether the expected



iii. *Evidence linking Hildebrandt and Hofmann to the crime of abortion*

Himmler, Conti, and Kaltenbrunner—the main policymakers in Germany's abortion program—were not available for trial in the *Greifelt* case.<sup>568</sup> However, Hildebrandt and Hofmann—two high-level but second-echelon defendants—were available and placed on trial.<sup>569</sup>

a. *Prosecution evidence against Hildebrandt*

The evidence that provided a sufficient connection between Hildebrandt and the crime of abortion, in addition to his leadership of RuSHA, came in the form of two documents bearing his signature. He promulgated a circular on August 13, 1943 reinforcing Kaltenbrunner's August 1, 1943 directive extending the abortion policy to include Polish women.<sup>570</sup> In the circular, he reemphasized the necessity of racial examinations as the basis for inclusion in re-Germanization programs:

[T]he already established possibility of interruption of pregnancy in the case of Eastern female workers is extended also to Polish women ....

I should like to emphasize especially that the necessity for the racial examination, which takes place upon the suggestion of the Main Race and Settlement-Office-SS, also applies here.

The directives for the Rusha field leaders' decision in the racial examination are the same as the ones laid down by me through the ordinance of 13 August 1943 to be applied in decisions about applications for pregnancy interruption for Eastern female workers.

All files of cases, in which the Rusha Field leader refuses the pregnancy interruption, are to be submitted to the Main Race and Settlement Office together with photographs and addresses of their relatives, so that they may be examined in the light of inclusion into the re-Germanization program.<sup>571</sup>

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child would be racially valuable or not. The district physician himself had to give an expert opinion from the purely medical point of view about this woman and how far the pregnancy was advanced and whether from a medical point of view the possibility still existed to perform an abortion.

....  
 ...I know that according to the regulations which were issued by the Main Race and Settlement Office in Berlin, in the case of sexual intercourse between a German man and a woman of foreign blood which resulted in the pregnancy of the woman, the child was taken away from the mother, if the mother had been found to be racially not valuable.

Prosecution Exhibit No. 494, Document No. NO-5126, Microfilm Publication M894, *supra* note 15, at Roll 16, Document Pages 1-2, Frames 0181-0182.

568. See PERISCO, *supra* note 22, at 70, 175, 426.

569. 5 NMT, *supra* note 1, at 160-62 (Judgment).

570. Prosecution Exhibit No. 473, Document No. NO-3557, Microfilm Publication M894, *supra* note 15, at Roll 16, Document Page 1, Frame 0113, *reprinted in* 4 NMT, *supra* note 1, at 1080-81 and *quoted in* 5 NMT, *supra* note 1, at 111 (Judgment).

571. *Id.*

Hildebrandt also issued a more detailed explanation of procedures to be followed in conducting racial examinations by an order dated August 23, 1943.<sup>572</sup> He included an admonition underscoring the importance of RuSHA's task:

The carrying out and the decision on the treatment of the pregnant women, as well as of the expected children, is the responsibility of the SS-Leader for Racial and Resettlement Matters. The regulations issued by me, in regard to the decisions on applications for interruption of pregnancy, also correspondingly apply to the decisions of the SS-Leaders for Racial and Resettlement Matters.

For tactical reasons vis-a-vis the Reich Ministry of the Interior the formulation of the above mentioned Order had to be approved, according to which the physicians of the Health Boards shall make not only health and eugenical examinations, but also an examination along racial lines ....

....

In order to preserve the neutral character of the Health Boards, the Reich Ministry for the Interior has demanded of the SS-Main Office for Race and Resettlement, that the racial examination be carried out by the SS-Leader for Racial and Resettlement Matters in civilian clothes—or possibly in a white coat.

....

All cases, in which the proposed interruption of pregnancy ... has been refused by the SS-Leader for Racial and Resettlement Matters, are to be reported to the Gau Office of the NSV ....

....

Though I have already done so in the regulations on the decisions of the interruption of pregnancies, I want to point out once more the grave responsibility, which has been assigned to the SS-Leaders for Racial and Resettlement Matters by this new order, i.e. to especially further all valuable racial strains for the strengthening of our people, and to accomplish a complete elimination of everything racially inferior.<sup>573</sup>

There was limited evidence that Hildebrandt was involved in implementing a forcible abortion policy in Crimea prior to assuming leadership of RuSHA. A witness testified that an order was in force strictly forbidding sexual relations between members of the uniformed police and foreign women, but the witness acknowledged that he had not seen a written order and testified that it did not originate with Hildebrandt.<sup>574</sup> Pregnancies resulting from violation of the order had to be reported.<sup>575</sup> If the unborn child was not racially valuable, the pregnancy was to be aborted.<sup>576</sup> On one occasion during Hildebrandt's tenure in

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572. Prosecution Exhibit No. 474, Document No. NO-933, Microfilm Publication M894, *supra* note 15, at Roll 16, Document Pages 1-2, Frames 0114-0115, *quoted in* 5 NMT, *supra* note 1, at 111-12 (Judgment).

573. *Id.*

574. Testimony of Ferdinand Gerbel, Microfilm Publication M894, *supra* note 15, at Roll 2, Document Pages 906-07, Frames 0914-0915.

575. *Id.* at Document Page 906, Frame 0914.

576. Gerbel was asked, "If these women and their expected offspring were not considered racially valuable was it required that an abortion be performed?" Gerbel answered, "Yes. That is

Crimea, the witness was ordered to find a pregnant woman who had gone missing, but he was unable to find her so that "necessary measures could be taken against that woman."<sup>577</sup>

It would have been in character for Hildebrandt to use extreme methods to compel abortions, given his involvement in other criminal activity charged<sup>578</sup> and the fact that he headed Germany's eugenics program prior to World War II.<sup>579</sup> However, the evidence that he used extreme methods as head of RuSHA to implement abortion policies was scant to non-existent.

*b. Prosecution evidence against Hofmann*

Hofmann headed RuSHA until April 1943, when Hildebrandt succeeded him, but at trial Hofmann claimed that he could not be held liable for RuSHA's participation in the abortion program as he was gone before it was implemented.<sup>580</sup> However, he received Himmler's October 9, 1942 letter, setting out the abortion policy.<sup>581</sup> The *Greifelt* tribunal also had a letter Hofmann issued on March 24, 1944, as Higher SS and Police Leader, connecting him with the

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what I found out, not from any orders which existed, at least not in my time—I never did see any orders—but much rather from the conversations which I was present at ...." *Id.* at Document Page 907, Frame 0915.

577. Under further questioning he testified:

A[.] ....

....

I carried out the investigation according to the order, but without any results. So that in this particular case no abortion was enforced. At least I know nothing about it. Not only I but other unit leaders had also been ordered to find that woman. Whether they found her, I don't know. In any case, I was told on that occasion—I asked them why there was so much trouble about it—one of the officers of the staff told me that that woman had to be found so that the necessary measures could be taken against that woman, as I stated them before.

....

Q[.] Did the staff officer tell you that Hildebrandt wanted this woman found so that an abortion could be performed?

A[.] Yes. That is what I was told because I left the matter in my drawer for quite a long time and was ordered to come to report to the office and they asked me why I hadn't done it and that's on the occasion of that that I told them--

*Id.* at Document Page 908, Frame 0916.

578. Hildebrandt was convicted of

the kidnapping of alien children; forcible abortions on Eastern workers; taking away infants of Eastern workers; the illegal and unjust punishment of foreign nationals for sexual intercourse with Germans; hampering the reproduction of enemy nationals; the forced evacuation and resettlement of populations; the forced Germanization of enemy nationals; and the utilization of the enemy nationals as slave labor.

5 NMT, *supra* note 1, at 161 (Judgment).

579. *Id.* at 161-62.

580. 4 NMT, *supra* note 1, at 609 (Indictment), 634 (Prosecution Opening Statement); 5 NMT, *supra* note 1, at 79-80 (Judgment).

581. Prosecution Exhibit No. 475, Document No. 5007, Microfilm Publication M894, *supra* note 15, at Roll 16, Document Pages 1-2, Frames 0116-0117.

crime of abortion.<sup>582</sup> That letter did not introduce any new policies regarding abortions and racial examinations, but in it Hofmann emphasized that his officers were to be diligent in performing their duties:

[T]he treatment of ... the pregnant foreign working women (female workers from the East and Polish women) and of the children born of foreign female workers in the Reich cause me to give, for my area of command, a resume of the most important parts of the ordinances and directives, that have been issued, and to recommend strict adherence thereto.... These offices [German Labor Front and the Reich Food Organization], in particular, are expected to keep in constant touch with the plant superintendent in order to take immediate care of every case of pregnancy among foreign female workers, upon its detection.<sup>583</sup>

Hofmann addressed several situations involving illicit sexual intercourse before laying out the specific procedures to be followed in processing abortion applications. Serious offenses of assault on, and sexual intercourse with, German women or girls were to be reported to the police.<sup>584</sup> Investigations were to be conducted when German women were found to be pregnant to determine who the father was.<sup>585</sup> If the father was foreign but suitable for Germanization, the couple would be permitted to marry.<sup>586</sup> In cases of sexual intercourse where the man was German and the woman foreign, the treatment varied depending upon whether the father had abused his supervisory authority over the woman.<sup>587</sup> If he had, she might be reassigned and he might be removed from positions of supervisory authority.<sup>588</sup> If he had not, the woman might be assigned to a concentration camp, but only after the child was born if she had become pregnant.<sup>589</sup> Children of valuable racial stock were sent to "homes" for foreign children or to private families.<sup>590</sup> Children who were not racially valuable were sent to "institutions for foreign children."<sup>591</sup> At the end of his directive, Hofmann restated and clarified the procedures to be followed in processing applications for interruption of pregnancies.<sup>592</sup>

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582. Prosecution Exhibit No. 481, Document No. NO-4141, Microfilm Publication M894, *supra* note 15, at Roll 16, Document Pages 1-4, Frames 0136-0139.

583. *Id.*

584. *Id.* at Document Page 2, Frame 0137.

585. *Id.*

586. *Id.*

587. *Id.*

588. *Id.*

589. *Id.*

590. *Id.* at Document Page 3, Frame 0138.

591. *Id.*

592. Hoffman explained:

Hereunder the procedure for application for interruption of pregnancy is clarified once again:

1. All pregnancies are reported by the plant to the State Employment Office.
2. The State Employment Office reports the case to the Youth Office in order to ascertain the paternity. Is the father German or member of an ethnic group related by blood or of alike kin (Germanic), the Youth Office will report the case to the Board of Health.

iv. *Evidence of forced abortions*

As it turned out, the single most important document evincing coercion was a letter dated February 18, 1944, from the Director of the SD-sub district Koblenz to all SD-(Main) Branch Offices.<sup>593</sup> This was the document upon which the *Greifelt* judgment relied to rebut the defendants' claim that all abortions were performed with the mothers' consent.<sup>594</sup> The document included the following language:

It is known that racially inferior offspring of Eastern workers and Poles is to be avoided if at all possible. Although pregnancy interruptions ought to be carried out on a voluntary basis only, *pressure is to be applied* in each of these cases.... A pregnancy interruption should go off without incidents, and the Eastern worker or Pole (female) is to be *treated generously during this period*, in order that this may get to be known among them as a simple and pleasant affair. Too late an operation can have fatal results. Inexpedient consequences would follow from this.<sup>595</sup>

In its opening statement, the prosecution argued that Himmler's directive of March 26, 1943,<sup>596</sup> stating that abortions in certain circumstances were "to be carried out positively," also proved that forcible abortions were authorized.<sup>597</sup> In one of its closing briefs, the prosecution again argued that Himmler's directive authorized abortions without the mother's consent.<sup>598</sup> But even then the

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3. The Board of Health will conduct the physical and eugenic examination and issues an expert opinion (with photo). The Board of Health refers the case to the Deputy of the Reich Commissar for Strengthening of Germanism.

4. The Deputy makes his decision in accordance with the regulations of the Reichsfuehrer-SS. The RuS-Leader conducts the racial evaluation.

5. If the evaluations indicate that the children are good from the viewpoint of race and hereditary health, they are transferred to the care of the NSV in children's homes for foreign children ... or in (private) families.

6. In negative cases the children are sent to institutions for foreign children ....

7. The Deputy of the Reich Commissar advises the following offices of the decisions: the competent Youth Office, the NSV-Office in the Office of the Gauleiter, the State employment Office.

*Id.* at Document Pages 3-4, Frames 0138-0139.

593. Prosecution Exhibit No. 471(a), Document No. L-8, Microfilm Publication M894, *supra* note 15, at Roll 16, Document Pages 1-2, Frames 0102-0103. The SD (Der Sicherheitsdienst des Reichsfuehrer SS) was the intelligence agency for the Nazi Party and not a part of RuSHA. 1 IMT, *supra* note 1, at 262 (Judgment).

594. 5 NMT, *supra* note 1, at 112 (Judgment).

595. Prosecution Exhibit No. 471(a), Document No. L-8, Microfilm Publication M894, *supra* note 15, at Roll 16, Document Page 1, Frame 0102 (emphases added).

596. Prosecution Exhibit 469, Document No. NO-1622, Microfilm Publication M894, *supra* note 15, at Roll 16, Document Page 1, Frame 0099. See *supra* Part IV.B.2.ii.a, and note 529 for the relevant text of the order.

597. The prosecution noted: "Almost immediately Himmler decided that such consent was not absolutely necessary insofar as an SS man was involved." 4 NMT, *supra* note 1, at 686.

598. Closing Brief on RuSHA and Greifelt et al., Microfilm Publication M894, *supra* note 15, at Roll 31, Document Page 39, Frame 0369.

prosecution did not argue that the order authorized physical force or threat of physical force:

Himmler's order to perform abortions on the women in the occupied Eastern territories (i.e. in the Soviet Union) who became pregnant by the members of the SS and German police does not take into account the wish of the women. According to this order only the women of good blood have to be exempted, the possibility of their refusing to undergo the operation is not mentioned. (Pros Ex. 469, NO-1622, D.B. 9, p. 5) (Himmler at that time was evidently afraid that "the precious blood" of the German "elite"—SS and policemen might be left in Russia and thus "strengthen" the Russian people!)<sup>599</sup>

Additionally, the prosecution's case included evidence that the women were living in very difficult conditions, that all pregnancies were reported to the authorities, that racial examinations were conducted, and that abortion activities were only part of a broad population policy marked by criminal activities.<sup>600</sup> No doubt, those factors weighed heavily in the NMT's judgment that Hofmann and Hildebrandt were guilty of forcible abortion. However, the amount of pressure placed on the women and the role that it played in their decisions to have abortions was not clear. No women were brought forward as witnesses claiming to have been forced to have abortions.<sup>601</sup> Circumstances were such that the women had sufficient freedom to become pregnant, so their behavior apparently was not totally regimented. The social stigma of out-of-wedlock pregnancy was undoubtedly a major factor affecting their decisions to have abortions.

v. *German resistance to the Nazi abortion policies*

The Nazis were not able to deal with all foreign workers and German nationals in all circumstances with brute force and still maintain the cooperation necessary for successful implementation of policies.<sup>602</sup> The Nazi recognition of this was apparent from the specific instructions and general tenor of most of the directives. Two documents provided evidence that members of the German medical profession resisted the voluntary abortion policies.<sup>603</sup> Many of the issues addressed and opinions expressed sound eerily familiar. In a report dated July

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599. *Id.*

600. For example, the prosecution argued: "The whole procedure of applications shows that women were giving their consent under duress. The authorities did not wait until the women themselves came and asked for an abortion though the fact that they had this opportunity was widely publicized." *Id.*

601. See Witnesses for the Prosecution, Microfilm Publication M894, *supra* note 15, at Roll 1, Document Pages 1-4, Frames 0354-0357.

602. ULRICH HERBERT, *HITLER'S FOREIGN WORKERS: ENFORCED FOREIGN LABOR IN GERMANY UNDER THE THIRD REICH* 24 (1997).

603. Prosecution Exhibit No. 471(d), Document No. L-8, Microfilm Publication M894, *supra* note 15, at Roll 16, Document Pages 8-9, Frames 0109-0110; Prosecution Exhibit No. 476, Document No. NO-1753, Microfilm Publication M894, *supra* note 15, at Roll 16, Document Page 2, Frame 0119, *reprinted in* 4 NMT, *supra* note 1, at 1081.

24, 1944, the Gau-office in Alsace reported that there was a shortage of Russian doctors to perform abortions on Eastern workers.<sup>604</sup> There were German doctors, nurses, professors, and heads of clinics available, but they resisted involvement in performing abortions.<sup>605</sup> The German chiefs of hospitals, university clinics, and national gynecological clinics refused to provide abortion services using the excuse that orders called for Russian doctors to perform the abortions.<sup>606</sup> Nazi officials recognized this excuse as a pretense.<sup>607</sup> The Nazi officials complained:

After all these scruples are in the most cases nothing but ridiculous prejudices originating in the time of liberalism. That is the reason why one welcomed the decree of the Reich Public Health Leader with such enthusiasm. That these interruptions of pregnancy are necessary will be affirmed by everybody who has anything to do with the labor-allocation in the East. It also seems a shame that in a territory like that in the lake-district (Seekreis), that is to say in the whole district around the Lake of Constance, not a single interruption of pregnancy can be made because there are nurses belonging to religious societies in all hospitals who sternly refuse to collaborate. One is tempted to ask: where does State authority come in in these cases or else, is the State, perhaps, not anxious to assert its authority in this particular instance?<sup>608</sup>

A second document gave evidence of the medical profession's resistance to the abortion policies. It reported reactions to Conti's directive of March 11, 1943, which provided for "at will" abortions for Eastern workers.<sup>609</sup> A minority of Catholic physicians and even physicians "whose political orientation [was] generally positive" voiced objections.<sup>610</sup> They based their "strongly disapproving attitude" on the ethical and moral principles holding that physicians are to "preserve life" and that they are not to discriminate on the basis of nationality.<sup>611</sup>

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604. Prosecution Exhibit No. 471(d), Document No. L-8, Microfilm Publication M894, *supra* note 15, at Roll 16, Document Pages 8-9, Frames 0109-0110.

605. *Id.* at Document Page 8, Frame 0109.

606. *Id.*

607. *Id.*

608. *Id.* at Document Pages 8-9, Frames 0109-0110. The U.S. Supreme Court also identified the nineteenth century as being the time of origin of the modern movement outlawing abortion. See *Roe v. Wade*, 410 U.S. 113, 138-42 (1973).

609. Prosecution Exhibit No. 476, Document No. NO-1753, Microfilm Publication M894, *supra* note 15, at Roll 16, Document Page 2, Frame 0119. The document stated: "The Reichsfuehrer for Public Health in an [sic] directive of 11 March 1943 decreed that pregnancy of female workers from the East be interrupted at will. The SS-Reichsfuehrer with regard hereto on 9 June 1943 issued a decree of implementation proceedings and extended this decree as of 1 August 1943 also to interruptions of pregnancy of female Poles." *Id.*

610. In fact, "[t]he decree of interruptions of pregnancy of female workers from the East and female Poles has called forth objections on the part of minority of reactionary Catholic physicians. Even physicians [sic] whose political orientation is positive voice objections to some extent." *Id.*

611. *Id.* Doctors gave mixed responses to the order:

[T]he minority of physicians ... argued that the decree was not in accordance with the moral obligation of a physician [sic] to preserve life. Individual physicians [sic] pointed out that a

Some of the "politically sound" physicians additionally expressed the view that although the abortion decree was expedient, it was contrary to medical and German ethics that "a pregnant woman is inviolable."<sup>612</sup>

Of those doctors who were apparently politically sound, additional reasons were given for their refusal to advise or perform abortions. Should the war be lost, they might be investigated and presumably placed on trial for their actions.<sup>613</sup> Apparently some of these doctors expressed a willingness to perform abortions if they could do so without the woman knowing what had happened during a medical examination.<sup>614</sup> These doctors purportedly recognized that the birth rate of Polish and Eastern workers was a biological threat to Germany, but deplored the fact that the abortion decree had not set forth that rationale.<sup>615</sup>

The report further noted that a majority of the physicians who recognized the racial and labor-supply concerns underlying the abortion policy had concerns that it would encourage the German people to approve of abortions generally, and that the average person would cease to view abortions as abominable.<sup>616</sup>

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discriminatory evaluation of fellow nationals and of foreign nationals should not be permitted to lead to such distinction in the field of medicine.

*Id.*

612. Prosecution Exhibit No. 476, Document No. NO-1753, Microfilm Publication M894, *supra* note 15, at Roll 16, Document Pages 3-4, Frames 0120-0121.

The following opinion of a politically sound physician [sic] (Amtsarzt) of Coburg could be construed as reflecting the opinion of many positively disposed physicians: "Personally I must say that I was disappointed by the report that abortions would be permitted on pregnant female workers from the East. In general I personally consider it in accord with medical and especially with German ethics that a pregnant woman is inviolable. My common sense tells me of the expediency of the decree and I have successfully filed several applications."

*Id.*

613. The doctors recognized that if the women were charged with voluntary abortion, they would allege that they were forced: "[Some physicians have stated that should] the war be lost, female workers from the East would, whenever possible, state that such and such a physician [sic] had [sic] summoned them for an abortion; the application forms would perhaps be found; and for this the physicians [sic] would be executed. (Will be investigated)." Prosecution Exhibit No. 476, Document No. NO-1753, Microfilm Publication M894, *supra* note 15, at Roll 16, Document Pages 2-3, Frames 0119-0120, *reprinted in* 4 NMT, *supra* note 1, at 1082.

614. These doctors "would therefore carry out abortions only if during the examination of the person concerned a secret abortion could be induced without the person's knowledge." *Id.*

615. Supposedly the doctors would have had fewer reservations had the necessity been stated:

When clearly oriented National Socialist fellow Germans pointed out that the birth rate of female workers from the East and female Poles represented a biological weapon against the German people and that the decree of the Reichsfuehrer-SS was consequently to be considered *inter alia* as a safety measure for the German people, they had reluctantly acknowledged this argument but had deplored the fact that this argument was not stated in the decree.

*Id.*

616. *Id.* at Document Pages 3-4, Frame 0121.



This would have a damaging effect on the morals of German women and girls, which had already become unstable as a result of the war.<sup>617</sup>

The document noted additional problems that arose in implementing the abortion decree. There was a danger that the decree would become generally known and used as an enemy propaganda tool.<sup>618</sup> Performing late-term abortions provoked the "understandable" objection that it was "Child Murder."<sup>619</sup> The more intelligent Eastern workers were reluctant to have abortions because they knew that artificial abortions reduced the ability to have children.<sup>620</sup>

The prosecution's evidence of Nazi abortion policies and the role of RuSHA and several of the defendants in implementing those policies was largely documentary. These sweeping and, in many instances, detailed policies were formulated and disseminated from the highest levels in the Nazi regime for implementation in Poland and Germany. The existence of these policies and their implementation was not in doubt. The only factual issue in question was the degree of participation of some of the defendants. The evidence of forced abortion, except in the sense of situational duress, was minimal.

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617. A report from Regensburg stated:

According to the opinion of most physicians this measure is to be considered a very dangerous experiment.... [I]f the decree becomes known, the danger will exist that encouragement will be given to the prevailing tendency to approve of abortions, and that the gradual realization, on the part of the average person, of how abominable such a practice is [sic], will be completely nullified [sic]. One physician [sic] said verbatim: "A damaging effect upon the morals of German women and girls which through the exigencies of war have to a great extent become unstable, cannot and will not fail to appear," and he subsequently states that this tendency has already been observed now and then in circles of women and girls, in spite of the fact that nothing is yet known about the decree in question.

*Id.*

618. *Id.*

619. Many thought that

[a] point especially to be considered in connection with how the decree was received is the fact that in the beginning it was not clear, up to what month abortions might be carried out. Thus it is understandable if occasionally objections against carrying out the measure were voiced and the expression 'Child murder' was heard now and then (Coburg).

*Id.* at Frames 0121-0122.

620. Apparently they believed that artificial abortion increases the risk of infertility:

Camp physicians ... were instructed to establish certain consultation hours for female workers from [sic] the East. The female workers from the East were to be instructed during those consultation hours as to the possibilities of interruption of pregnancy.... As it is reported from Coburg, the more intelligent female workers from the East had misgivings about an interruption of pregnancy, since they knew from their native country that a woman's ability to conceive suffers through artificial abortion.

*Id.* at Document Pages 4-5, Frame 0122.

*C. Defense Evidence Presented at Trial*

The defense offered several forms of evidence in response to the abortion charges. Evidence included testimony of several defendants and other witnesses, affidavits of persons with firsthand knowledge of the implementation of the abortion policies, and government documents, including application packets of women requesting abortions.<sup>621</sup> Two lines of defense were evidence-based. The first line was defendants' denial of culpable participation in implementing the abortion policies. The second line was the claim that abortions were performed only with the mothers' consent.

*1. Denial of Participation in the Abortion Program*

The denial of culpable participation took several forms. One was to deny that the defendant's organization was involved in the abortion program.<sup>622</sup> Another was to deny that the defendant himself had a role in implementing an abortion policy, even though he knew of it.<sup>623</sup> A stronger form of defense was the denial that the defendant knew anything about the abortion policies or practices.<sup>624</sup> One defendant and one witness claimed to have actually protested or resisted the policies.<sup>625</sup> Some members of RuSHA even claimed that their

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621. Testimony of Greifelt, Microfilm Publication M894, *supra* note 15, at Roll 3, Document Page 1555, Frame 0334 (regarding the role of the Office of the Reich Commissar for the Strengthening of Germanism and the Main Staff Office); Testimony of General Karl Wolf, Microfilm Publication M894, *supra* note 15, at Roll 3, Document Pages 2088-89, Frames 0876-0877 (regarding the Main Staff Office); Testimony of Huebner, Microfilm Publication M894, *supra* note 15, at Roll 4, Document Page 2552, Frame 0436 (regarding organizations operating outside of Germany); Testimony of Bruekner, Microfilm Publication M894, *supra* note 15, Roll 4, Document Page 2854, Frame 0738 (testimony regarding the role of VOMI); Testimony of Schwalm, Microfilm Publication M894, *supra* note 15, at Roll 5, Document Page 3384, Frame 0380 (regarding organizations operating outside of Germany); Testimony of Greifelt, Microfilm Publication M894, *supra* note 15, at Roll 3, Document Page 1549, Frame 0328 (that he had nothing to do with abortions).

622. Testimony of Greifelt, Microfilm Publication M894, *supra* note 15, at Roll 3, Document Page 1555, Frame 0334 (regarding the role of the Office of the Reich Commissar for the Strengthening of Germanism and the Main Staff Office); Testimony of General Karl Wolf, Microfilm Publication M894, *supra* note 15, at Roll 3, Document Pages 2088-89, Frames 0876-0877 (regarding the Main Staff Office); Testimony of Huebner, Microfilm Publication M894, *supra* note 15, at Roll 4, Document Page 2552, Frame 0436 (regarding organizations operating outside of Germany); Testimony of Bruekner, Microfilm Publication M894, *supra* note 15, Roll 4, Document Page 2854, Frame 0738 (testimony regarding the role of VoMi); Testimony of Schwalm, Microfilm Publication M894, *supra* note 15, at Roll 5, Document Page 3384, Frame 0380 (regarding organizations operating outside of Germany).

623. Testimony of Greifelt, Microfilm Publication M894, *supra* note 15, at Roll 3, Document Page 1549, Frame 0328 (testifying that he had nothing to do with abortions).

624. Testimony of Huebner, Microfilm Publication M894, *supra* note 15, at Roll 4, Document Pages 2548-49, Frames 0432-0433; Testimony of Bruekner, Microfilm Publication M894, *supra* note 15, at Roll 4, Document Page 2854, Frame 0738; Testimony of Schwalm, Microfilm Publication M894, *supra* note 15, at Roll 5, Document Page 3385, Frame 0381.

625. Testimony of General Karl Wolf, Microfilm Publication M894, *supra* note 15, at Roll 3, Document Page 2089, Frame 0877.

involvement as racial examiners had saved the lives of unborn children.<sup>626</sup> They argued that their determination that an unborn child was racially valuable protected it from the mother's desire to have an abortion.<sup>627</sup> The prosecution did not dispute the fact that RuSHA's role was limited to conducting racial examinations, but it argued that this did not absolve its leaders of culpable involvement.<sup>628</sup>

## 2. *Claim that All Abortions Were Consensual*

The defense additionally claimed that doctors performed abortions only with the consent of the women,<sup>629</sup> that the policies permitted only voluntary abortions,<sup>630</sup> that often the women insisted that they be given abortions, and that the women even thanked their doctors.<sup>631</sup> Because Hildebrandt and Hofmann were the two defendants most clearly implicated in the crime of abortion, they had the greatest incentive to introduce the most extensive documentary and affidavit evidence in their defense.

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626. Testimony of Hofmann, Microfilm Publication M894, *supra* note 15, at Roll 5, Document Page 3252, Frame 0248.

627. *Id.* (testimony that "the activities of the racial selectors or of the Race and Settlement leaders caused a vote to be taken against about 50 percent of all cases, and the interruption which had been applied for was prevented").

628. Closing Brief Against Hildebrandt, Microfilm Publication M894, *supra* note 15, at Roll 31, Document Page 4, Frame 0270; Closing Brief Against Hofmann, Microfilm Publication M894, *supra* note 15, at Roll 31, Document Page 6, Frame 0296; Closing Brief on RuSHA and Greifelt et al., Microfilm Publication M894, *supra* note 15, at Roll 31, Document Page 1555, Frame 0334.

629. Abortions were performed "[o]nly on a voluntary basis because the applications were made by the female eastern workers themselves." Testimony of Georg Roedel, Microfilm Publication M894, *supra* note 15, at Roll 5, Volume 9, Document Page 3458, Frame 0455. Radush stated:

These women were examined by me. Now according to my opinion every woman had the possibility to complain to me and to protest against the application which had been made for her; protest against the abortion, because I assume that any person who has something done to them against their will would use every possibility to object to it and to make a protest, but I do not even know of one single instance where such a woman had protested to me against the abortion.

*Id.* at Document Page 3462, Frame 0459. Another witness testified that he refused a woman's request to perform an abortion because the pregnancy was too far advanced. Testimony of Friedrich Radusch, Microfilm Publication M894, *supra* note 15, at Roll 5, Volume 9, Document Page 3467, Frame 0464.

630. Testimony of Otto Fersch, Microfilm Publication M894, *supra* note 15, at Roll 5, Volume 9, Document Page 3599, Frame 0596.

631. One witness testified, "It happened often that these women stressed that they wanted to have their pregnancy interrupted." Testimony of Georg Roedel, Microfilm Publication M894, *supra* note 15, at Roll 5, Document Page 3459, Frame 0456. Another witness testified that the women "wished to be freed from these results of their illegal sexual intercourse by means of abortion." Testimony of Rudolph Haessler, Microfilm Publication M894, *supra* note 15, at Roll 5, Document Page 3790, Frame 0787.

The defendants introduced numerous application packets of women seeking abortions.<sup>632</sup> The main difference between these applications and the ones the prosecution introduced was that these applications were signed by the women seeking abortions rather than by others purportedly applying on the women's behalf.<sup>633</sup> Often, the applications included the reasons the women were requesting abortions: "[W]e are living in very bad and difficult times of war."<sup>634</sup> "We are sorry to have to do this, but times are very bad at present and we cannot afford to have a child."<sup>635</sup> "The reason for my request is that I am not married and that the father of the expected child ... also agrees to an interruption of pregnancy."<sup>636</sup> "[The father was transferred away and] so far he has failed to show any more concern for her."<sup>637</sup> "The genitor of the child ... intends to marry the girl at a later date."<sup>638</sup>

Several prosecution exhibits referred to Conti's Decree No. 4/43 of March 11, 1943, but it was Hildebrandt who introduced that decree as a defense exhibit to prove that abortions were performed only with the mother's consent.<sup>639</sup> Conti's decree in effect directed that German law and policy, which allowed for abortion only under limited circumstances, was not to be enforced against Eastern workers seeking abortions.<sup>640</sup> Upon request, the Eastern workers would be permitted to have abortions for any reason.<sup>641</sup> Conti's decree implemented Himmler's directive of October 9, 1942, launching the abortion program.<sup>642</sup> The decree stated:

I herewith order that in the case of Eastern female workers the "Directions for interruption of Pregnancy and Sterilization for Health Reasons" (published by the Reich Medical Board, edited by Prof. Hans Stadler, Lehmann's Publishing House, Munich 1936) *may be departed from and that the pregnancy may be interrupted if the pregnant woman so desires.*

In order to comply with such desires the following procedure is to be adopted: Application has to be made to the Advisory Committee for Interruption of Pregnancy of the responsible medical board. The latter will contact the delegate of the Reich Commissar for the Strengthening of Germanism. If this office agrees

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632. E.g., Hildebrandt Document No. 111, Microfilm Publication M894, *supra* note 15, at Roll 27, Document Page 52, Frame 0347.

633. E.g., *id.*

634. *Id.*

635. *Id.*

636. *Id.* at Document Page 55, Frame 0350.

637. *Id.* at Document Page 61, Frame 0356.

638. *Id.* at Document Page 63, Frame 0358.

639. Hildebrandt Document No. 112, Microfilm Publication M894, *supra* note 15, at Roll 27, Document Page 71, Frame 0367, *as reprinted in* 4 NMT, *supra* note 1, at 1094-95.

640. *Id.* at Document Pages 71-71a, Frames 0367-0368.

641. *Id.*

642. *Id.*

with the application for interruption, the Advisory Committee will make a decision and charge a surgeon with the treatment.<sup>643</sup>

Hildebrandt introduced a letter dated October 9, 1947, in which a doctor explained that Conti's Decree was followed.<sup>644</sup> The doctor claimed that the Health-Office performed abortions only with the consent and upon application of the pregnant woman.<sup>645</sup> In some cases, doctors tried to discourage women who came directly to the Health-Office without following the correct application procedures.<sup>646</sup> The doctors told these women that they could have abortions only if their lives were endangered.<sup>647</sup> When the women insisted that they knew of others who had gotten abortions, the doctors relented and explained the procedures for procuring permission from the Medical Chamber.<sup>648</sup>

Hildebrandt also introduced a document dealing with the issue of payments for abortion services.<sup>649</sup> The purpose of the document was to address the administrative issue of who was to pay for the abortions.<sup>650</sup> The central issue was not the procedures to be followed for abortion applications, but the document did reiterate the procedures to be followed for obtaining an abortion "if the pregnant woman so desires."<sup>651</sup>

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643. *Id.* (emphasis added).

644. Hildebrandt Document No. 113, Microfilm Publication M894, *supra* note 15, at Roll 27, Document Pages 74-75, Frames 0371-0372 (OMR Dr. Puerckhauer).

645. *Id.*

646. *Id.* at Document Pages 74-76, Frames 0371-0372.

647. *Id.*

648. For example, one doctor said:

You can see from this [4/43], that the National Health Leader permitted the doctors to interrupt the pregnancy of Eastern female workers for health reasons—if they themselves desired the interruption of pregnancy—irrespective of rules and regulations.

....

I am enclosing a sample of such an application to the Reich Medical Chamber of Upper Palatinate, sent by a Doctor, from which it can be seen, that not only the assent of the pregnant woman, but also that of the genitor had been obtained.

In addition – as I remember – pregnant Eastern female workers sometimes came directly to the governmental Health-Office with the request to be shown a method of interrupting their pregnancy. In accordance with the opinion of the doctors of the Health-Office Regensburg, that an interruption of pregnancy should be allowed only, if the life of the mother was endangered, the pregnant women were advised, that a pregnancy should take its course.

But when applicants pointed out, that the pregnancy of some of their friends had been interrupted, they were informed, that an interruption could be carried out in their case, if they themselves and the genitor desired the interruption and that they would have to approach their Plant-Doctor, who would have to forward an application to this effect to the Medical Chamber.

*Id.* at Document Pages 74-75, Frames 0371-0372.

649. Hildebrandt Document No. 112, Microfilm Publication M894, *supra* note 15, at Roll 27, Document Pages 72, Frame 0369.

650. *Id.*

651. Hildebrandt's document noted:

An affidavit of another doctor dated December 8, 1947, even claimed that the Porcelain-Factory Schoenwald erected a Maternity-Hospital for foreign workers in 1942.<sup>652</sup> This affidavit seems a bit self-serving. Not only did the doctor claim there were no forced abortions at the hospital, but he also claimed there were no abortions performed there at all, and that the hospital was built for the purpose of providing maternity services for Eastern workers.<sup>653</sup>

Hofmann also introduced several documents as evidence that abortions were performed only with the woman's consent. One racial examiner's affidavit emphasized that abortions were consensual and that RuSHA played no role in requesting abortions.<sup>654</sup> Another affidavit, from a female hospital worker at a university gynecological clinic, reported her experiences dealing with abortion requests from Eastern workers.<sup>655</sup> She stated that Eastern workers frequently came to the clinic and requested abortions.<sup>656</sup> The clinic explained the necessary application procedures and, once the applications were approved, took additional steps to ensure that the requests were voluntary before performing the

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According to the confidential circular decree—V12-1940.28/37—of 5 April 1943, an interruption of pregnancy may be made in the case of pregnant Eastern female workers, in agreement with the Reich Commissar for the Strengthening of Germanism and with the approval of the Advisory Office for Interruption of Pregnancy of the responsible medical board, *if the pregnant woman so desires*. In general, those will not be insurance cases, so that there will be no question of contributions by the Health Insurance.

*Id.* (emphasis added).

652. Hildebrandt Document No. 114, Microfilm Publication M894, *supra* note 15, at Roll 27, Document Page 79, Frame 0376 (Dr. Martin Bauer).

653. The affidavit stated:

The Porcelain-Factory Schoenwald ... erected a Maternity-Hospital for pregnant Eastern female workers ... where, in addition to the pregnant foreign laborers from their own plant, those from plants in the immediate neighbourhood or farther away would be brought .... All in all about 20 children were born there.

To my knowledge, as deputy-manager of the Porcelain-Factory Schoenwald at that time, the Eastern female workers and the Poles were not forced to have their pregnancy interrupted. The above-mentioned fact in itself would contradict such a belief.

As far as I know, the Eastern female laborers *were given the opportunity for a voluntary interruption of their pregnancy*, but I can state for certain, that such interruptions were not performed in the above-mentioned Maternity-Hospital.

*Id.* (emphasis added).

654. The affidavit of Hans Johann Victor Proksch, a RuSHA racial examiner, states:

I had to deal with some such cases [abortion], but have to state expressly that voluntary application was made by the pregnant foreign women workers concerned. No compulsion was used. Nor was the request for these examinations made by the Race and Settlement Main Office.

Hofmann Document No. 17, Microfilm Publication M894, *supra* note 15, at Roll 27, Document Page 54, Frame 0505.

655. Hofmann Document No. 96, Microfilm Publication M894, *supra* note 15, at Roll 27, Document Page 35, Frames 0746.

656. *Id.*

abortions.<sup>657</sup> She claimed that women pleaded with doctors to perform abortions when their applications were not in order or their pregnancies were too far advanced.<sup>658</sup> Additionally, one doctor received many letters of thanks from the women whose pregnancies were aborted.<sup>659</sup>

*D. Prosecution Theories of the Case*

In *Goering*, the significance of the distinction between voluntary and involuntary abortion was not an issue; however, it became a major issue in *Greifelt*. The indictment alleged, and the prosecution argued, that not all Eastern workers in Germany voluntarily submitted to abortions.

1. *Forcible Abortion as an International Crime*

The criminality of abortion compelled by threat or by direct physical force was not questioned, but there was virtually no evidence of forcible abortion in either of those senses. Instead, the prosecution focused on the conditions in which the women lived to advance the view that extreme situational duress constituted forcible abortion.

The nature of the prosecution's evidence of involuntary abortion was two-fold. First, there was evidence of direct coercion: One written policy stated that abortions were "to be carried out positively"<sup>660</sup> and another stated that "pressure

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657. The affidavit stated:

Eastern female workers frequently came to us with the request that we perform an abortion on them. At first we refused on the basis that we were not empowered to do this without authorization. Thereupon they applied to the Reich Medical Chamber in Fuerth and presented their petition.... Before the operation was performed we demanded in addition the express agreement that the abortion was to be performed solely at the request of the woman in question.... I am positive that all requests, as far as may be seen from the documents, voluntarily presented, and I can also confirm the fact that when the operation was to be performed, the pregnant women in question were again specifically asked whether they were in agreement. Only if they affirmed this voluntarily was the operation performed.

*Id.*

658. *Id.*

659. The expressed gratitude of many women supports the contention that the abortions were voluntary:

In most cases the pregnant women pleaded with the doctor, and begged them tearfully to go ahead with the abortion. This was the case if the doctor refused to perform the operation in case the papers were not in order or in case it was already too late for the operation.

....

It may be seen from the numerous letters of thanks which Dr. Brandl received that the abortions were performed only at the request of the female worker in question.

*Id.* at Document No. 35/36a-37, Frames 0747-0748.

660. Prosecution Exhibit No. 469, Document No. NO-1622, Microfilm Publication M894, *supra* note 15, at Roll 16, Document Page 1, Frame 0099. See also discussion *supra* Part IV.B.2.ii.a. (copy of relevant text) and Part IV.B.2.iv. (prosecution arguments regarding the document).

is to be applied" if a woman did not request an abortion.<sup>661</sup> Second, there was evidence of indirect duress: General wartime living and working conditions of Eastern women in Germany militated against free choice.<sup>662</sup> The prosecution argued that this combination of living and working conditions, amounting to a severe form of situational duress, was sufficient to constitute the crime of forcible abortion:

The Nazis paid lip service to the idea that all abortions were voluntary but this was obviously not the case. These unfortunate women working as slaves under terrible conditions in a hostile country found themselves subjected to all manner of pressure, both direct and indirect. They lived and labored under conditions which would not permit them to take care of their children. Moreover, every pregnancy had to be reported to the dreaded Gestapo. The suggestion of an abortion by that organization did not invite argument from Polish and Russian women.<sup>663</sup>

## 2. *Voluntary Abortion as an International Crime*

The prosecution did acknowledge that several German abortion decrees stressed the fact that the women had to make application for abortion, but it argued that even if all abortions were consensual they were still crimes under international law.

Abortion was a crime according to the German law and the law of the countries whose nationals those women were, even in the cases when the women submitted to abortions voluntarily. Thus, the fact that all the decrees quoted above stress that the women had to make applications for abortions, does not change the illegal character of these operations.<sup>664</sup>

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661. Prosecution Exhibit No. 471(a), Document No. L-8, Microfilm Publication M894, *supra* note 15, at Roll 16, Document Page 1, Frame 0102. See also discussion *supra* Part IV.B.2.iv. (copy of relevant text).

662. 4 NMT, *supra* note 1, at 687; Closing Brief Against Greifelt, Microfilm Publication M894, *supra* note 15, at Roll 31, Document Page 19, Frame 0125; Closing Brief on RuSHA and Hofmann et al., Microfilm Publication M894, *supra* note 15, at Roll 31, Document Page 39, Frame 0369.

663. 4 NMT, *supra* note 1, at 687 (Prosecution Opening Statement). The prosecution maintained the same position at the end of the trial, expressed in nearly identical language:

It has been claimed that these abortions were voluntary on the part of the woman but the proof shows otherwise. These unfortunate women, working as slaves under terrible conditions in a hostile country, found themselves subjected to all manner of pressure, both direct and indirect. They lived and labored under conditions which would not let them take care of their children. Moreover, every pregnancy had to be reported to the dreaded Gestapo. When the Gestapo suggested that an abortion was in order it is not likely that they received an argument from these Polish and Russian women.

Closing Brief Against Greifelt, Microfilm Publication M894, *supra* note 15, at Roll 31, Document Page 19, Frame 0125.

664. Closing Brief on RuSHA and Hofmann et al., Microfilm Publication M894, *supra* note 15, at Roll 31, Document Page 38, Frame 0368. See also 4 NMT, *supra* note 1, at 687; Closing Brief



The premise that unborn children are human beings subject to protection of law is implicit in the criminalization of voluntary abortion. The prosecution's opening and closing statements left no room for doubt about its position.

i. *Domestic law*

Domestic criminal law was considered a source of international law in the Nuremberg trials, and both German and Polish criminal law treated voluntary abortion as a crime. The indictment in *Goering*<sup>665</sup> and the indictment and judgment in *Greifelt*<sup>666</sup> expressly stated that the domestic law of nation states in which crimes took place was a source of law to be applied in defining crimes against humanity and war crimes.<sup>667</sup> Accordingly, in its closing brief, the prosecution in *Greifelt* argued:

Abortions were prohibited in Germany under paragraph 218 of the German Criminal Code .... After the Nazis came to power this law was enforced with great severity. Abortions were also prohibited under the Polish penal code ... and under the Soviet penal code. But protection of the law was *denied to the unborn children* of the Russian and Polish women in Nazi Germany. Abortions were encouraged and even forced on these women. The RuSHA also played a prominent role in this scheme.<sup>668</sup>

The German Penal Code punished involuntary abortions more severely, for the obvious reason that forcible abortion is a crime against the mother as well as against the child.<sup>669</sup> The same was true of the Polish Criminal Code.<sup>670</sup> The

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on Main Staff Office and Greifelt et al., Microfilm Publication M894, *supra* note 15, at Roll 31, Document Page 12, Frame 0178; Closing Brief Against Hofmann, Microfilm Publication M894, *supra* note 15, at Roll 31, Document Page 6, Frame 0296.

665. Count Three of the *Goering* indictment (war crimes) explained that the crimes alleged in the count constituted violations "of internal penal laws ...." 1 IMT, *supra* note 1, at 43. Moreover, Count Four of the indictment (crimes against humanity) alleged that the crimes alleged in the count constituted violations "of internal penal laws ...." *Id.* at 65.

666. The final paragraph of Count One of the *Greifelt* indictment (crimes against humanity) and the final paragraph of the Count Two of the indictment (war crimes) read that "[t]he acts and conduct of the defendants set forth in this count were committed unlawfully, willfully, and knowingly and constitute violations ... of the internal penal laws of the countries in which such crimes were committed ...." 4 NMT, *supra* note 1, at 617 (Indictment). Similarly, the *Greifelt* judgment stated that the acts and conduct, as set forth in the judgment, and as charged in the indictment, constituted crimes against humanity and war crimes as defined in Article II (c) and (b) of the Control Council Law No. 10 and violated the internal penal law of the countries in which such crimes were committed. 5 NMT, *supra* note 1, at 153 (Judgment).

667. See *supra* notes 665 & 666 for relevant discussion of the two indictments.

668. Closing Brief on RuSHA and Hofmann et al., Microfilm Publication M894, *supra* note 15, at Roll 31, Document Page 33, Frame 0363, as reprinted in 4 NMT, *supra* note 1, at 1077 (emphasis added) (internal citations omitted).

669. Section 218, German Criminal Code. See also Prosecution Exhibit No. 466, Document No. NO-5130, Microfilm Publication M894, *supra* note 15, at Roll 16, Document Page 1, Frame 0092. See *supra* note 495 (for relevant text of the statute).

Nazis were fully aware of the Polish law because they set out to remove unborn Polish children from that law's protection.<sup>671</sup>

From the beginning of the trial, starting with its opening statement, the prosecution took the position that internal penal laws criminalizing abortion were applicable: "But even if it be assumed that all abortions were voluntary, they still constitute a crime. This was nothing more than another technique in furtherance of the basic crime of genocide and Germanization. It was even a crime under German law."<sup>672</sup>

In its closing brief against defendants Greifelt, Creutz, Meyer-Hetling, and Schwarzenberger, the prosecution again argued: "Even under the assumption that her request was genuinely voluntary, it constitutes a crime under sec. 218, German Penal Code. At the same time it constitutes a war crime and crime against humanity."<sup>673</sup>

In its closing brief against Hofmann, the prosecution reiterated the assertion that both voluntary abortion and involuntary abortion constituted crimes. It was argued that "[t]he prosecution in its brief on RuSHA has shown the illegality of the abortion program regardless of whether or not the individual abortions were performed upon willing or unwilling Eastern female workers."<sup>674</sup>

ii. *Article 46 of Hague IV (1907)*

The prosecution also relied upon treaty law. The indictment cited article 46 of Hague Convention IV (1907) as a source of legal authority defining crimes against humanity.<sup>675</sup> Article 46 states: "Family honour and rights, the lives of persons, and private property, as well as religious convictions and practice, must be respected. Private property cannot be confiscated."<sup>676</sup>

The prosecution argued that even if an abortion were truly voluntary, it violated not only section 218 of the German Penal Code, but article 46 of Hague Convention IV (1907) as well.<sup>677</sup> Abortion, it asserted, was a war crime as defined in article II(b) of C.C. Law 10 because abortion violated article 46,

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670. Prosecution Exhibit No. 468, Document No-3089(b), Microfilm Publication M894, *supra* note 15, at Roll 16, Document Pages 2-4, Frames 0096-0098. *See also supra* note 494 (for relevant text of the statute).

671. Prosecution Exhibit No. 468, Document No-3089(b), Microfilm Publication M894, *supra* note 15, at Roll 16, Document Pages 2-4, Frames 0095-0098. *See also* Closing Brief on RuSHA and Hofmann et al., Microfilm Publication M894, *supra* note 15, at Roll 31, Document Page 33, Frame 0363.

672. 4 NMT, *supra* note 1, at 687.

673. Closing Brief on Main Staff Office and Greifelt et al., Microfilm Publication M894, *supra* note 15, at Roll 31, Document Page 12, Frame 0178.

674. Closing Brief Against Hofmann, Microfilm Publication M894, *supra* note 15, at Roll 31, Document Page 6, Frame 0296.

675. 4 NMT, *supra* note 1, at 617.

676. Hague Convention IV (1907), *supra* note 78, at Annex, Sec. III, art. 46.

677. Closing Brief on Main Staff Office and Greifelt et al., *supra* note 15, at Roll 31, Document Page 12, Frame 0178.

"which provides that family honor and rights must be respected."<sup>678</sup> The prosecution argued that "[i]t is also an act of 'ill-treatment' of a civilian population."<sup>679</sup> If abortion is truly voluntary, the "rights" violated are those of the unborn child, and the sector of the "civilian population" that is ill-treated is the unborn.

The prosecution reinforced its position by arguing that abortion is a crime against humanity because it "constitutes an act of 'extermination,' 'persecution on racial grounds,' and an 'inhumane act.'"<sup>680</sup> Abortion is simply a form of homicide, and if committed on a vast scale as a matter of state policy, it is genocide. It was unnecessary to prove that any one distinct form of homicide—in this case abortion—violated customary law or a general principle of law common to all civilized nations.

As Chief of Counsel in trials before the NMT, Telford Taylor articulated a position in which treaty, custom, principles of law generally accepted by civilized nations, and domestic law converge.<sup>681</sup> He wrote: "Those acts which offended the conscience of our people were criminal by standards generally accepted in all civilized countries [and may be punished] in full accord with both our own traditions of fairness and with standards of just conduct which have been internationally accepted."<sup>682</sup> He then noted that the Hague Convention provides for "rule of 'the principles of the law of nations, as they result from the usage established among civilized peoples, from the laws of humanity and the dictates of the public conscience.'"<sup>683</sup> He also echoed the IMT judgment by stating that the Hague Convention was declaratory of well-established laws of war.<sup>684</sup>

There is a clearer explanation for the fact that the various sources of international law converge on the issue of abortion. Including the domestic law of abortion in the sources of international law applied in the Nuremberg tribunals implicitly shows that abortion—like murder, theft, and kidnapping—is a crime *malum in se* (inherently and essentially wrong).<sup>685</sup> Treaties, customary law, domestic law, and the law of the Control Council all reflected this preexisting law.<sup>686</sup> Even though the NMT was a novel forum for enforcing that law, it in no way violated the *ex post facto* principle when it tried and punished defendants for crimes *malum in se*. Abortion and other forms of homicide were not made criminal by any of these "sources" of international law. Instead, they were included in these sources because they are criminal by their very nature.

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678. *Id.*

679. *Id.*

680. *Id.*

681. Telford Taylor, *The Nuremberg War Crimes Trials*, 27 INT'L CONCILIATION 243, 251 (1949), reprinted in TAYLOR, FINAL REPORT, *supra* note 1, at 121, 133.

682. *Id.*

683. *Id.* at 251-52.

684. *Id.* at 265.

685. See WAYNE R. LAFAVE, SUBSTANTIVE CRIMINAL LAW § 1.6(b) (5th ed. 2010) (explaining the difference between crimes *malum in se* and crimes *malum prohibitum*). This is also reflected in the international law principle of *jus cogen*. Vienna Convention on the Law of Treaties, art. 53, May 23, 1969, 1155 U.N.T.S. 331.

686. See generally *supra* Part IV.D.2.i-ii.

### iii. Medical ethics

Medical ethics provide standards of criminality in international law. The prosecution introduced evidence that members of the medical profession raised objections to the Nazi abortion policies, and that they based those objections on ethics grounded in religious and professional principles.<sup>687</sup> One of the most significant holdings of *United States v. Brandt*, the first case tried by the NMTs,<sup>688</sup> was that rules of medical ethics provide standards of criminality.<sup>689</sup> The *Greifelt* tribunal acknowledged that its own "constitution, powers, jurisdiction, and functions" were stated in the IMT's judgment and the judgments of three NMT cases, including *Brandt*.<sup>690</sup>

For 2,000 years, the foremost statement of the principles for medical ethics had been the Hippocratic oath.<sup>691</sup> The Hippocratic oath requires doctors to

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687. See *supra* Part IV.B.2.v.

688. 1 NMT, *supra* note 1, at 1.

689. 2 NMT, *supra* note 1, at 181-83. In its judgment, the tribunal set forth ten basic principles that "must be observed in order to satisfy moral, ethical and legal concepts." *Id.* at 181. After listing the ten principles, the tribunal stated: "Of the ten principles which have been enumerated our judicial concern, of course, is with those requirements which are purely legal in nature—or which at least are so clearly related to matters legal that they assist us in determining criminal culpability and punishment." *Id.* at 182-83. Certainly, the ability to identify that class of beings who are human is of assistance in "determining criminal culpability." See *id.*

690. 5 NMT, *supra* note 1, at 88.

691. Dr. Ivy was an expert witness for the prosecution in the *Brandt* case. He testified that the Hippocratic Oath was the standard for medical ethics:

Q. Is the oath of Hippocrates the Golden Rule in the United States and to your knowledge throughout the world?

A. According to my knowledge it represents the Golden Rule of the medical profession. It states how one doctor would like to be treated by another doctor in case he were ill. And in that way how a doctor should treat his patient or experimental subjects. He should treat them as though he were serving as a subject.

Q. Several of the defendants have pointed out in this case that the oath of Hippocrates is obsolete today. Do you follow that opinion?

A. I do not. The moral imperative of the oath of Hippocrates I believe is necessary for the survival of the scientific and technical philosophy of medicine.

2 NMT, *supra* note 1, at 86. One of the defendants in *Greifelt* was Dr. Ebner, on trial for his role in Lebensborn. He proffered a rather peculiar defense invoking the Hippocratic oath, which the prosecution characterized as professional immunity for doctors:

Ebner's defense in essence amounts to a unique and untenable claim of professional immunity. His testimony is replete with such absurd claims. Whether it was in connection with an examination of a kidnapped child to determine whether it should be placed with German foster parents or a decision to confiscate Jewish or foreign property, he takes refuge in the statement that he only did it "from a medical point of view." But surely a man cannot be *particeps criminis* and then be absolved of all responsibility simply because he possesses a medical degree from the University of Erlangen. No, the Oath of Hippocrates [sic] which serves as a sacred guide for medical men the world over cannot be perverted as a shield for crime.

Closing Brief Against Ebner, Microfilm Publication M894, *supra* note 15, at Roll 31, Document Page 3, Frame 0059 (citations omitted).

protect the lives of unborn children and not to take them—"I will give no deadly medicine to anyone if asked, nor suggest any such counsel; and in like manner, I will not give to a woman a pessary to produce abortion."<sup>692</sup> In his final report on the NMTs, Telford Taylor noted that the disclosure of horrors involving the medical profession in the *Brandt* case was an important impetus for the World Medical Association to adopt a modern version of the Hippocratic oath.<sup>693</sup> Taylor wrote:

Noting the disclosures at the trial, the World Medical Association recently adopted a "modern version" of the ancient Hippocratic oath, in which the doctor vows:

I will not permit considerations of race, religion, nationality, party politics or social standing to intervene between my duty and my patient. I will maintain the *utmost respect for human life from the time of its conception*. Even under threat I will not use my knowledge contrary to the laws of humanity.<sup>694</sup>

Both before and after World War II, the medical profession recognized that unborn children are the object of special protection based on the understanding that they are human beings.<sup>695</sup> Obviously, the *Greifelt* prosecutors shared this commonly held understanding.

The underlying issue in abortion is whether the unborn child is a human being and therefore entitled to the protection of law.<sup>696</sup> The Nuremberg prosecutors made no attempt to prove that unborn children are biologically or genetically human beings.<sup>697</sup> The prosecution's basic premise—that abortion is a crime against the unborn child—presumed that the unborn child is a human being and not some other life form that is protected by law.<sup>698</sup> The prosecution introduced no evidence of fetal development or medical or scientific testimony on the issue, and it made no arguments from philosophy or case precedent.<sup>699</sup> The implication is that such proof was unnecessary because the humanity of the unborn child was not in question. Not even the Nazi defendants argued that unborn children are not human beings.<sup>700</sup> The prosecution made no more attempt to prove that unborn children are fully human than it made to prove that non-Aryan adults are human beings protected by law against genocide.

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692. *Roe v. Wade*, 410 U.S. 113, 131-32 (1973) (quoting the version of the Hippocratic Oath adopted by the World Medical Association).

693. TAYLOR, FINAL REPORT, *supra* note 1, at 168.

694. *Id.* (emphasis added).

695. See *supra* Part IV.D.2.iii.

696. See, e.g., *Roe*, 410 U.S. at 150 ("The third reason is the State's interest—some phrase it in terms of duty—in protecting prenatal life. Some of the argument for this justification rests on the theory that a new human life is present from the moment of conception.").

697. See generally 4 NMT, *supra* note 1, at 686-87 (omitting any discussion as to whether the unborn child is a human being). See also *supra* Part IV.D.2.i-iii (discussing the prosecution's theory of the case).

698. See 4 NMT, *supra* note 1, at 686-87.

699. The evidence presented by the prosecution to support its case regarding the crimes of abortion committed by the Nazi defendants contained no scientific or medical testimony. See, e.g., *id.* at 1077-89.

700. See, e.g., 4 NMT, *supra* note 1, at 694-710; 5 NMT, *supra* note 1, at 3-30, 72-87.

### 3. *Voluntary Abortion by Removing the Protection of Law*

Although the allegation that defendants *encouraged abortion* was stated in the form of the standard criminal law doctrine of accomplice liability, its application in the context of *Greifelt* was very different.<sup>701</sup> The reason for this difference is that in the typical criminal case, accomplice liability arises when an accomplice (who is not deemed a state actor) encourages or otherwise aids a principal (also not a state actor) to commit a crime against the state.<sup>702</sup> Conviction requires proof that a particular crime was committed by the principal and that the accomplice in some way aided or encouraged the principal.<sup>703</sup> In *Greifelt*, however, the “accomplices” were acting as high-level state officials.<sup>704</sup>

Standard criminal law doctrine is thus ill-suited, and in fact is rendered unnecessary, when prosecuting cases of crimes against humanity.<sup>705</sup> Those crimes necessarily entail the establishment of state policies that are themselves criminal.<sup>706</sup> The act of encouraging criminal behavior therefore does not require proof of a causal connection between the encouragement and any particular crime consummated.<sup>707</sup>

Because the *Greifelt* prosecution targeted Nazi abortion policies that had no specific geographical nexus, its case did not focus on the performance of abortions, but rather upon high-level decisions not to extend the protection of law to unborn children.<sup>708</sup> The nature of the criminal act was therefore that of omission, rather than commission. The Nazi regime had a duty to protect innocent life through the enforcement of the criminal law and deliberately failed to do so.<sup>709</sup> Because the particular manner in which the omission was effected in Poland differed from that in Germany, those two situations are treated separately.

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701. See 4 NMT, *supra* note 1, at 609-10. See also *supra* Part IV.A.1-3.

702. See generally 1 GIDEON BOAS ET AL., FORMS OF RESPONSIBILITY IN INTERNATIONAL CRIMINAL LAW 317-18 (2008) [hereinafter BOAS, FORMS OF RESPONSIBILITY IN INTERNATIONAL CRIMINAL LAW].

703. *Id.* at 318-19.

704. See C.C. Law 10, *supra* note 67 (addresses high political positions).

705. See 15 NMT, *supra* note 1, at 11, 1087.

706. TAYLOR, FINAL REPORT, *supra* note 1, at 73 (“No defendant is specifically charged in the indictment with the murder or abuse of any particular person.... Simple murder and isolated instances of atrocities do not constitute the gravamen of the charge. Defendants are charged with crimes of such immensity that mere specific instances of criminality appear insignificant by comparison. The charge, in brief, is that of conscious participation in a nation-wide governmentally organized system of cruelty and injustice....”) (quoting *United States v. Altstoetter*).

707. See 2 GIDEON BOAS ET AL., ELEMENTS OF CRIMES UNDER INTERNATIONAL LAW 17, 39 (2008); BOAS, FORMS OF RESPONSIBILITY IN INTERNATIONAL CRIMINAL LAW, *supra* note 702, at 3, 12, 149.

708. See 4 NMT, *supra* note 1, at 613-14.

709. *Id.* at 613.

*i. Removal of jurisdiction from the Polish courts*

Germany occupied Poland after invading and defeating it in September 1939.<sup>710</sup> International law places basic obligations on occupying powers for the governance of occupied territories.<sup>711</sup> Hague Convention IV (1907) established those rules of law, and article 43, which had particular significance, states:

The authority of the legitimate power having in fact passed into the hands of the occupant, the latter shall take all the measures in his power to restore, and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country.<sup>712</sup>

The Nazis complied with this rule, at least to the extent that they allowed the Polish courts to remain operational, and for a time, the Polish courts continued to vigorously enforce the abortion provisions of the Polish law.<sup>713</sup> That changed in March 1942 when Himmler, at the prompting of Conti, implemented the recommendation of the Racial-Political office to remove jurisdiction over the crime of abortion from the Polish courts.<sup>714</sup>

Withdrawing criminal jurisdiction from the Polish courts effectively nullified the Polish criminal law of abortion, thereby removing the protection of law from unborn children.<sup>715</sup> This, in turn, likely encouraged doctors to perform, and pregnant women to procure, abortions. From the women's perspective, the abortions were clearly voluntary, at least in the sense that the state was not pressuring them.<sup>716</sup>

The indictment asserted that defendants were guilty of the crime of abortion because when it removed jurisdiction from the Polish courts, Germany had failed to meet its governance obligations as an occupying power.<sup>717</sup> When viewed as a failure to meet its governance obligations, the nature of Germany's criminal conduct is properly characterized as an omission.<sup>718</sup> Germany breached its duty to afford the protection of law to unborn Polish children. It is extremely important to note that the prosecution asserted that by removing the protection of law, the Nazis, as state actors, had not committed an offense of simply failing to meet their governance obligations as an occupying power; they were guilty of committing the crime they had a legal duty to protect against—abortion.<sup>719</sup>

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710. 1 IMT, *supra* note 1, at 204.

711. Hague Convention IV (1907), *supra* note 78, at Annex, Sec. III, art. 43.

712. *Id.*

713. Prosecution Exhibit No. 468, Document No. NO-3089(a), Microfilm Publication M894, *supra* note 15, at Roll 16, Document Page 1, Frame 0095.

714. *Id.*

715. *Id.*

716. *See id.* at 0096-0098.

717. 4 NMT, *supra* note 1, at 613.

718. *See* Hague Convention IV (1907), *supra* note 78, at Annex, Sec. III, art. 43 & Sec. II, ch. I, art. 23.

719. *See id.* at Annex, Sec. II, ch. I, art. 23 (classifying suspension of rights as a breach of international law).

*ii. Failure to extend the protection of German law*

The Nazis brought hundreds of thousands of persons from the East into Germany to Germanize those persons who were racially valuable and to exploit as slave labor those who were not racially valuable.<sup>720</sup> Because these women and their unborn children were now in Germany rather than an occupied country, article 43 of Hague Convention IV (1907)<sup>721</sup> did not govern their treatment. Nevertheless, Germany still had an international obligation to extend the protection of law to them.<sup>722</sup>

Even though it was clear that the government doctors and doctors compensated by the state performed abortions,<sup>723</sup> the major thrust of the prosecution's case was that the Nazi government failed to provide protection of law to racially non-valuable unborn children.<sup>724</sup> The theory of criminal liability was the state's failure to protect innocent human life as a matter of state policy, rather than its direct complicity in breaking the law.<sup>725</sup> The culpable criminal conduct was an omission or failure to act, rather than the commission of a criminal act.

The means of committing abortions upon Eastern workers in Germany bore a resemblance to prohibiting Polish courts from enforcing Polish law.<sup>726</sup> As in Poland, existing laws in Germany protecting unborn children from abortion were not enforced.<sup>727</sup> The critical difference was that in Poland, the Nazis actively intervened to stop the enforcement of the law.<sup>728</sup> In Germany, no intervention was necessary; the Nazis simply refused to enforce the law, despite the fact that the Minister of Justice had been given the power to change the law.<sup>729</sup>

The performance of abortions on Eastern workers is also a crime against humanity, as defined in Article II(c) of Control Council Law No. 10. It constitutes an act of "extermination," "persecution on racial grounds" and an "inhumane act". Furthermore, it is a violation of Article 218 of the German Code.... Under the amended provisions the Minister of Justice was given authority to decree that

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720. 4 NMT, *supra* note 1, at 610, 626; 5 NMT, *supra* note 1, at 112-16.

721. Hague Convention IV (1907), *supra* note 78, Annex, Sec. III, art. 43.

722. *Id.* at Annex, Sec. II, ch. I, art. 23.

723. Hildebrandt Document No. 112, Microfilm Publication M894, *supra* note 15, at Roll 27, Document Page 72, Frame 0369; Prosecution Exhibit No. 476, Document No. NO-1753, Microfilm Publication M894, *supra* note 15, at Roll 16, Document Page 5, Frame 0122.

724. Closing Brief on RuSHA and Hofmann et al., Microfilm Publication M894, *supra* note 15, at Roll 31, Document Page 33, Frame 0363.

725. *Id.*

726. Compare *id.* (discussing Germany), with Prosecution Exhibit No. 468, Document No. NO-3089(a), Microfilm Publication M894, *supra* note 15, at Roll 16, Document Page 1, Frame 0095 (discussing Poland).

727. Prosecution Exhibit No. 468, Document No. NO-3089(a), Microfilm Publication M894, *supra* note 15, at Roll 16, Document Page 1, Frame 0095.

728. *Id.*

729. Closing Brief on RuSHA and Hofmann et al., Microfilm Publication M894, *supra* note 15, at Roll 31, Document Page 33, Frame 0363; Closing Brief on RuSHA and Hofmann et al., Microfilm Publication M894, *supra* note 15, at Roll 31, Document Pages 12-13, Frames 0179.



performance of abortions on certain populations would not be punishable (RGBL 1943, p. 140, Article 8). Such a decree has never been issued by the Minister of Justice.<sup>730</sup>

More importantly, even if Article 218 had been repealed and abortion was no longer prohibited under German law, it still remained a crime against humanity because it was an act of extermination.<sup>731</sup> Moreover, the failure to extend the protection of law based on distinctions of nationality constituted a classic violation of international law.<sup>732</sup> The prosecution summed up the matter in its closing brief: "[P]rotection of the law was denied to the unborn children of the Russian and Polish women in Nazi Germany."<sup>733</sup>

The prosecution's theory of the case that voluntary abortion is a crime and that the Nazis, including some of the defendants, were guilty of voluntary abortion was based on two premises—that unborn children are human beings and that removal of the protection of law from them is a crime against humanity. The defense avoided responding to the first premise, and as to the second premise, characterized the acts of withholding protection of law as non-culpable omissions.

#### E. Defense Theories of the Case

Four defenses raised had particular relevance to the crime of abortion: (1) that there was no culpable participation in the abortion program; (2) that abortions were voluntary; (3) that omission to enforce the law was not culpable conduct; and (4) that abortion was necessary. While not a recognized defense, there was also a stinging criticism that the trials were little more than an exercise of victor's justice<sup>734</sup> in which the Nazis alone were tried for offenses that the Allies had also committed (*tu quoque*).<sup>735</sup>

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730. Closing Brief on RuSHA and Hofmann et al., Microfilm Publication M894, *supra* note 15, at Roll 31, Document Pages 12-13, Frames 0178-0179.

731. See London Charter, *supra* note 49, Art. 6(c).

732. BRIERLY, *supra* note 263, at 276, 280, 284, 286; 1 OPPENHEIM, *supra* note 240, at 496.

733. Closing Brief on RuSHA and Hofmann et al., Microfilm Publication M894, *supra* note 15, at Roll 31, Document Page 33, Frame 0363.

734. Defense Counsel for the Gestapo offered a version of the "victor's justice" defense when he argued that the laws of the London Charter, such as the concept of assumption of collective guilt and laws with retroactive effects, constituted "'a new law' with principles which contradict the age-old traditional legal conception." 21 IMT, *supra* note 1, at 495 (citing Justice Jackson). If the tribunal imposed such rules, explained Defense Counsel, "[w]ould it not create the impression that the victorious powers, particularly in the realm of ethics, do not have sufficient confidence in their innermost essence? As a result, for coming generations this maxim would develop: 'That which benefits the victor is right.'" *Id.* at 496. See also Final Plea of Hildebrandt, Microfilm Publication M894, *supra* note 15, at Roll 33, Document Page 40, Frame 0453 ("Germany has lost the war. That was her crime.").

735. *Tu quoque* has a much stronger emotional appeal than sound legal basis. Essentially, it is an allegation of hypocrisy—"you are charging us with the very things you did." See TAYLOR, THE ANATOMY OF THE NUREMBERG TRIALS, *supra* note 5, at 467. For example, the defense pointed out that many states in the U.S. criminalized interracial marriage as a means of maintaining racial

### 1. *Denial of Culpable Involvement in Abortion*

The defense raised only one clearly successful defense to the charges of abortion. The *Greifelt* tribunal acquitted eight of the ten defendants charged based on a lack of evidence that they were sufficiently involved.<sup>736</sup> In the case of those defendants for whom there was no evidence of knowing participation, it was purely a question of fact.<sup>737</sup> But for those defendants who continued to perform their duties as members of RuSHA, or in cooperation with it, knowing that RuSHA had a role as racial examiner in implementing abortion policies, there was a mixed question of law (How substantial must that involvement be to be culpable?) and of fact (How substantial was defendant's involvement?).<sup>738</sup>

The one defense that most of the *Greifelt* defendants successfully raised was lack of knowledge or culpable participation in the Nazi abortion program.<sup>739</sup> The court required more than simple membership in RuSHA plus knowledge of its involvement in the abortion program.<sup>740</sup> That explains why neither Rudolf Creutz, who was in charge of official RuSHA statistical tabulations,<sup>741</sup> nor Otto Schwarzenberger, who had general fiscal oversight of RuSHA operations,<sup>742</sup> were found guilty of abortion. Even the fact that Greifelt as Head of the Staff Main Office of the RKFDV had responsibility for coordinating the activities of several offices, including RuSHA, did not constitute culpable involvement.<sup>743</sup>

### 2. *Argument that All Abortions Were Voluntary*

Although the defendants did not clearly acknowledge that forcible abortion was a crime under international law, it seems that they would have had to

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purity and engaged in the eugenic practice of sterilization. Hofmann Defense Exhibit 61, Microfilm Publication M894, *supra* note 15, at Roll 27, Document Pages 9-11, Frame 0614-0616.

736. See 5 NMT, *supra* note 1, at 154-64.

737. *E.g., id.* at 156.

738. *Id.* at 154-64.

739. 5 NMT, *supra* note 1, at 154-64.

740. *Id.*

741. Closing Brief of Creutz, Microfilm Publication M894, *supra* note 15, at Roll 31, Document Pages 3-5, Frames 0043-0045 (head of statistics for the Main Staff Office [of the RKFDV] and leader of Amtsgruppe A which had some involvement in the abortion program). However, Creutz claimed to have refused to remove the protection of law from Eastern workers, so that may account for his acquittal. Final Pleas of All Defendants, Microfilm Publication M894, *supra* note 15, at Roll 33, Document Page 56, Frame 0104.

742. Closing Brief against Schwarzenberger, Microfilm Publication M894, *supra* note 15, at Roll 31, Document Page 5, Frame 0692 (admitted handling the finances of all the agencies involved including RuSHA and the Medical Chamber but claimed he did not know how the money was being spent).

743. 5 NMT, *supra* note 1, at 154-155 (Judgment) (While Greifelt was found to be the "main driving force in the entire Germanization program," that was insufficient to hold him criminally responsible for the crime of abortion). Other evidence made clear that he had knowledge of the abortion policies and must have had some part in furthering them. Closing Brief against Main Staff Office and Greifelt et al., Microfilm Publication M894, *supra* note 15, at Roll 31, Document Pages 11-12, Frames 0177-0178 (claiming no knowledge of abortion or responsibility for branch offices despite secretary's testimony otherwise and secret abortion file kept in that office).

recognize that it constituted ill-treatment of the mother and was therefore a crime. The charge of forcible abortion, especially when based upon situational duress, raises a mixed question of law (What nature and degree of force constitutes culpable force?) and of fact (How substantial was defendant's involvement in bringing that force to bear?).<sup>744</sup> The problem of identifying the nature and degree of force necessary is illustrated in the defendants' denial that wartime conditions were such that women were forced to request abortions:

I will take pains to prove that the abortion took place by request of the pregnant woman. To the objection of the Prosecution that under the labor conditions during wartime voluntary action of the Eastern workers was not possible, I oppose with the same right the idea that even under different circumstances these workers would have wanted the abortion of illegitimate children for economic and, above all, for social reasons.<sup>745</sup>

It is not clear whether the defense of voluntariness was offered as a complete defense to the charge of voluntary abortion or only as a partial defense to the charge of forcible abortion. Voluntariness would be a complete defense only if international law, unlike German and Polish law, criminalized only forcible abortion.<sup>746</sup> The defendants did not argue that voluntary abortion by its nature is not criminal, nor did they argue that unborn children are not human beings.<sup>747</sup> Therefore, the claim that consent is a total defense would have been based on the rationale that voluntary abortion simply had never been treated under international law as criminal, or at least not as a war crime or crime against humanity.

The defendant's legal argument, that abortion was not a crime under international law, was not elaborate or extensive. It consisted essentially of a denial that any of the sources of international law listed in the indictment criminalized abortion.<sup>748</sup> These included treaties, custom, general principles of law common to civilized nations, and German law.<sup>749</sup> The defense claimed that treaties, in particular the Hague Conventions, made no reference to abortion.<sup>750</sup> They made a similar assertion with regard to customary law—that it simply had not recognized abortion as criminal.<sup>751</sup> Defendants also claimed that there was no common principle among civilized nations of criminalizing abortion, but the only proof for their contention was a vague reference made to prewar advocacy

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744. See generally 4 NMT, *supra* note 1, at 687.

745. Defense Counsel Opening Statement, Microfilm Publication M894, *supra* note 15, at Roll 3, Document Page 1293, Frame 0065.

746. See 4 NMT, *supra* note 1, at 687.

747. See Final Plea of Hofmann, Microfilm Publication M894, *supra* note 15, at Roll 33, Document Page 67, Frame 0537.

748. *Id.*

749. *Id.*

750. *Id.*

751. *Id.* See also Hildebrandt Testimony, Microfilm Publication M894, *supra* note 15, at Roll 6, Document Page 4023, Frame 0216, as reprinted in 4 NMT, *supra* note 1, at 1090.

in some countries for the loosening of restrictions on abortion.<sup>752</sup> Although defendants claimed that Germany had decriminalized abortion, it had not done so by legislative enactment or even formal administrative decree.<sup>753</sup> Nazi officials had simply failed to protect non-Germanic children under the laws that existed.<sup>754</sup>

Based on their argument that international law had not previously recognized abortion as a crime, defendants logically claimed that the proceedings violated the fundamental principle that a person should not be tried for actions made criminal after the fact.<sup>755</sup> That injustice, they believed, was only compounded by calling abortion a "crime against humanity."<sup>756</sup>

Of course, the underlying issue was whether unborn children are human beings, but the defendants did not argue that unborn children as a class are not human beings subject to protection of law.<sup>757</sup> The defendants' course of behavior during World War II suggested that they believed some unborn children were not persons to be protected by law and some were persons to be protected by law. German law made abortion a crime, and Nazi policy ensured that unborn Aryan children would be protected by that law.<sup>758</sup> The reason that the Nazis did not protect some unborn children was not that unborn children were not human beings, but rather that they were Slavs or Jews.<sup>759</sup>

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752. Defense Counsel Opening Statement, Microfilm Publication M894, *supra* note 15, at Roll 3, Document Page 1292, Frame 0064.

753. Compare *id.* at Frames 0064-0065, with Closing Brief on RuSHA and Hofmann et al., Microfilm Publication M894, *supra* note 15, at Roll 31, Document Page 33, Frame 0363.

754. See *supra* Part IV.D.3.ii.

755. Defense Counsel Opening Statement, Microfilm Publication M894, *supra* note 15, at Roll 3, Document Page 1292, Frame 0064.

756. Hildebrandt Testimony, Microfilm Publication M894, *supra* note 15, at Roll 6, Document Page 4023, Frame 0216, as reprinted in 4 NMT, *supra* note 1, at 1090.

757. The defendants did not expressly acknowledge that unborn children are human beings or persons, but they did so implicitly. For example, Hildebrandt argued that RuSHA's racial examiners had engaged in "life sustaining activity" when they identified unborn children as Germanic, thereby preventing their destruction. Final Plea of Hildebrandt, Microfilm Publication M894, *supra* note 15, at Roll 33, Document Page 27, Frame 0441. In addition, Hildebrandt testified that "[i]nterruption of pregnancy ... is or was never considered as murder, but it was considered a special violation against life." Direct Examination of Hildebrandt, Microfilm Publication M894, *supra* note 15, at Roll 6, Document Page 4023, Frame 0216, as reprinted in 4 NMT, *supra* note 1, at 1090. Greifelt denied responsibility for the crime of voluntary abortion not because it was not "murder, maltreatment, or neglect" of human beings, but because criminal liability did not attach to omissions in this case. Final Plea of Greifelt, Microfilm Publication M894, *supra* note 15, at Roll 33, Document Page 58, Frame 0264.

758. Compare Defense Counsel Opening Statement, Microfilm Publication M894, *supra* note 15, at Roll 3, Document Page 1292-93, Frame 0064-0065, with Closing Brief on RuSHA and Hofmann et al., Microfilm Publication M894, *supra* note 15, at Roll 31, Document Page 33, Frame 0363.

759. Compare Defense Counsel Opening Statement, Microfilm Publication M894, *supra* note 15, at Roll 3, Document Page 1292-93, Frame 0064-0065, with Closing Brief on RuSHA and Hofmann et al., Microfilm Publication M894, *supra* note 15, at Roll 31, Document Page 33, Frame 0363.

### 3. *Culpability May Not Be Predicated on Acts of Omission*

Greifelt's counsel argued that there could be no culpability for failure to enforce German abortion laws in cases involving foreign workers in Germany.<sup>760</sup> His argument was based on the principle of criminal law that a failure to act (omission) does not satisfy the *actus reus* requirement for an offense unless there is a positive duty to act.<sup>761</sup> He asserted that nothing in international law imposed a duty to prosecute crimes committed in Germany by or against foreigners, especially where foreigners committed crimes against each other.<sup>762</sup> No one, he argued, would suggest that a state is liable for every crime it failed to prosecute:

From the point of view of international law the only decisive factor is whether a war crime or a crime against humanity may be seen in the non-application of Par. 218 of the Penal Code to abortions by members of certain alien sectors of population. Is it a crime of this sort if an attitude is not punished which is punished in ones' own nationals? Is a nation obliged to prevent citizens of foreign countries who are only temporarily staying in its territory, from harming their own ethnic group or themselves by excesses or by operations, such as an interruption of a pregnancy?

....  
I think I may establish the fact that according to the unanimous opinion of the legal minds an omission is liable to punishment only if there was a legal obligation to act. This principle must apply as a basic principle of law also for the omission according to international law.<sup>763</sup>

Greifelt's counsel correctly characterized the prosecution's theory of the case with regard to abortion of unborn children of Eastern workers in Germany as basing criminal responsibility upon an omission, or failure to act. However, the prosecutor's theory of criminal liability was consistent with principles of international law generally, which impose duties on nation states regarding the treatment of foreign nationals within their territory during peacetime and wartime.<sup>764</sup> States may not engage in mistreatment of foreign nationals.<sup>765</sup> Nation states must not only refrain from harming foreign nationals, but they also must extend the protection of law to them.<sup>766</sup> Of course, a nation state is not responsible for every wrong done to foreign nationals within its boundaries any more than it is legally responsible for every wrong done to one of its own

760. Final Plea of Greifelt, Microfilm Publication M894, *supra* note 15, at Roll 33, Document Pages 57, Frames 0263.

761. See generally LAFAYE, *supra* note 685, § 6.2; BRIERLY, *supra* note 263, at 280; BOAS, FORMS OF RESPONSIBILITY IN INTERNATIONAL CRIMINAL LAW, *supra* note 702, at 148-57.

762. Final Plea of Greifelt, Microfilm Publication M894, *supra* note 15, at Roll 33, Document Pages 57-58, Frames 0263-0264.

763. *Id.*

764. BRIERLY, *supra* note 263, at 276, 280, 283-84, 286; 1 OPPENHEIM, *supra* note 240, at 496.

765. BRIERLY, *supra* note 263, at 276, 286; 1 OPPENHEIM, *supra* note 240, at 495-97.

766. BRIERLY, *supra* note 263, at 289-90; 1 OPPENHEIM, *supra* note 240, at 496; IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 454-55 (7th ed. 2008).

nationals.<sup>767</sup> But a state certainly may not, as a matter of policy, decide not to extend the protection of law to foreign nationals.<sup>768</sup>

#### 4. *Necessity*

As might be expected, the defendants raised the quintessential Nazi defense, a plea often seen as that of last resort—necessity.<sup>769</sup> But for the Nazis, necessity was not a plea simply of last resort: It was the ground motive and justification for their entire war effort.<sup>770</sup> In actuality, the defense of necessity by its very nature knows no law, or perhaps, trumps all laws. While the defense acknowledged that decrees regarding Eastern workers may have violated the equal protection of law, it argued that defendants were justified in doing so by the defense of necessity.<sup>771</sup> In their minds, necessity justified the killing of “useless eaters,” Slavs and Jews, the born and unborn, without having to disprove, or even deny, that they were human beings.<sup>772</sup>

The Nazis believed that the survival of the Aryan race was at stake.<sup>773</sup> They faced a biological emergency that arose from the danger posed by the existence of too many Slavs and too many Jews.<sup>774</sup> The Nazis believed that lasting peace depended on the elimination of inferior races.<sup>775</sup> In short, the biological emergency constituted a security threat:

If one examines the lawfulness of this regulation, one encounters the following legal position: the decrees were only directed against female Eastern workers. It is true that they violated the principle of equality before the law. The question is whether they could be justified by the biological emergency and for security reasons.

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767. BRIERLY, *supra* note 263, at 281; BROWNLIE, *supra* note 766, at 529.

768. BRIERLY, *supra* note 263, at 282; BROWNLIE, *supra* note 766, at 529.

769. *E.g.*, Final Plea of Hofmann, Microfilm Publication M894, *supra* note 15, at Roll 33, Document Page 66a, Frame 0533.

770. The Nazi concept of “total war” was based on necessity, according to the IMT judgment:

For in this conception of “total war,” the moral ideas underlying the conventions which seek to make war more humane are no longer regarded as having force or validity. Everything is made subordinate to the overmastering dictates of war. Rules, regulations, assurances, and treaties all alike are of no moment; and so, freed from the restraining influence of international law, the aggressive war is conducted by the Nazi leaders in the most barbaric way. Accordingly, War Crimes were committed when and wherever the Fuhrer and his close associates thought them to be advantageous.

1 IMT, *supra* note 1, at 227.

771. Final Plea of Hofmann, Microfilm Publication M894, *supra* note 15, at Roll 33, Document Page 66a, Frame 0533.

772. 1 IMT, *supra* note 1, at 247-48, 301.

773. *Id.* at 248-49; Final Plea of Hofmann, Microfilm Publication M894, *supra* note 15, at Roll 33, Document Page 66a, Frame 0533.

774. Final Plea of Hofmann, Microfilm Publication M894, *supra* note 15, at Roll 33, Document Page 66a, Frame 0533; 1 IMT, *supra* note 1, at 237-49.

775. 1 IMT, *supra* note 1, at 237-49; Final Plea of Hofmann, Microfilm Publication M894, *supra* note 15, at Roll 33, Document Page 66a, Frame 0533.

Perhaps in a similar way as the Control Council Law No. 10, which was only directed against subjects of the vanquished nations and is to ensure the security of the coming peace.<sup>776</sup>

Certainly, the defendants did not think the necessity defense would succeed under these circumstances, but they did realize it was not out of step with the times. The jurisprudential march in the West for over a century had been toward positivistic and sociological views of the law in which there are no fixed standards.<sup>777</sup> And if there are no fixed standards, then law really is nothing more than what the victor decrees or the consensus of society embraces at any given time and place.<sup>778</sup> The Nazis were relativists, and they asserted that their accusers were as well.<sup>779</sup> They then challenged their accusers to be consistent with the relativistic presuppositions that modern jurisprudence professes. Their plea argued:

17. Far be it from me to palliate or excuse acts that are punishable under law, or inhuman. Where criminal acts were committed they may be punished. In Germany and in the victor states. But what does it mean, crimes against humanity? Is there an absolute law which defines such a conception?

18. Is law in the name of humanity only what is decreed to the vanquished?

....  
20. If there existed an absolute law there ought to be a World Tribunal which would have to pass judgment in the millions of cases .... All Law is limited to time and serves political and social ends. What today is right, may be wrong tomorrow. Therefore, one should not pass judgment [of] law in the name of all humanity if humanity is no conception behind which the absolute truth is manifest.<sup>780</sup>

Legal positivism has no response to this argument except "you lost and we won." Sociological jurisprudence has no response except "your opinion does not matter in forming the social consensus because you lost and we won."

#### F. *The Opinion and Judgment*

The basic structure of the *Greifelt* opinion and judgment ("judgment") was similar to that of the IMT's judgment in one very important respect. It began with general findings of criminality of the Nazi regime and various high-ranking officials, many of whom were not on trial.<sup>781</sup> Following these general findings of

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776. Final Plea of Hofmann, Microfilm Publication M894, *supra* note 15, at Roll 33, Document Page 66a, Frame 0533.

777. EDGAR BODENHEIMER, JURISPRUDENCE: THE PHILOSOPHY AND METHOD OF THE LAW 95-104, 111-33 (rev. ed. 1974).

778. *Id.* at 101.

779. Final Plea of Hildebrandt, Microfilm Publication M894, *supra* note 15, at Roll 33, Document Pages 40-41, Frame 0453.

780. *Id.* at Frame 0453-0454.

781. 5 NMT, *supra* note 1, at 71-154.

criminality the NMT, like the IMT, pronounced its findings with regard to the individual defendants on trial.<sup>782</sup>

Five major components comprise the *Greifelt* judgment. It began by summarizing background facts and general criminal policies and activities, including the Nazi population policies, and gave a description of RuSHA's organization and role in implementing those policies.<sup>783</sup> It then summarized evidence particularly relevant to each of the specific offenses charged, including "Abortions on Eastern Workers."<sup>784</sup> Next, the judgment briefly described the counts of war crimes and crimes against humanity, identifying the sources of international law upon which those counts were grounded.<sup>785</sup> The judgment then declared verdicts as to each specific offense charged against each individual defendant.<sup>786</sup> Finally, the judgment pronounced sentences on each of the defendants found guilty of one or more of the specific offenses.<sup>787</sup>

Although the *Greifelt* tribunal convicted only two defendants of abortion, and those two convictions were for "forcible abortions on Eastern workers,"<sup>788</sup> there are several reasons to conclude that the NMT found voluntary abortion to be a war crime and crime against humanity. The *Greifelt* tribunal neither dismissed the voluntary abortion charges nor gave any indication that voluntary abortion is not an international crime.<sup>789</sup> Additionally, in its findings the tribunal quoted the Nazi abortion policy designed for implementation in Poland, even though none of the defendants were involved in formulating or implementing that policy.<sup>790</sup> Lastly, the tribunal held that all the offenses alleged in the indictment, substantially as charged, were war crimes and crimes against humanity.<sup>791</sup>

#### 1. *Background Facts and General Criminal Policies and Activities*

The judgment's summary of general background facts and findings as to general criminal policies and activities is particularly relevant for two aspects of the Nazi abortion program. It highlighted the importance of Nazi race theory as the system of belief spawning the general population policies, and it highlighted RuSHA's role in transforming Nazi doctrine into practice.<sup>792</sup>

The tribunal recounted the development and approval of the Polish abortion policy, beginning with its inception in the Nazi Party, through Hitler's approval and Himmler's promulgation.<sup>793</sup> The tribunal traced the policy's inception to the

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782. *Id.* at 154-64.

783. *Id.* at 88-102.

784. *Id.* at 102-52.

785. *Id.* at 152-54.

786. *Id.* at 154-64.

787. *Id.* at 165-67.

788. *Id.* at 160-61.

789. *See id.* at 152-54.

790. *Id.* at 95-96.

791. *Id.* at 152-53.

792. *Id.* at 101-02.

793. *Id.* at 90, 95-96.



45-page treatise that the Racial-Political Office of the NSDAP (Nazi Party) had compiled and entitled "The Problem of the Manner of Dealing with the Population of the Former Polish Territories on the Basis of Racial-Political Aspect."<sup>794</sup> The judgment quoted portions, including the section entitled "The treatment of Poles and Jews in the remaining Poland."<sup>795</sup> Within that section, the judgment states:

All measures serving birth control are to be admitted or to be encouraged. Abortion must not be punishable in the remaining territory. Abortives and contraceptives may be publicly offered for sale in every form without any police measures being taken. Homosexuality is to be declared as not punishable. Institutes and persons who make a business of performing abortions should not be prosecuted by the police.<sup>796</sup>

After receiving a copy, Himmler drafted a directive entitled "Reflections on the Treatment of Peoples of Alien Races in the East."<sup>797</sup> Once Hitler approved the directive, Himmler gave Greifelt a copy directing that it must be handled with "utmost secrecy."<sup>798</sup>

The judgment noted that beginning in June 1941, Himmler instituted a series of organizational changes designed in part to implement the Nazi population policies.<sup>799</sup> These policies included an expansion of RuSHA's duties beyond its prewar role of serving to ensure the racial purity of SS men and their families.<sup>800</sup> The tribunal noted the integral role RuSHA was to play in implementing several criminal policies, including the abortion program:

But with the advent of the war, the original aims of RuSHA were largely abandoned; and entrusted to that organization was the task of screening millions of people in carrying out the Germanization program. RuSHA conducted, through racial examiners, racial examinations in connection with Germanization, the transfer and expulsion of populations, abortions, slave labor, persecution of Jews and Poles, punishment for sexual intercourse between Germans and non-Germans, and the kidnapping of foreign children. The racial examination determined the treatment to be accorded the person to be examined.<sup>801</sup>

The judgment's structure and content reflect the Nuremberg trials' purpose to expose the magnitude of Nazi war crimes and to create a record of them.<sup>802</sup> This purpose of exposure was furthered in part through the process of identifying

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794. *Id.* at 91-96.

795. *Id.* at 95.

796. *Id.* at 95-96.

797. *Id.* at 96.

798. *Id.* at 97-98.

799. *Id.* at 99.

800. *Id.* at 101.

801. *Id.*

802. Mark J. Osiel, *In Defense of Liberal Show Trials—Nuremberg and Beyond*, reprinted in *PERSPECTIVES ON THE NUREMBERG TRIAL*, *supra* note 4, at 704.

criminal organizations.<sup>803</sup> The tribunal also furthered that purpose by chronicling the activities of those who could not be brought to trial.<sup>804</sup> None of the high-level officials responsible for the implementation of Nazi abortion policies in Poland were available for trial; they were dead or missing.<sup>805</sup> The first part of the judgment, therefore, served the purpose not only of providing common background facts, but of exposing certain policies as criminal in nature.<sup>806</sup> This affirmed the prosecution's theory of the case that removing the protection of law from unborn children in Poland that resulted in wholly voluntary abortions was a crime against humanity.

## 2. *Abortion on Eastern Workers*

The NMT noted that "the oral and documentary evidence ... consist[ed] of approximately 10,000 pages" and that it was impracticable to summarize all of it.<sup>807</sup> This impracticability was no less true of the abortion evidence.<sup>808</sup> The *Greifelt* judgment quoted from only a few of the Nazi documents and summarized a portion of other evidence upon which it relied in reaching its verdicts on the crime of abortion.<sup>809</sup>

The tribunal focused upon the written policies that simply withdrew the protection of law from racially non-valuable unborn children of Eastern workers in Germany and upon the specific measures defendants took to encourage or pressure women to have abortions.<sup>810</sup> The judgment contained quotations from several documents introduced into evidence at trial—Himmler's decree of March 26, 1943,<sup>811</sup> Kaltenbrunner's instructions of June 9, 1943,<sup>812</sup> and Hildebrandt's two directives of August 1943.<sup>813</sup> Those documents did not bear on their face any evidence that abortions were to be performed without the mothers' consent.<sup>814</sup> The language used in the documents was couched mostly in terms of women's requests for abortion and consent of Nazi officials granted or denied.<sup>815</sup>

The judgment summarized the evidence of RuSHA's role in implementing the abortion policies, in particular the procedures to be followed in applying for

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803. *E.g.*, 5 NMT, *supra* note 1, at 154-64 (holding *Greifelt* defendants as members of a criminal organization for their roles in the SS).

804. *Id.* at 101-02.

805. Hitler, Himmler, and Conti had committed suicide. PERISCO, *supra* note 22, at 12-13, 175, 70. The IMT sentenced Bormann, Kaltenbrunner, Frank, and Rosenberg to death. 1 IMT, *supra* note 1, at 366-67.

806. 5 NMT, *supra* note 1, at 89.

807. *Id.* at 88.

808. *Id.* at 89.

809. *See id.* at 109-12.

810. *See id.* at 111-12.

811. *Id.* at 109.

812. *Id.*

813. *Id.* at 111-12.

814. *See id.* at 109-11.

815. *Id.*

and receiving permission to have abortions.<sup>816</sup> Women could request abortions, but they were permitted only if an unborn child was determined not to be racially valuable.<sup>817</sup> RuSHA conducted racial examinations to make these determinations.<sup>818</sup> If RuSHA determined that a child was not racially valuable, the woman's request to abort her pregnancy was granted.<sup>819</sup> If a woman did not abort her racially non-valuable child, it was placed in an orphanage for non-Germanic children.<sup>820</sup> Racially valuable children were placed in settings where they would be cared for and Germanized.<sup>821</sup>

The judgment quoted lengthy excerpts from two documents bearing Hildebrandt's name, which gave detailed instructions for handling pregnancy and abortion matters.<sup>822</sup> The prosecution had very limited evidence connecting Hofmann to the implementation of abortion policies while head of RuSHA. At trial, it had introduced one abortion-related document dated March 24, 1944 bearing Hofmann's signature as SS-Obergruppenfuehrer and General of Police,<sup>823</sup> but the tribunal did not quote from that document in its judgment. That document provided no evidence of forced abortion.<sup>824</sup> The facts that Hildebrandt and Hofmann had headed RuSHA or held other high positions, and that their names appeared on incriminating documents, best explain why they alone were guilty of abortion or forcible abortion.<sup>825</sup>

Only at the end of the section of the opinion summarizing the evidence related to the abortion policies did the NMT directly address the issue of voluntariness.<sup>826</sup> It quoted the document dated February 18, 1944, from the Director of the SD-sub district Koblenz, who was not a defendant in the case, to counter the defense assertion that all abortions were voluntary.<sup>827</sup> The judgment, quoting the February 18, 1944 document stated:

Since one of the main defenses to this specific charge is the contention that abortions were performed in all cases only on a voluntary basis, by the express consent of the women involved, we quote another document which clearly refutes that contention:

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816. *Id.* at 109-12.

817. *Id.* at 109-10.

818. *Id.* at 110.

819. *Id.* at 109-10.

820. *Id.* at 110.

821. *Id.* at 109-11. Although a letter from Himmler's office indicated that children of good racial stock would be placed in Lebensborn (orphanage) with the mother's consent, the letter went on to say, "She has to be made to consent to it through interpretations by the caretaking office which set forth the advantages but not the ends of this procedure." *Id.* at 110.

822. *Id.* at 111-12.

823. Prosecution Exhibit 481, Document NO-4141, Microfilm Publication M894, *supra* note 15, at Roll 16, Document Page 1, Frame 0136.

824. *Id.*

825. 5 NMT, *supra* note 1, at 160-62.

826. *Id.* at 112.

827. *Id.* The SD (Der Sicherheitsdienst des Reichsfuehrer SS) was the intelligence agency for the Nazi Party and not a part of RuSHA. 1 IMT, *supra* note 1, at 262 (Judgment).

"It is known that racially inferior offspring of Eastern workers and Poles is to be avoided if at all possible. Although pregnancy interruptions ought to be carried out on a voluntary basis only, pressure is to be applied in each of these cases."<sup>828</sup>

Nothing in the NMT's judgment suggested that only forcible abortion was a crime. Most likely, the tribunal quoted the policy simply to counter the defendants' partial defense that all abortions were voluntary. The documents quoted and evidence summarized gave little evidence that abortions were forced, except in the sense of situational duress, and the judgment gave very little attention to elaborating upon conditions that constituted situational duress.<sup>829</sup>

### 3. *Applicable Law*

The NMT stated in very general terms that the activities as set forth in the judgment and alleged in the indictment constituted crimes against humanity and war crimes: "Judged by any standard of proof, the record in this case clearly *established crimes against humanity and war crimes, substantially as alleged in the indictment* under counts one and two."<sup>830</sup>

The tribunal then proceeded to identify the applicable sources of international law:

The acts and conduct, as set forth in this judgment, and as substantially charged in the indictment, constitute crimes against humanity as defined in Article II(c) of the Control Council Law No. 10, and are violative of international conventions, and particularly of Articles 23, 45, 46, 47, 52, 55, and 56 of the Hague Regulations (1907), and are violative of the general principles of criminal law as derived from the criminal laws of all civilized nations and of the internal penal laws of the countries in which such crimes were committed.<sup>831</sup>

The crime of voluntary abortion was among the activities set forth in the judgment and alleged in the indictment.<sup>832</sup> The judgment included in its findings, as the indictment alleged, the abortions policies established for occupied Poland.<sup>833</sup> Those policies provided for the removal of the protection of Polish law from unborn children whose mothers were voluntarily seeking abortions.<sup>834</sup> Although the choices of Eastern workers in Germany were not as clearly voluntary as the choices of Polish women in occupied Poland, the indictment charged both voluntary and forcible abortions as war crimes and crimes against

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828. 5 NMT, *supra* note 1, at 112 (quoting Prosecution Exhibit No. 471(a), Document No. L-8, Microfilm Publication M894, *supra* note 15, at Roll 16, Document Page 1, Frame 0102).

829. *Id.* at 109-12.

830. *Id.* at 152 (emphasis added).

831. *Id.* at 153.

832. *Id.* at 155-56; 4 NMT, *supra* note 1, at 613-14.

833. 5 NMT, *supra* note 1, at 95-98.

834. *Id.* See also Prosecution Exhibit No. 468, Document No. NO-3089(b), Microfilm Publication M894, *supra* note 15, at Roll 16, Document Page 1, Frame 0095.

humanity.<sup>835</sup> The NMT's judgment affirmed that both were crimes substantially as charged and alleged.<sup>836</sup> It is noteworthy that the NMT specifically mentioned the "internal penal laws of the countries in which such crimes were committed" because the abortion laws of both Poland and Germany which played prominently in the *Greifelt* case criminalized both voluntary and involuntary abortion.<sup>837</sup>

#### 4. *Judgment of Individuals*

The indictment had charged ten of the *Greifelt* defendants with the crimes of both voluntary and involuntary abortion.<sup>838</sup> The NMT did not dismiss the charges, despite defendants' contention that voluntary abortion was not a crime under international law.<sup>839</sup>

Two defendants—Hofmann and Hildebrandt—were adjudged guilty of "forcible abortions on Eastern workers."<sup>840</sup> Lorenz alone was found not guilty of "forcible abortion" as the "evidence [was] insufficient to authorize a conclusion of guilt with regard to forcible abortions on Eastern workers."<sup>841</sup>

Three defendants—Greifelt, Creutz, and Meyer-Hetling—were found not guilty of "abortions on Eastern workers."<sup>842</sup> The tribunal found Greifelt and Creutz guilty of several offenses, but with regard to abortion stated "the evidence is insufficient" to establish guilt.<sup>843</sup> With regard to Meyer-Hetling, the judgment stated that he was charged "with such criminal activities as kidnapping alien children, abortions on Eastern workers, and hampering the reproduction of enemy nationals" yet "there is not a single syllable of evidence even remotely connecting him with any of these activities."<sup>844</sup>

As for the remaining defendants charged with abortion—Huebner, Brueckner, Schwalm, and Schwarzenberger—the judgment made no specific mention of the abortion offense with which they were charged.<sup>845</sup> After stating the offenses for which Huebner, Brueckner, and Schwalm were found guilty, the tribunal simply stated that the "evidence is insufficient to authorize a conclusion

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835. 4 NMT, *supra* note 1, at 610.

836. 5 NMT, *supra* note 1, at 155-61.

837. *Id.* at 153; Prosecution Exhibit No. 468, Document No. NO-3089(b), Microfilm Publication M894, *supra* note 15, at Roll 16, Document Pages 2-3, Frames 0096-0097 (Polish statute); Prosecution Exhibit No. 466, Document No. NO-5130, Microfilm Publication M894, *supra* note 15, at Roll 16, Document page 1, Frame 0092.

838. 4 NMT, *supra* note 1, at 613-14.

839. Direct Examination of Hildebrandt, Microfilm Publication M894, *supra* note 15, at Roll 6, Document Page 4023, Frame 0216, *as reprinted in* 4 NMT, *supra* note 1, at 1090.

840. 5 NMT, *supra* note 1, at 160, 161.

841. *Id.* at 159.

842. *Id.* at 155, 156.

843. *Id.* at 155.

844. *Id.* at 156.

845. *See id.* at 158, 160, 162, 157.

of guilt" with regard to the other specifications.<sup>846</sup> The tribunal simply found Schwarzenberger "not guilty on counts one and two of the indictment."<sup>847</sup>

The tribunal did not expressly rule whether abortion was only a war crime or only a crime against humanity, or both.<sup>848</sup> It simply declared all defendants whom it had found guilty of some offense other than membership in a criminal organization to be guilty under Counts One and Two.<sup>849</sup>

Count Three was membership in a criminal organization.<sup>850</sup> The *Greifelt* tribunal found all but one of the defendants guilty of Count Three in that they were "member[s] of a criminal organization, that is, the SS, under the conditions defined and specified by the judgment of the International Military Tribunal."<sup>851</sup> The IMT had identified the SS as a criminal organization, in part because of the activities of RuSHA in effecting the Nazi population policies.<sup>852</sup> While RuSHA's role in conducting racial examinations was set out in Document D-884, introduced in *Goering*, the evidence of its role as introduced in *Greifelt* was much more extensive.<sup>853</sup> The basic policies regarding Eastern workers implemented in Baden-Alsace were implemented more extensively in Germany and Eastern occupied territories.<sup>854</sup>

## 5. Sentences

Greifelt received a life sentence for crimes he had committed.<sup>855</sup> Hildebrandt and Hofmann each received 25 years of confinement for their multiple crimes.<sup>856</sup> All remaining defendants who were convicted of at least one offense received lesser terms of confinement.<sup>857</sup> The tribunal did not announce discrete terms of confinement for particular offenses.<sup>858</sup>

## CONCLUSION

A prosecution team comprised of the four major Allied powers presented evidence of Nazi abortion policies as crimes against humanity, war crimes, and as a mark of the Political Leadership Corps as a criminal organization.<sup>859</sup> The two chief pieces of evidence were Document R-36 (setting out a general policy

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846. *Id.* at 158, 160, 162.

847. *Id.* at 158.

848. 5 NMT, *supra* note 1, at 154-64.

849. *See id.*

850. 4 NMT, *supra* note 1, at 618.

851. 5 NMT, *supra* note 1, at 155-64.

852. 1 IMT, *supra* note 1, at 269, 272.

853. Compare 42 IMT, *supra* note 1, at 36; Document D-884, *supra* note 13, at 1018-23, with 5 NMT, *supra* note 1, at 109-10.

854. 4 NMT, *supra* note 1, at 1077-81.

855. 5 NMT, *supra* note 1, at 165.

856. *Id.* at 166.

857. *Id.* at 165-67.

858. *See id.*

859. *Id.* at 88-89; 1 IMT, *supra* note 1, at 260-61.

with regard to Poland) and Document D-884 (setting out a particular policy with regard to Eastern workers in Baden-Alsace).<sup>860</sup> Neither of those documents indicated that the policies were to be implemented by force, nor did the prosecutors argue that they had been implemented by force. The IMT quoted a portion of Document R-36 in its findings on crimes against humanity and war crimes,<sup>861</sup> and briefly summarized the policies regarding Eastern workers in ruling that the Political Leadership Corps of the Nazi Party was a criminal organization.<sup>862</sup> A United Nations General Assembly Resolution affirmed the principles of the London Charter and the judgment of the IMT.<sup>863</sup>

The prosecution in *Greifelt* expressly charged the crime of abortion in the indictment as a crime against humanity and a war crime.<sup>864</sup> It charged and argued that both voluntary and involuntary abortion are crimes because abortion is a crime against the unborn child.<sup>865</sup> The structure of the prosecution's case distinguished between the abortion policies implemented in Poland under the occupation government and the policy implemented in Germany.<sup>866</sup> In Poland, the Nazi regime withdrew jurisdiction over abortion offenses from the Polish courts in violation of Hague Convention IV (1907).<sup>867</sup> In Germany, the Nazi government refused to enforce its own abortion laws to protect the racially non-valuable children of Eastern workers.<sup>868</sup> The two policies had in common the deliberate failure to apply existing law for the protection of unborn children. Those omissions were in violation of duties imposed under international law, and they constituted crimes against humanity and war crimes.<sup>869</sup>

The structure of the *Greifelt* judgment was similar to that of the IMT judgment in one very important respect. Both judgments began with extensive findings regarding the Nazi regime and high-level officials before addressing the guilt or innocence of individual defendants who were actually on trial.<sup>870</sup> This reflects the fact that a primary purpose of the trial was to create a record of the activities of a criminal regime as a lesson for future generations. As a reflection of that purpose, the *Greifelt* tribunal included in its findings Nazi policies regarding Poland and Eastern workers generally, as well as the role of dead high-level officials, before addressing the more limited involvement of those defendants actually on trial.<sup>871</sup>

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860. See Document R-36, *supra* note 12, at 53; Document D-884, *supra* note 13, at 1018-23.

861. 1 IMT, *supra* note 1, at 237.

862. *Id.* at 260, 261.

863. Affirmation of the Principles of International Law Recognized by the Charter of the Nürnberg Tribunal, *supra* note 409.

864. 4 NMT, *supra* note 1, at 609, 613-14, 617-18.

865. *Id.* at 1077.

866. See *id.* at 1077-81.

867. See *id.* at 613.

868. *Id.* at 1077-78.

869. See *supra* Part IV.D.3.

870. Compare 1 IMT, *supra* note 1, at 171-279, with 5 NMT, *supra* note 1, at 71-154.

871. 5 NMT, *supra* note 1, at 88-102.

Only two of the ten *Greifelt* defendants charged with abortion were convicted, and their convictions were for the crime of forcible abortion.<sup>872</sup> Those two defendants, Hildebrandt and Hofmann, successively headed RuSHA, which conducted racial examinations for the purpose of determining whether women carried racially valuable or non-valuable children.<sup>873</sup> Those who carried non-valuable children were permitted, encouraged, and even pressured to have abortions.<sup>874</sup> It is unclear what form the pressure took other than general situational duress. There was no evidence that any women were physically coerced or physically threatened.<sup>875</sup>

There are several reasons to reject the conclusion that the tribunal held only forcible abortion to be a crime. The indictment charged voluntary abortion,<sup>876</sup> and the tribunal acquitted seven of the defendants simply of the crime of abortion.<sup>877</sup> If voluntary abortion were not a crime, the proper disposition of the charge would have been dismissal rather than a finding as to guilt. The tribunal included in its findings the policy to be implemented in Poland, which was designed simply to remove the protection of law from unborn children.<sup>878</sup> The judgment expressly affirmed the crimes as charged in the indictment.<sup>879</sup> The tribunal's judgment also affirmed that domestic law was a source of international law, and the laws of Poland and Germany—which played a prominent role in *Greifelt*—criminalized both voluntary and involuntary abortion.<sup>880</sup>

Nuremberg marked a departure from customary international law in that individuals were tried and held criminally responsible in international courts for crimes against humanity.<sup>881</sup> The Nuremberg trials established the principle that abortion is a crime against humanity and that state officials are criminally liable for failing, as a matter of state policy, to extend the protection of law to unborn children.<sup>882</sup> The hope that the concept of crimes against humanity could be extended to reach criminal conduct committed by Germans against German nationals during peacetime was not realized at Nuremberg.<sup>883</sup> But in the decades following Nuremberg, the doctrine that high-ranking government officials are liable for massive human rights violations committed against their own nationals

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872. *Id.* at 160-161.

873. *Id.* at 110-11, 160-61.

874. *Id.* at 112.

875. *Id.*

876. 4 NMT, *supra* note 1, at 610, 613.

877. 5 NMT, *supra* note 1, at 155-60.

878. *Id.* at 109-12.

879. *Id.* at 152.

880. *Id.* at 152-54.

881. TAYLOR, THE ANATOMY OF THE NUREMBERG TRIALS, *supra* note 5, at 35-36, 76. See also discussion *supra* Part III.A.1.

882. See discussion and accompanying sources, *supra* Parts III.A.3 (discussing the IMT); IV.D-F and accompanying sources (discussing the NMT).

883. TAYLOR, THE ANATOMY OF THE NUREMBERG TRIALS, *supra* note 5, at 583.



during peacetime has become widely accepted.<sup>884</sup> The implications of this development for the United States and other nation states are stunning.

The prosecution's theory that the German government unlawfully encouraged abortion by providing or funding abortion services directly applies to the U.S. government's practice of providing abortion services in federal facilities and providing funding for abortions. The prosecution's theory that the German government committed crimes against humanity by prohibiting Polish courts from punishing abortion is analogous to the U.S. Supreme Court's decision in *Roe v. Wade*, which effectively prohibited states from protecting unborn children.<sup>885</sup>

Serving as the chief U.S. prosecutor at Nuremberg, Justice Robert Jackson addressed the International Military Tribunal in his opening statement with an admonition to all of the participants:

We must never forget that the record on which we judge these defendants today is the record on which history will judge us tomorrow. To pass these defendants a poisoned chalice is to put it to our own lips as well. We must summon such detachment and intellectual integrity to our task that this Trial will commend itself to posterity as fulfilling humanity's aspirations to do justice.<sup>886</sup>

Abortion was one face of Nazi genocide. It was a face unashamed of its purpose—to reduce the growth in populations that the Nazi elite did not “want to have too many of.”<sup>887</sup> Justice Jackson had hoped that the people of Germany and of the world would be so moved by the spectacle of these atrocities that they would collectively resolve “Never Again!”<sup>888</sup>

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884. See, e.g., Theodor Meron, *International Criminalization of Internal Atrocities*, 89 AM. J. INT'L L. 554, 569 (1995) (discussing the United Nation Security Council's Statutes for the former Yugoslavia and Rwanda).

885. 410 U.S. 113, 164 (1973).

886. 2 IMT, *supra* note 1, at 101.

887. U.S. Supreme Court Justice Ruth Bader Ginsburg commented in an interview: “Frankly I had thought that at the time *Roe* was decided, there was concern about population growth and particularly growth in populations that we don't want to have too many of.” Emily Bazelon, *The Place of Women on the Court*, N.Y. TIMES MAG., July 12, 2009, at 22, available at <http://www.nytimes.com> (search for “the place of women on the court”; then follow “The Place of Women on the Court” hyperlink).

888. 2 IMT, *supra* note 1, at 154-55.