

**NUREMBERG REVISITED:
ABORTION AS A HUMAN RIGHTS ISSUE**

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From late 1945 to late 1946, twenty-one leading Nazis were tried at Nuremberg by an international tribunal made up of American, British, French and Soviet judges. From late 1946 to the spring of 1949, 185 lesser-known Nazis were tried before American military tribunals. The American military, in the American zone of occupation, held twelve trials before six different military tribunals, with three American judges on each tribunal. The RuSHA (a German acronym for Race and Resettlement Office) or Greifelt case was No. 8 (of 12), Military Tribunal No. 1 (of 6). There were fourteen defendants in the RuSHA or Greifelt case: Himmler's deputy Ulrich Greifelt, after whom the case was alternately named, also Otto Hofmann, Richard Hildebrandt, and eleven others. There were some two dozen charges made in this trial, and abortion was one of them. This paper will concentrate on abortion.

The authority for the twelve subsequent cases before the American Military Tribunals against lesser known Nazi war criminals derived from the International Tribunal of 1945-1946, plus from Control Council Law No. 10 of October 20, 1945. General Telford Taylor was in charge of the American Military Tribunals. Taylor had been deputy to Supreme Court Justice Robert Jackson, the chief prosecutor at the International Military Tribunal of 1945-1946. Some prosecutors and staff from that trial were also brought to the American Military Tribunals.ⁱ

Hence, in terms of time, the number of trials and the number of those tried, most trials of Nazis after World War II were conducted by the United States. These American Tribunals operated, to repeat, from Control Council Law No. 10, which recognized, in Article

II, three types of crimes: a) Crimes against Peace, b) War Crimes, c) Crimes against Humanity. Abortion would fall under b) and c), which read as follows:

- b) War Crimes. Atrocities or offenses 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 labor or for any other purpose, of civilian populations 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 offenses, including but not limited to murder, extermination, enslavement, deportation, imprisonment, torture, rape, or other inhumane acts committed against any civilian population, or persecution on political, racial, or religious grounds, **whether or not in violation of the domestic laws of the country where perpetrated.**" (emphasis mine)

This last phrase was important. The 1871 Penal Code of the German Reich followed the 1851 Prussian Penal Code on the subject of abortion. It provided up to five years in the penitentiary for violation of Section 218, which read:

A pregnant woman who shall purposely cause herself to abort or who shall kill her child in utero shall be subject to a penitentiary sentence.... The same punishment shall be imposed on any person who, with the consent of the pregnant woman, applied or administered the means to induce abortion or to cause the death of the child."

The Weimar democracy had liberalized this abortion law during the 1920s, reducing Section 218 from a felony to a misdemeanor, making the punishment a fine and not a prison sentence."¹⁰ The Nazis, during the 1930s, while forbidding abortion again for most Germans, paradoxically were the first to legalize the practice, doing so for "unfit" Germans and for "non-Germans," such as the Jews.¹¹ The prosecutor would admit that Section 218 had been amended. The Weimar and Nazi regimes had been fully legal. In the case of abortion, the

prosecutor, nevertheless, would refer to the original version of Section 218 and, in so doing, make an extra-legal statement.

The indictment in the RuSHA case listed "encouraging" as well as "compelling" abortions.^v This is important, since the main defense of the accused in the matter of abortion would be that the abortions on eastern women were voluntary, and not forced, implying that there was no crime. But the inclusion of the word "encouraging" implied that it did not matter whether the abortions were voluntary or not.

The opening statement by Deputy Chief Counsel James M. McHaney referred to abortion as a crime under (the original) Section 218 of the German Criminal Code.^{vi} He stated that all sorts of pressures were placed on eastern women to abort (so as to be available for slave labor and to weaken eastern nations), and that the abortions were really forced and not voluntary as the accused would try to maintain. He quoted from a letter of February 18, 1944 from the SD (Sicherheitsdienst – SS Security Service):

A pregnancy interruption should go off without incidents and the eastern worker or Pole 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.^{vii}

Whether voluntary or forced, however, it did not matter, continued McHaney:

But even if it be assumed that all abortions were voluntary, they still constituted 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.^{viii} (emphasis mine)

The question arises whether McHaney viewed even voluntary (as well as forced) abortion as a crime because it was connected to genocide (destroy others, strengthen Germany), or whether abortion per se was a crime. That is was most likely the latter could be seen from the precedent set in the first trial by the International Tribunal. In one of the few other references to abortion at Nuremberg besides the RuSHA case, Soviet Counselor Smirnov, presenting evidence with regard to atrocities against children, had said:

In their hatred of the Slav race, the German fascist criminals **even attempted to murder babes in the womb.**^v

This strongly suggests that the first (international) Nuremberg Tribunal made no distinction between born and unborn children as human beings, and that abortion per se was probably considered a crime.

As the trial progressed, the Nazi defense for abortion was that they knew nothing about it, that when it was done it was through agencies other than RuSHA, and that it was voluntary.^{vi} Hildebrandt stated in his testimony that abortion had been liberalized lately (Weimar) and had never been considered murder in the eyes of the law, but rather as a "special violation against life." He also stated that it had always been punished more mildly than murder. He further seemed to indicate that the prosecutor was considering abortion **itself** a crime when he said: "Up to now nobody had the idea to see this interruption of pregnancy **as a crime against humanity.**"^{vii} (emphasis mine)

In reaction to the defense arguments about not knowing about the abortions and that they had been voluntary, the prosecutor reminded the defense that Hitler had forbidden abortion, for the most part, for Germans, and that the practice was also prohibited under the penal codes of Poland and the Soviet Union – major parts of the eastern lands. In a statement reminiscent of the International Tribunal, placing both preborn and born children within the definition of humanity, and again seeming to hold that all abortion was a crime, the prosecution declared:

But protection of the law was denied to **unborn children** of the Russian and Polish women in Nazi Germany. Abortions were encouraged **and even** forced on these women.^{viii} (emphasis mine)

The prosecutor presented evidence of those who had resisted Hitler's and Himmler's decrees regarding abortion. Quoting a letter of October 30, 1943 from the Bayreuth SD, the prosecutor indicated that the Nazis had divided doctors into those "reactionary" Catholic doctors who refused to perform abortions and those whose doctors with the "right political views" who accepted. Even many of the latter, however, had misgivings. One "politically sound" physician had stated that in medical ethics a pregnancy woman was inviolable, and that the abortion decrees merely reflected "expediency."^{ix} Another doctor, who

was mentioned in the letter, also recognizing the "necessity of it" for Germany, bemoaned the fact that the RuSHA de-crees did not specify a gestational limit, and that the ex-pression "child murder" was heard now and then. Many doctors who did do abortions stopped at twenty weeks gestation. The previously cited doctor, who was doing the abortions, also anticipated future events in Germany, the U.S., and most of the industrial world when he said:

If 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, will be completely eliminated."

During the trial, and in its closing briefs, the prosecution maintained that RuSHA was involved in abortion, that its heads (first Hofmann, then Hildebrandt) knew about it, and that abortions were forced, not voluntary. In the indictment, opening statement, and during the trial, the prosecution had hinted strongly that it did not even matter whether the abortions were forced or voluntary. In the closing briefs it left no doubt:

The performance of abortions on eastern workers is a war crime, as defined in Article II (b) of Control Council Law No. 10. It is a violation of Article 48 of the Hague Regulations, which provide that family honor and rights must be respected. It is also an act of "ill treatment" of a civilian population.

The performance of abortions on eastern workers is also a crime against humanity, as defined in Article II (c) of the 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 Penal Code. There is no doubt that the performance of abortion was a criminal act under Article 218 in its original version.... Even after Article 218 was amended, the performance of abortions on eastern workers remained a crime.

Assuming that the abortions performed upon approval by the Branch office of RKFDV [a subdivision of RuSHA] were made upon request, it is obvious that under the Nazi system of terror the

pregnancy women had no other alternatives but to request abortion.

Even under the assumption that her request was genuinely voluntary, it constitutes a crime under Section 218, German Penal Code.

At the same time it constitutes a war crime and a crime against humanity.^{vii} (emphasis mine)

In the final judgment, the justices elaborated on the definition of a crime against humanity according to Control Council Law #10. They stipulated that a crime against humanity was broader than a war crime. War crimes were limited to offenses against civilian populations in occupied territories, but crimes against humanity were atrocities or offenses against any civilian population anywhere. A war crime was automatically a crime against humanity, but the reverse was not true. Stressing that Cont. Coun. Law #10 was not limited to punishing war crimes but the broader definition of crimes against humanity, the Tribunal stated:

The force of circumstances, the grim fact of world-wide 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 constitute violations not alone of statute but also of common international law.^{viii}

On March 10, 1948 Hofmann and Hildebrandt were found guilty and each sentenced to twenty-five years imprisonment. They were convicted of a number of offenses, including forced abortions. The judges never ruled one way or another on whether voluntary abortion constituted a war crime, and therefore a crime against humanity. The Tribunal did state:

The acts and conduct, **as substantially charged in the indictment** ("encouraging and compelling abortions") constitute crimes against humanity as defined in Article II (c) of the Control Council Law No. 10 and... (they) also constitute war crimes.^{viii}

Looking at the RuSHA case in toto, one can discern that the prosecutor's conduct in the RuSHA case probably reflected American public opinion of the time: that voluntary abortion was killing, and that forced abortion was particularly heinous. This is probably why the

Tribunal's judgment singled out forced abortion, although it agreed with the prosecution's indictment of "encouraging" abortions and thus seemed to agree with the prosecution that both forced and voluntary abortions were crimes against humanity.

Also, in the same year as the conviction of Nazi abortionists in Germany and American abortionists in the United States,^{xix} the World Medical Association, an organization embracing 39 national medical societies around the world, including the American Medical Association, formulated the Declaration of Geneva, or Geneva Code. This was in deliberate reaction to the Nazi experience and was intended to modernize the Hippocratic Oath. It stated:

I (the physician) solemnly pledge to consecrate my life to the service of humanity.... I will maintain the utmost respect for life from the time of its conception.^{xx}

How valid were the Nuremberg Judgments? How much impact should they have on modern lawmaking and contemporary thought?

There is a large minority of legal and academic opinion which holds that the Nuremberg Tribunals and their judgments were flawed. This opposition's arguments can be boiled down to three main reasons. First, the German (Nazi) government was legal and sovereign. To claim, therefore, that its leaders and followers participated in illegal, criminal acts, is to engage in ex post facto law. The concept of "crimes against humanity" followed Nazi actions; it did not precede them. Second, international law is not precise, and applies to nations, not to individuals. Finally, this school states that it was the old story of the victors over the vanquished, or a case of revenge and not justice.^{xxi}

Those who claim the Nuremberg Trials were legitimate counter with three chief arguments of their own. First, release of Nazis at the end of the war was unthinkable, although summary punishment would, indeed, have been the victors simply imposing their judgment over the vanquished. A trial was the only possibility. Second, the Nuremberg trials were an attempt to come to terms with an episode in history that had no parallels. Finally, someone or something had to transcend the dry, legal argument and make a moral or semi-moral judgment in international law in order to maintain basic, universal standards of decency for the future.^{xxii}

To use a metaphor, the Nuremberg cases are like a cake. Many ingredients go into a cake, but if one thinks that the case is, let us

say, too sweet, he or she cannot take the sugar out of it. The eater must accept or reject the cake as it is. Charges initiated, trials conducted, judgments made, and sentences passed constitute the ingredients of the Nuremberg War Crimes Trials. One cannot accept condemnation of the ovens, the cannibalism, the bone-breaking machines, and so much else, while ignoring abortion.^{xviii}

A generation after the Nuremberg RuSHA case, in which the United States roundly condemned abortion as a tool of the Nazi holocaust, the United States legalized abortion for virtually any reason, at any point in pregnancy. Our legal stance on abortion is one of the most permissive in the world. The war crimes and crimes against humanity segments of the Nuremberg judgments, which had often been quoted by those opposed to the Vietnam War, were forgotten after 1973. After all, America was out of that war in the very same month that Roe v. Wade was formulated.

NOTES

- i. The description and makeup of the Military Tribunals, and the authority behind them, can be found in the introduction to any of the 15 volumes of Trials of War Criminals before the Nürnberg Military Tribunals, October, 1946 -- April, 1949.
- ii. Trials of War Criminals before the Nürnberg Military Tribunals, October, 1946 -- April, 1949, Vols. IV-V, "The RuSHA Case" (Washington, D.C.: U.S. Government Printing Office, 1949), IV, pp. xvi-xvii. Cited hereafter as TWC.
- iii. West German Federal Republic, Press and Information Office, Bulletin 6, May 27, 1980 (Bonn: Deutsche Bundesverlag GmbH) 13, cited hereafter as Bulletin. See also Donald D. Kommers, "Abortion and the Constitution: The Cases of the United States and West Germany," in Abortion: New Directions for Policy Studies, edited by Edward Manier, William Liv and David Solomon (Notre Dame: University of Notre Dame Press, 1977) 83; and William Brennan, The Abortion Holocaust: Today's Final Solution (St. Louis: Landmark Press, 1983) 7.
- iv. Richard Grunberger, "The Family in Nazi History," in Everyman in Europe: Essays in Social History, Vol. II: The Industrial Centuries, eds. Allan Mitchell and Istvan Deak (Englewood Cliff, NJ, 1974) 305; Bulletin 13. See also Clarissa Henry and Marc Hiller, Of Pure Blood, tr. from the French by Eric Mossbacher (NY: McGraw-Hill, 1976) 36.
- v. Grunberger 304-5; Henry and Hiller 36; Bulletin 13; Germany, Reichsgesetzblatt, I. No. 86 (Berlin: 1933) 530. A decree in the middle of the war actually threatened death to abortionists. See Bulletin

- 14.
- vi. TWC IV, 610, 613.
- vii. TWC IV, 686.
- viii. TWC IV 687.
- ix. TWC IV, 687.
- x. Trials of the Major War Criminals before the International Military Tribunals, Nuremberg, 14 November 1945 -- 1 October 1946 (Nuremberg, Germany: 1947) VII, 547. In this series there are also brief references to Jewish women at Auschwitz being "subjected to abortion"; see VI, 212, and the abortions done on eastern women, see XX, 62.
- xi. TWC IV, 1076, 1090-94; Records of the United States Nürnberg War Crimes Trials, United States of America v. Ulrich Greifelt Et Al (Case VIII), October 10, 1947 -- March 10, 1948; The National Archives, Washington, D.C.: Microfilm Publication 894, Roll 6 (Trial Vols. 10 & 11), pp. 3952-53, 4024, M 894, R 31, pp. 27-28, 48-66. Cited hereafter as NWCT.
- xii. TWC IV, 1090.
- xiii. TWC IV, 1077.
- xiv. TWC IV, 1082-83.
- xv. TWC IV, 1083-84.
- xvi. NWCT, M 894, R 31, pp. 13-14. See also pp. 37-42.
- xvii. TWC V, 54-55.
- xviii. TWC V, 153, 160-61, 166. See also IV, 610, 613.
- xix. The New York Times, November 15, 1947, p. 19; November 29, 1947, p. 8; July 15, 1948, p. 24; July 16, 1948, p. 40.
- xx. Brennan 137-38, 142.
- xxi. For just a few references to the con of Nuremberg, see Milton R. Konvitz, "Will Nürnberg Serve Justice?" in Commentary (January 1946) 9-11, 12-15; (Senator) Robert Taft, Vital Speeches (November

1946) 47; Reinhold Niebuhr, "Victor's Justice," in Common Sense (January 1946) 6-9; Eugene Davidson, Trial of the Germans: an Account of the Twenty-Two Defendants before the International Military Tribunal at Nuremberg (NY: MacMillan, 1966); see also his Nuremberg Fallacy: War and War Crimes since World War II (NY: MacMillan, 1973).

xxii. For a few references here, see Henry L. Stimson, "The Nuremberg Trial: Landmark in Law," in Foreign Affairs (January 1947) 179-81, 183-89; Karl Jaspers, The Question of German Guilt (NY: Capricorn Books, 1961) 59; George Finch, "The Nuremberg Trial and International Law," in The American Journal of International Law (January 1947) 20-24, 34-37; Robert Jackson, The Nürnberg Cases: As Presented by Robert Jackson, Chief Counsel for the United States (NY: Alfred Knopf, 1947).

xxiii. The concept of crimes against humanity goes back in law only to WWI, the slaughter of Armenians by Truks. Contrary to popular belief, it had little force at Nuremberg. The concept of war crimes, however goes back centuries, and codified laws of war were born during the U.S. Civil War and codified internationally at the Hague Conventions in 1899 and 1907. See letter from Telford Taylor, former Chief Prosecutor in charge of the American Military Tribunals, 1946-1949, to the author, June 21, 1993. See also Telford Taylor's The Anatomy of the Nuremberg Trials: a Personal Memoir (New York: Alfred A. Knopf, 1992), chapter 1, "Nuremberg and the Laws of War."