

Medical War Crimes

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I. Introduction

Physicians have always played an important role in armed conflicts being the first to treat wounded and sick combatants, prisoners of war, and civilians. This makes them an important, essential category of actors in armed conflicts, a role which is reflected in the laws of war.¹ In granting first aid and emergency care, physicians can fulfill a further role by reporting on human rights abuses or violations of international humanitarian law.² They are thus in a privileged position to watch over the rights of the victims of armed conflicts. However, their position is also susceptible to abuse. Physicians have always used armed conflicts for their own gain, to further their medical skills or to use their skills to enhance military gains or further medical science.

Recently, attention has been drawn to the question of the involvement of physicians in coercive interrogations and ill-treatment of detained persons.³ In 2009, a confidential Report by the *International Committee of the Red Cross* (ICRC) on the conditions of detention of

* The author would like to thank Julia Gebhard and Marie von Engelhardt for their invaluable comments and suggestions.

¹ M. Torrelli, "La Protection du Médecin dans les Conflits Armés", in: C. Swinarski, *Studies and Essays on International Humanitarian Law and Red Cross Principles in Honour of Jean Pictet*, 1984, 582.

² A recent example highlights this important role: with their insider-report of the 2008/2009 Gaza conflict, the Norwegian physicians Mads Gilbert and Erik Fosse were among the first eyewitnesses to provide an account of the events. They found violations of the neutral status of the Red Cross by the conflict parties and reported on wounds from white phosphorus and DIME-bombs. M. Gilbert/ E. Fosse, "Inside Gaza's Al-Shifa Hospital", *The Lancet* 373 (2009), 200-202. Although so-called "focused lethal munition" is not prohibited under international disarmament agreements, experts have voiced concerns about its effects. UN Report of the Secretary-General on the Protection of Civilians in Armed Conflict of 29 May 2009, Doc. S/2009/277, para. 36; see also UN Report of the United Nations Fact-Finding Mission on the Gaza Conflict (Goldstein Report) of 25 September 2009, Doc. A/HRC/12/48, paras 907 – 908.

³ The term ill-treatment is used here to refer to mistreatment that may amount to cruel, inhuman or degrading treatment. In no way should the seriousness of such treatment be denied by the use of this term.

high-value detainees in CIA custody was leaked to the media.⁴ As well as detailing with the experiences of the fourteen detainees while in CIA custody which, in many cases, amounted to cruel, inhuman and/or degrading treatment and, in some cases, to torture, the ICRC in the Report clearly stated its concern about the involvement of members of the medical profession.⁵ Discussing the role of physicians in coercive interrogations, the ICRC concludes that,

“The alleged participation of health personnel in the interrogation process and, either directly or indirectly, in the infliction of ill-treatment constituted a gross breach of medical ethics and, in some cases, amounted to participation in torture and/or cruel, inhuman or degrading treatment.”⁶

It was considered especially problematic where the physicians’ involvement in interrogations was integral to and complicit in ill-treatment. Others, for example *Physicians for Human Rights*, have classified the behavior of the physicians in Guantánamo Bay as torture. *Physicians for Human Rights* went as far as to claim that the physicians had conducted experiments so as to find the most efficient methods of torture.⁷

⁴ International Committee of the Red Cross, Regional Delegation for the United States and Canada, *ICRC Report on the Treatment of Fourteen “High-Value Detainees” in CIA Custody*, WAS 07/76, 14 February 2007. The Report does not address mistreatment in Guantánamo Bay.

⁵ For example, “For certain methods, notably suffocation by water, the health personnel were allegedly directly participating in the infliction of the ill-treatment. In one case, it was alleged that health personnel actively monitored a detainee’s oxygen saturation using what, from the description of the detainee of a device placed over the finger, appeared to be a pulse oxymeter”, see note 4, 23.

⁶ See note 4, 26 – 27. In more detail, the ICRC states that “[a]s such, the interrogation process is contrary to international law and the participation of health personnel in such a process is contrary to international standards of medical ethics. In the case of the alleged participation of health personnel in the detention and interrogation of the fourteen detainees, their primary purpose appears to have been to serve the interrogation process, and not the patient. In so doing the health personnel have condoned, and participated in ill-treatment”, see note 4, 24.

⁷ Physicians for Human Rights, *Experiments in Torture: Evidence of Human Subject Research and Experimentation in the “Enhanced” Interrogation Program*, June 2010.

As the legal status of the persons detained during armed conflicts and subjected to interrogations is at times disputed,⁸ the consequences for the perpetrator of ill-treatment, especially for the physicians involved, are not clear. Under human rights law, the alleged ill-treatment of detainees in CIA custody, later on also in Guantánamo Bay,⁹ by state officials would be a violation of the right to be free from torture and cruel, inhuman and/or degrading treatment or punishment.¹⁰ However, when carried out on protected persons during an armed conflict, the alleged involvement of physicians in harmful interrogations is also a violation of international humanitarian law.¹¹ This conclusion leads to different consequences; consequences that will be discussed in this article on explicitly medical war crimes.

Medical grave breaches are introduced to the system of Geneva Law in article 11 of Additional Protocol I (AP I), although the concept of explicitly “medical” war crimes is much older.

⁸ When in doubt, all persons detained in armed conflict should be granted the benefit of treatment as prisoners of war, as established in article 5 (2) GC III. Furthermore, any person having fallen into the hands of an adverse party enjoys the general protection of common article 3 and article 75 AP I. The debate on the combatant status of persons detained during the so-called “war on terror” demonstrates the controversy surrounding the legal status of persons detained. See for example, G.H. Aldrich, “The Taliban, Al Qaeda, and the Determination of Illegal Combatants”, *AJIL* 96 (2002), 891 - 898; M. Sassòli, “The Status of Persons held in Guantánamo under International Humanitarian Law”, *Journal of International Criminal Justice* 2 (2004), 96 - 106; J.C. Yoo, “The Status of Soldiers and Terrorists under the Geneva Conventions”, *Chinese Journal of International Law* 3 (2004), 135 - 150; M. Sassòli, “Combatants”, *Max Planck Encyclopedia of Public International Law*, 2008.

⁹ See, for example, P.J. Sands, *Torture Team - Deception, Cruelty and the Compromise of Law*, 2008.

¹⁰ The relevant international human rights norms can be found in article 7 ICCPR, article 5 UDHR, and the Convention against Torture (CAT).

¹¹ For international armed conflicts article 12 GC I and GC II, article 17 GC III, article 32 GC IV, and arts 11 and 75 (2)(ii) and (iv) AP I, and for non-international armed conflicts common article 3 to the Geneva Conventions and article 4 (2)(a) AP II prohibit torture and call for humane treatment. Cruel, inhuman and/or degrading treatment is not explicitly prohibited though inhuman treatment is one of the “classic” grave breaches. International humanitarian law also classifies torture of protected persons a grave breach of the Conventions in arts 50 GC I, 51 GC II, 130 GC III, and 147 GC IV.

The term “medical war crime” was coined by United States investigators after World War II.¹² It had its peak in the aftermath of World War II when physicians were prosecuted for crimes carried out in the name of medicine within Germany and in concentration camps abroad. From then on, the concept of medical war crimes as developed for physicians in the German Reich lost its momentum. Generally, to be classified as a medical war crime, there has to be a willful act that seriously endangers the health or integrity of a detained person who is affiliated with the adversary, committed by physicians in carrying out their medical duties during an armed conflict. However, medical war crimes have been mostly forgotten in the international prosecution of war crimes. Nonetheless, the concept of medical war crimes is worth analyzing to determine its suitability to address the involvement of physicians in interrogations that violate international humanitarian law in recent conflicts. It would provide a legal framework for the prosecution of crimes committed by physicians during armed conflict.

This article will thus re-introduce the concept of medical grave breaches and medical war crimes, examine its implementation on an international level, and analyze its application in practice.¹³ For this, two international prosecutions of physicians for their actions during armed conflicts will provide an illustration: the *Doctors’ Trial* before the Nuremberg Military Tribunal and the *Ntakirutimana Trial* before the International Criminal Tribunal for Rwanda. The objective of the examination is, first, to discover how the concept of medical war crimes was introduced in an international prosecution, and, second, to assess the probability of future prosecutions for such crimes.¹⁴

¹² P.J. Weindling, *Nazi Medicine and the Nuremberg Trials - From Medical War Crimes to Informed Consent*, 2004, 1.

¹³ Medical aspects of crimes against humanity will be illuminated when relevant. The emphasis is on medical war crimes for the explicit basis for such crimes in article 11 AP I.

¹⁴ It should be noted that the article’s aim is a general discussion of the question, not to provide specific solutions to the question of physicians in Guantánamo Bay.

II. Medical War Crimes

1. Medical Grave Breaches and Medical War Crimes

The development of the criminalization of medical war crimes was prompted by the *Doctors' Trial* before the Nuremberg Military Tribunal in 1946 where physicians were tried for medical crimes committed during the war. Medical war crimes can be defined as willful acts seriously endangering the health or integrity of a detained person who is affiliated with the adversary committed by physicians in carrying out their medical duties during an armed conflict. Although the concept is modeled after the medical grave breach introduced in article 11 of AP I it should extend to non-international armed conflicts.¹⁵ Article 11 (4) AP I introduces medical grave breaches.¹⁶ Pursuant to article 11 (4) AP I medical acts constitute grave breaches when they (a.) fall under the prohibited acts of the second paragraph or constitute violations of the requirements in the first paragraph, (b.) are committed by a willful act or omission, and (c.) seriously endanger the physical or mental health or integrity of (d.) a protected person in the power of an adverse party.¹⁷

Prohibited acts are, on the one hand, those enumerated in article 11 (2) AP I, namely physical mutilations, medical or scientific experiments, or the removal of tissue or organs for transplantation even with the consent of the person.¹⁸ However, the paragraph merely provides ex-

¹⁵ On war crimes in non-international armed conflicts in general, see E. La Haye, *War Crimes in Internal Armed Conflicts*, 2008.

¹⁶ The classification as grave breaches was neither initially envisaged (see original draft in Official Records of the Diplomatic Conference on the Re-affirmation and Development of International Humanitarian Law applicable in Armed Conflicts (Conférence Diplomatique de Droit Humanitaire (CDDH)) (O. R.), Part III, 6), nor introduced as a written amendment (see O.R. Part III, Table of Amendments to the Draft Additional Protocol, 60 – 62) but rather introduced in the last phase of the drafting by an Australian oral amendment, in 1977. See O.R. Part XI, CDDH/II/SR.29, 294; CDDH/II/SR.30, 305.

¹⁷ See also Y. Sandoz et al., *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, 1987, para. 3474.

¹⁸ The principle of informed consent is a specification of the principle of autonomy – one of the four generally accepted principles of biomedical ethics. According to Beauchamp and Childress, the four principles of biomedical ethics are beneficence, non-maleficence, autonomy and justice. For

amples of acts that are prohibited.¹⁹ Generally all medical procedures that do not meet the cumulative requirements of article 11 (1) AP I are prohibited.²⁰ Article 11 (1) AP I requires that a procedure has to be in accordance with generally accepted medical standards and indicated by the state of health of the person concerned.

A clarification in the same paragraph details that generally accepted medical standards are such standards that “would be applied under similar medical circumstances to persons who are nationals of the Party conducting the procedure and who are in no way deprived of liberty.” The party conducting the procedure, the civilian or military medical personnel, should treat protected persons as they would treat their own nationals who are not deprived of liberty in similar circumstances.

Yet, not all medical procedures prohibited by article 11 (1) AP I also give rise to a grave breach. In order for an act or omission to be a grave breach, it additionally needs to have been committed willfully and have seriously endangered the health and integrity of the patient. To actually be considered a serious danger, the effect of the medical procedure must affect the person treated in a “long-lasting or crucial” manner.²¹ Usually, medical procedures without a therapeutic purpose meet these criteria. Following the wording of article 11 (4) AP I which refers to a “*wilful* act or omission”(emphasis added), the relevant *mens rea* for such acts is willfulness. This should entail willfulness or recklessness but not simple neglect.²² The indictment in the *Doctors’ Trial*, the *mens rea* was construed as “unlawfulness, willingness and knowledge.” This reso-

a detailed discussion, consult T.L. Beauchamp/ J.F. Childress, *Principles of Biomedical Ethics*, 6th edition, 2009.

¹⁹ L. Moir, “Conduct of Hostilities - War Crimes”, in: J. Doria et al., *The Legal Regime of the International Criminal Court: Essays in Honour of Professor Igor Blisshchenko*, 2009, 511.

²⁰ The ICRC Study on Customary International Humanitarian Law has found that “[m]utilation, medical or scientific experiments or any other medical procedure not indicated by the state of health of the person concerned and not consistent with generally accepted medical standards are prohibited”, Rule 92 in J.M. Henckaerts et al., *Customary International Humanitarian Law, Vol. 1: Rules*, 2005, 320.

²¹ Sandoz et al., see note 17, para. 3474.

²² Id., see note 17, para. 493.

nates in the requirement of willfulness for a medical grave breach of article 11 (4) AP I.²³

Article 11 (4) AP I does not limit the possible perpetrators of medical grave breaches to physicians but generally medical grave breaches are committed by persons who carry out medical procedures. In most cases, a violation of article 11 (4) AP I will therefore bring physicians within the ambit of criminal prosecution.²⁴

Although article 11 AP I offers protection for all detained persons,²⁵ and generally also applies to a party's own nationals, the denial of the provision's protection regarding a party's own nationals, even if deprived of their liberty, cannot result in a grave breach.²⁶ Such crimes are usually prosecuted as crimes against humanity.²⁷ Where the scope of protection of article 11 (1) AP I includes "[persons] who are interned, detained or otherwise deprived of liberty as a result of a situation referred to in Article 1", this was omitted in article 11 (4) AP I. Accordingly, a medical violation is prosecutable as a grave breach only if the victim is a person "in the power of a party other than the one on which he depends."²⁸

This restriction was included to ensure the sovereignty of parties to a conflict over their own nationals.²⁹ It is compatible with article 85 (1)

²³ Count 2 of the Indictment in United States Military Tribunal I, *United States of America v. Karl Brandt, et al.* ["The Doctors' Trial"], *Trials of War Criminals Vol. I & II*, Judgment (19 August 1947).

²⁴ A. Baccino-Astrada, *Manuel des Droits et Devoirs du Personnel Sanitaire lors des Conflits Armés*, 1982, 34 – 35.

²⁵ F. Kalshoven/ L. Zegveld, *Constraints on the Waging of War - an Introduction to International Humanitarian Law*, 3rd edition, 2001, 118.

²⁶ W.A. Solf, "Development of the Protection of the Wounded, Sick and Shipwrecked under the Protocols Additional to the 1949 Geneva Conventions", in: Swinarski, see note 1, 242.

²⁷ As was the case in some prosecutions after World War II, for example, C.F. Rüter, *DDR-Justiz und NS-Verbrechen - Sammlung Ostdeutscher Strafurteile wegen Nationalsozialistischer Tötungsverbrechen*, 2002, Lfd. Nr. 1760. See also ICTR *Prosecutor v. Elizaphan and Gérard Ntakirutimana*, Trial Chamber Judgment of 21 February 2003.

²⁸ The paragraph expressly does not use the nationality category to avoid definitional problems.

²⁹ Sandoz et al., see note 17, para. 493 (b).

AP I concerning grave breaches.³⁰ The chosen formulation avoids the controversial nationality issue. A purely textual interpretation providing protection according to nationality would give a rather restrictive result; in modern wars, ethnicity or affiliation is more often the basis for allegiance than nationality.³¹ The Rome Statute, for example, determines that a perpetrator does not have to know the nationality of his victim; solely that he belongs to the adverse party.³² Hence, a physician's act can incur prosecution when he treats a patient who is not of the same party to the conflict as he himself and he knows this. This broad interpretation of civilian protected persons is within the object and purpose of the drafters of the Geneva Conventions. Nonetheless, care should be taken not to broaden the concept beyond practical applicability.

Medical grave breaches should be treated equally to all other grave breaches of the Geneva system as the concise wording of article 85 (3) AP I indicates.³³ When implemented and criminalized by Member States, they can be prosecuted as medical war crimes. Whereas medical grave breaches under article 11 (4) AP I are limited to violations committed in international armed conflicts, (medical) war crimes in general

³⁰ M. Bothe et al., *New Rules for Victims of Armed Conflicts - Commentary on the two 1977 Protocols Additional to the Geneva Conventions of 1949, 1982*, 115.

³¹ Article 4 GC IV still used the nationality criterion for determining who should be categorized as "civilian". It thereby respected states' sovereignty over their own nationals by protecting those civilians in the hands of a party of which they were not a national. O.M. Uhler/ H. Coursier, *Commentary to the Geneva Convention Relative to the Protection of Civilian Persons in Time of War*, 1958, 46 – 47. Ever since, a teleological approach whereby nationality or affiliation is irrelevant, as taken by the ICTY Appeals Chamber in the *Tadić* Judgment, has found resonance. ICTY *Prosecutor v. Dusko Tadić a.k.a. "Dule"*, Appeals Chamber Judgment of 15 July 1999, paras 163 – 166. Meron thinks "nationality" should at times be construed as "persons in the hands of an adversary." T. Meron, "War Crimes Law for the Twenty-First Century", in: M.N. Schmitt/ L.C. Green, *The Law of Armed Conflict: Into the Next Millennium*, 1998, 329. Also rejecting an "allegiance approach", see M. Sassòli/ L.M. Olson, "The judgment of the ICTY Appeals Chamber on the merits in the *Tadić* case", *Int'l Rev. of the Red Cross* 82 (2000), 733 et seq.

³² Concerning article 8 (2)(a)(i): Elements of Crimes, Doc. ICC-ASP/1/3 (part II-B) of 9 September 2002, 14.

³³ The acts constituting grave breaches listed under article 85 (3) AP I are "In addition to the grave breaches defined in Article 11 [...]".

can be committed in both international and non-international armed conflicts.³⁴ Unwarranted medical procedures are also prohibited in article 5 (2)(e) AP II. The paragraph determines that persons detained or interned “for reasons related to the armed conflict”³⁵ should not be subjected to an unjustified act or omission that may endanger their physical or mental health and integrity. Acts which are not justified by the health of the person treated and which are not consistent with generally accepted medical standards “applied to free persons under similar medical circumstances” are prohibited.

However, Additional Protocol II does not determine what consequences a violation of the prohibition has. The ICRC Commentary states that: “[paragraph] 2 may be considered as a sort of guideline which may be developed, depending on the circumstances and the goodwill of those responsible; the few rules that are given serve as illustrations and should not be interpreted restrictively or rigidly.”³⁶ The system of grave breaches is thus limited to international armed conflicts, although violations of provisions of protection in non-international armed conflicts can nowadays also lead to prosecution.³⁷ This approach is supported by the Rome Statute which equally criminalizes mutilations and medical and scientific experiments committed in non-international armed conflicts. The requirements for medical grave breaches should, then apply analogously to medical war crimes committed during non-international armed conflicts with the difference of course being in the form of armed conflicts.³⁸

³⁴ ICTY *Prosecutor v. Dusko Tadić a.k.a. “Dule”*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction of 2 October 1995, paras 81 – 84. This is in line with the literature, see C. Kress, “War Crimes committed in Non-International Armed Conflict and the Emerging System of International Criminal Justice”, *Isr. Y. B. Hum. Rts* 30 (2000), 103 et seq. (107 – 109); L. Moir, “Particular Issues regarding War Crimes in Internal Armed Conflicts”, in: Doria et al., see note 19, 612 – 614. Others would even apply the grave breaches regime *mutatis mutandi* to non-international armed conflicts see *Tadić* Interlocutory Appeal, Separate Opinion of Judge Abi-Saab, para. IV.

³⁵ Article 5 (1) AP II.

³⁶ Sandoz et al., see note 17, para. 4581. See also J. Kleffner, “Protection of the Wounded, Sick and Shipwrecked”, in: D. Fleck, *The Handbook of International Humanitarian Law*, 2008, para. 606.

³⁷ La Haye, see note 15, 121 et seq.

³⁸ The concept of protected persons is not recognized as such in non-international armed conflicts. Instead protected are “persons taking no ac-

A medical war crime has to have a *nexus* with an armed conflict, whether non-international or international. “[T]he nexus requirement serves to exclude from the realm of the laws of war purely random or isolated criminal occurrences which do not constitute war crimes.”³⁹ The fact that there is an armed conflict must thus have played a role in the commission of the crime.⁴⁰ The perpetrator does not necessarily need to have a close relationship with one of the parties to the conflict but the act that was committed needs to have something to do with the armed conflict.⁴¹ Additionally, a perpetrator must have been aware of the factual circumstances of an armed conflict, whether non-international or international.⁴² Whether it can be determined with sufficient certainty if a perpetrator was aware that his actions constituted a grave breach is questionable. Therefore, the burden of proof for this requirement should lie with the prosecution.⁴³ If a violation of international humanitarian law that meets the criteria of a medical war crime has been committed, irrespective of the sort of armed conflict it should always lead to prosecution.

tive part in the hostilities” pursuant to common article 3 to the Geneva Conventions. This is also the definition used in article 8 (2)(c) Rome Statute regarding the victims of war crimes in non-international armed conflicts. It should apply to victims of medical war crimes.

³⁹ G. Mettraux, *International Crimes and the ad hoc Tribunals*, 2005, 39.

⁴⁰ A. Cassese, *International Criminal Law*, 2003, 49. For ICTY Jurisprudence see *Tadić Interlocutory Appeal*, paras 81 – 84. See also ICTY *Prosecutor v. Zlatko Aleksovski*, Appeals Chamber Judgment of 24 March 2000, para. 80; ICTY *Prosecutor v. Tihomir Blaškić*, Appeals Chamber Judgment of 29 July 2004, para. 170; ICTY *Prosecutor v. Mladen Naletilić (a.k.a. Tuta) and Vinko Martinović (a.k.a. Štela)*, Appeals Chamber Judgment of 3 May 2006, para. 110; ICTY *Prosecutor v. Radoslav Brđanin*, Appeals Chamber Judgment of 3 April 2007, para. 256.

⁴¹ La Haye, see note 15, 323.

⁴² K. Dörmann, *Elements of War Crimes under the Rome Statute of the International Criminal Court - Sources and Commentary*, 1st edition, 2002, 18 – 28. This analysis relies heavily on the ICTY jurisprudence, e.g. ICTY *Prosecutor v. Dario Kordić and Mario Čerkez*, Appeals Chamber Judgment of 17 December 2004, para. 311.

⁴³ As is the case before the ICTY, see *Naletilić and Martinović Appeal Judgment*, paras 118 – 121.

2. Medical Aspects of the Classic Grave Breaches

Arts 50 GC I, 51 GC II, 130 GC III, and 147 GC IV exhaustively enumerate violations of the Conventions considered serious enough to merit universal prosecution.⁴⁴ The “classic” grave breaches are “wilful killing, torture or inhuman treatment, including biological experiments, wilfully causing great suffering or serious injury to body or health”⁴⁵ of the protected persons by an individual in the respective Convention. All these crimes can also be committed by a physician in a medical context. For a medical act or procedure by a physician to be prosecuted as a grave breach of the Conventions, the act must also meet the requirements of the grave breaches under the Conventions.

“Willful killing” refers to killing both by commission as well as omission, irrespective of whether the victim belongs to the adverse party or not, as long as he was a protected person.⁴⁶ The word “willful” denotes an intention on the side of the perpetrator to cause the death of the victim or at least a *dolus eventualis*.⁴⁷ Examples of willful killing by omission are the intentional starvation of persons under the medical supervision of physicians or the intentional denial of medical care.⁴⁸ When exactly a person was acting with the relevant intent and when a killing is not merely a consequence of the armed conflict but willfully carried out, depends on the circumstances.⁴⁹

Because a classification as torture within the grave breaches regime depends on the intention behind the act and not “the mere assault on

⁴⁴ H. McCoubrey, “War Crimes: the Criminal Jurisprudence of Armed Conflict”, *Rev. Dr. Mil. Dr. Guerre* 31 (1992), 168 et seq. (176).

⁴⁵ Each Geneva Convention contains some additional special grave breaches. These are of little importance to the examination of medical grave breaches and shall not be further discussed.

⁴⁶ J. Pictet, *La Convention de Genève pour l'Amélioration du sort des Blessés, des Malades et des Naufragés des Forces Armées sur Mer*, 1959, 271.

⁴⁷ *Dolus eventualis* or recklessness means that the perpetrator knowingly acts in a way that risks the death of the protected person. Cassese, see note 40, 57 – 58.

⁴⁸ For an example of willful killing by omission (willful neglect) see Military Court for the Trial of War Criminals, *Trial of Heinrich Gerike, Georg Hessling, Werner Noth, Hermann Müller, Gustav Claus, Richard Dmmerich, Fritz Flint, and Valentina Bilien* [“The Velpke Baby Home Trial”], Vol. VII, Judgment of 3 April 1946.

⁴⁹ Uhler/ Coursier, see note 31, 597.

the physical or moral integrity of a person”,⁵⁰ a physician would only be prosecutable for torture as a grave breach if he assaulted or assisted in the assault of a protected person with the intention to extract information or a confession of sorts. The severity of the pain does not have to be excessive, cause permanent injury, or leave visible signs.⁵¹ Torture is, of course, also prohibited by the Convention against Torture.⁵² Whether or not a medical procedure fulfills the severity requirement is a “fact-dependent inquiry.”⁵³ There are some indicators of torture such as electric shocks, prolonged denial of medical assistance, and simulated executions which can all have a medical element.⁵⁴

A grave breach often mentioned together with torture is “inhuman treatment”. The principle of humane treatment⁵⁵ is a “guiding theme”⁵⁶ or “cornerstone of all four Conventions.”⁵⁷ When providing medical care during armed conflicts, physicians should at all times treat patients humanely. Inhuman treatment involves intentional acts that violate a protected person’s human dignity – beyond his physical and mental integrity – and are committed with the intention of “leveling the victim with an animal.”⁵⁸ The required intent was not explicated, as is the case

⁵⁰ Uhler/ Coursier, see note 31, 598; Pictet, see note 46, 272.

⁵¹ ICTY *Prosecutor v. Radoslav Brđanin*, Trial Chamber Judgment of 1 September 2004, paras 483 – 484.

⁵² The definition of torture can be found in article 1 of the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, 10 December 1984, *ILM* 23 (1984), 1027 et seq.

⁵³ *Naletilić and Martinović Appeal Judgment*, para. 299.

⁵⁴ The Trial Chamber in *Čelebići* clearly states that it does not intend to exhaustively list acts that constitute torture. ICTY *Prosecutor v. Zdravko Mucić, Hazim Delić, Esad Landžo and Zejnil Delalić (Čelebići)*, Trial Chamber Judgment of 16 November 1998, paras 467 – 469. Its enumeration of indicators of torture is based on *Report by the Special Rapporteur, Mr. P. Kooijmans, appointed pursuant to Commission on Human Rights resolution 1985/33*, Doc. E/CN.4/1986/15 of 19 February 1986, para. 119.

⁵⁵ As established in arts 12 GC I and II, 13 GC III, and 27 and 32 GC IV, as well as article 75 AP I.

⁵⁶ R. Wolfrum/ D. Fleck, “Enforcement of International Humanitarian Law”, in: D. Fleck, *The Handbook of International Humanitarian Law*, 2008, para. 1410 (6).

⁵⁷ *Čelebići Trial Judgment*, see note 54, para. 532.

⁵⁸ Pictet, see note 46, 273. Reference is made to the Commentary to GC II, as the Commentary to GC I classified torture, inhuman treatment and biological experiments as “clear enough in themselves and [needing] no de-

with *willful* killing. The requisite intent should, however, still be the “willingness and knowledge” to subject a person to inhuman treatment. This was the *mens rea* requirement that was used in the *Doctors’ Trial*.⁵⁹ The prohibition of inhuman treatment is often used as a residual category for criminal acts that do not fall under the other provisions.⁶⁰

Biological experiments are explicitly and separately named as a form of inhuman treatment. This proves the emphasis placed on the prohibition of experiments on protected persons in the system of the Conventions.⁶¹ Physicians are allowed to use new therapeutic methods if such treatment is medically justified, for the amelioration of the health of a patient, and the patient, if competent, has provided his informed consent.⁶² Whether something is a justified new therapeutic method or whether it is purely experimental may be controversial.⁶³ A physician should thus always conduct a careful analysis as to whether a new procedure is considered humane. The informed consent of a patient to the procedure is an important element of such an analysis although consent to an inhuman procedure can never justify said procedure.

Next to the explicit medical grave breach, physicians can thus also be involved in the commission of the classic grave breaches. Whether physicians should be prosecuted on the basis of the classic grave breaches or whether they should rather be specifically prosecuted for a medical grave breach should be decided on a case-by-case basis.

III. Medical War Crimes in International Criminal Law

Considering that medical grave breaches entail the same responsibilities for State Parties’ as the conventional grave breaches of the Geneva Conventions and AP I, the provision in article 11 (4) AP I should be implemented in criminal legislations. The necessary criminalization of medi-

tailed comment”. J. Pictet, *La Convention de Genève pour l’Amélioration du sort des Blessés et des Malades dans les Forces Armées en Campagne*, 1952, 418.

⁵⁹ The *Doctors’ Trial* will be analyzed below.

⁶⁰ G. Boas et al., *Elements of Crimes under International Law*, 2008, 272.

⁶¹ See comparatively article 12 GC I and II, article 13 GC III, and article 32 GC IV.

⁶² These requirements are taken from article 13 GC III. The Commentary refers to the requirements in article 12 GC II. Pictet, see note 46, 273.

⁶³ Wolfrum/ Fleck, see note 56, para. 1410 (7).

cal grave breaches can be on a national level, to facilitate national prosecution, on an international level, e.g. in the Statutes of the International Criminal Tribunal for the former Yugoslavia (ICTY) or for Rwanda (ICTR) or the International Criminal Court (ICC), or, if the relevant state practice and *opinio juris* exist, criminalization can be inferred from customary international law.⁶⁴ The criminalization of medical grave breaches, but also the penalization of medical war crimes committed in non-international armed conflicts reveals information concerning the interpretation of such crimes. Questions to be answered are whether medical grave breaches are attributed equal importance to other breaches, whether the criminalization includes the context of non-international armed conflicts, and whether the implementation provides some interpretation or analysis relevant to make the concept most practicable.

1. The ICTY and ICTR Statutes

Neither the Statute for the ICTY nor that of the ICTR explicitly criminalizes medical grave breaches. Article 2 ICTY Statute provides jurisdiction over the grave breaches of the Geneva Conventions and AP I, namely willful killing, torture or inhuman treatment, including biological experiments, and willfully causing great suffering or serious injury to body or health. Other breaches of the Geneva Conventions, serious violations of Hague Law, and certain (grave) breaches under AP I are enumerated in article 3 ICTY Statute dealing with “violations of the laws or customs of war”. These concern the means and methods of warfare. The Appeals Chamber in *Tadić* established that they can also be committed in non-international armed conflicts.⁶⁵ The medical grave breach of article 11 (4) AP I was included neither in article 2 nor in article 3 ICTY Statute. Medical war crimes can thus only be prosecuted as conventional grave breaches, such as killing, torture or inhuman treatment. Most probably, medical grave breaches were not included because these crimes were not considered as being relevant in the conflict in the former Yugoslavia.⁶⁶

⁶⁴ Cassese, see note 40, 50 – 51.

⁶⁵ *Tadić Interlocutory Appeal*, paras 128 – 137.

⁶⁶ The *Čelebići* Indictment charged the accused with the willful killing of persons as a grave breach pursuant to article 2 (a) of the ICTY Statute and as a violation of the laws and customs of war pursuant to article 3 of the ICTY

The ICTR Statute determines that the ICTR has no jurisdiction over grave breaches of the Geneva Conventions and limits the jurisdiction to war crimes committed during a non-international armed conflict only. Article 4 ICTR Statute criminalizes violations of common article 3 Geneva Conventions and violations of AP II, including under subparagraph (a) cruel treatment such as torture, mutilation or any form of corporal punishment. Next to outrages upon personal dignity that could be committed in a medical context, this is the only remotely medical crime prosecutable under the ICTR Statute.⁶⁷

2. The Rome Statute

Article 8 of the Rome Statute enumerates all war crimes the ICC has jurisdiction over.⁶⁸ Article 8 (2)(a) Rome Statute sets out the grave breaches of the Geneva Conventions as war crimes punishable by the ICC, especially when “committed as part of a plan or policy or as a part

Statute which correlates to article 3 (1)(a) Geneva Conventions by denying medical care. *Čelebići Indictment*, para. 18. None of the accused were physicians, as was *Ntakirutimana*, and the denial of medical care was considered part of the crime of willful killing. Neither the Trial nor the Appeals Chamber of the ICTY in their judgments elaborated on this aspect separately.

⁶⁷ Under article 3 of the Special Court for Sierra Leone Statute, mutilation as a form of violence to life, health and physical or mental well-being of persons is considered a serious violation of article 3 common to the Geneva Conventions, and of Additional Protocol II. There have been no prosecutions on this basis. The Law on the Establishment of the Extraordinary Chambers for Cambodia, with inclusion of amendments as promulgated on 27 October 2004 (NS/RKM/1004/006) does not specifically mention medical grave breaches or war crimes. Its article 6 omits experiments as a grave breach of the Geneva Conventions.

⁶⁸ To satisfy the principle of legality, article 8 has precisely, complexly, and thoroughly listed the crimes that can incur prosecution. The exhaustive character of the enumeration has, however, generated much critique for fear of loopholes and unwanted restrictedness. W.A. Schabas, *An Introduction to the International Criminal Court*, 2nd edition, 2004, 54 – 55. Although providing an extensive list of war crimes mostly based on Geneva Law, the Rome Statute does not intend to codify customary international law. Cassese, see note 40, 54.

of a large-scale commission of such crimes.”⁶⁹ Article 8 (2)(a)(ii) criminalizes biological experiments with protected persons.⁷⁰ Pursuant to the Elements of Crimes, biological experiments seriously endanger the physical or mental health or integrity of the persons subjected to them when they are non-therapeutic, not justified by medical reasons, and not carried out in the interest of the research subject. There is thus no result requirement – death does not have to ensue, a “mere” threat to the health and integrity of the research subject suffices.⁷¹

Article 8 (2)(b)(x) prohibits mutilations and medical or scientific experiments in international armed conflicts.⁷² The provision correlates to arts 13 GC III, 32 GC IV, and 11 (2)(a) and (b) AP I. Article 8 (2)(b)(x) is listed among the provisions addressing “other serious violations of laws and customs applicable in international armed conflict.” The placement of the article is significant: the drafters excluded this medical breach from the grave breaches provisions under sub-paragraph (a) and moved it to the residual enumeration under sub-paragraph (b) instead. By this, the drafters indicated that pursuant to the Rome Statute this is considered a war crime but not a grave breach of the GCs or AP I.⁷³ The prohibition of mutilations and medical or scientific experiments appears misplaced in sub-paragraph (b) because the prohibition derives directly from article 11 (2)(b) AP I and was heavily influenced by the

⁶⁹ Article 8 (1) Rome Statute. This requirement of a plan or policy has generated much controversy because it is thought to introduce criteria that were previously limited to genocide and crimes against humanity. See Schabas, see note 68, 55. Others argue that it was included to clarify that only the “most serious crimes of concern to the ‘international community as a whole’” will be prosecuted. M. Bothe, “War Crimes”, in: A. Cassese et al., *The Rome Statute of the International Criminal Court: A Commentary*, 2002, 380.

⁷⁰ The provision is based on arts 12 GC I, 13 GC II, 13 GC III, 32 GC IV and 11 (2)(b) AP I.

⁷¹ K. Dörmann, “Article 8 (a) Grave Breaches”, in: O. Triffterer, *Commentary on the Rome Statute of the International Criminal Court – Observers’ Notes, Article by Article*, 2008, para. 21.

⁷² Based upon a proposal by New Zealand and Switzerland. Doc. A/AC.249/1997/WG.1/DP.1, para. 1 (d); its final version as proposed by Germany in Doc. A/AC.249/1997/WG.1/DP.23/Rev.I, Section B (h).

⁷³ Schabas, see note 68, 63. Seemingly supporting the re-classification by the Rome Statute, Dörmann, see note 42. Elements common to all crimes under article 8 (2)(b) ICC Statute, 128.

wording and interpretation in the Commentary to AP I.⁷⁴ In addition, sub-paragraph (b) addresses acts committed on the battlefield which can hardly be said of these crimes. Despite the fact that article 8 (2)(a)(ii) is based heavily on Geneva Law, it is less explicitly based on article 11 (4) AP I than article 8 (2)(b)(x). Furthermore, article 8 (2)(b)(x) offers a wider scope of protection than article 8 (2)(a)(ii) which is limited to crimes against protected persons.⁷⁵ Still, since these two provisions criminalize experiments, arts 8 (2)(a)(ii) and 8 (2)(b)(x), correspond and overlap.

Article 8 (2)(e)(xi) criminalizes mutilations and medical or scientific experiments amongst “other serious violations of the laws and customs applicable in armed conflicts *not of an international character*.” (emphasis added).⁷⁶ The prohibition of mutilations and experiments in non-international armed conflicts derives from article 5 (2)(e) AP II and is nearly identical with article 8 (2)(b)(x).⁷⁷

Mutilations and medical or scientific experiments are thus penalized as medical war crimes in all armed conflicts.⁷⁸ The analysis will concentrate on article 8 (2)(b)(x) but applies *mutatis mutandi* to non-international armed conflicts unless indicated otherwise.

⁷⁴ Such experiments, as all other medical procedures, are under article 11 (1) AP I, justified only when indicated by the health of a person and consistent with the generally accepted medical standards. If a person carries out such an experiment in violation of the cumulative criteria of para. 1 and thereby willfully endangers the health of a person, he is punishable for a grave breach, pursuant to para. 4. According to Bothe, a more direct assimilation to article 11 AP I would have been beneficial for the sake of clarity. Bothe, see note 69, 393.

⁷⁵ Dörmann, see note 42, para. 21.

⁷⁶ Mutilations in general are also criminalized in article 8 (2)(c)(i) as a violation of common article 3 to the Geneva Conventions when committed against a person “taking no active part in the hostilities”. This offense committed in a non-international armed conflict lacks the strict requirements the Elements of Crimes proscribe for the offense in an international armed conflict, such as the result requirement. Moir, see note 19, 512.

⁷⁷ The only difference is in the wording “another party to the conflict” instead “adverse party.” Dörmann, see note 42, 483.

⁷⁸ The Rome Statute, though controversially maintaining the differentiation between war crimes committed in international and those committed during a non-international armed conflict, has contributed to the equalization of the two systems by developing definitions of war crimes in non-international armed conflict. Schabas, see note 68, 54.

According to the Elements of Crimes,⁷⁹ both mutilations and experiments are prohibited when (a.) not “justified by the medical, dental or hospital treatment of the person concerned,”⁸⁰ (b.) carried out against the patient’s interest, and (c.) “[causing] death or seriously [endangering] the health of [these] persons.”

There is no explanation of what treatment would be justified by a person’s health. Examples of prohibited mutilations are unjustified amputations, and, according to the first element in the Elements of Crimes, such acts that cause permanent disfigurement, the disablement or removal of organs or appendages. This is, however, open to interpretation.⁸¹ For example, some may consider genital cutting justified, whereas others, including the present author, would consider this an unwarranted mutilation.⁸² Because relevant case-law is lacking, *Dörmann* in his Commentary refers to documents of the World Medical Association to establish which procedures are not indicated by the health of a person, in particular to the “Regulations in Time of Armed Conflict” and the “Rules governing the Care of Sick and Wounded, particularly in Time of Conflict.”⁸³ These documents he classifies as “tools for clarifying terms.”⁸⁴

⁷⁹ For interpretive and assistance purpose, the Assembly of States Parties to the ICC has accepted an interpretive guide, the Elements of Crimes, as detailed in article 9 (1) Rome Statute. Elements of Crimes, see note 32.

⁸⁰ In comparison, article 11 (1) AP I speaks of “indicated by the state of health of the person.”

⁸¹ Dörmann interprets mutilation textually and refers to the definition in the Oxford English Dictionary: to mutilate: “to inflict a violent or disfiguring injury on”. The Oxford Dictionary of English, 2nd edition, 2006. Moir defines “mutilation” as a medical procedure lacking medical justification. Moir, see note 19, 513.

⁸² *General Comment No. 14 - The Right to the Highest Attainable Standard of Health (Article 12)*, Doc. No. E/C.12/2000/4, 2000, para. 22. And in literature, see A. Zimmermann, “Article 8 (2)(b)(x) Prohibition of Physical Mutilation”, in: Triffterer, see note 71, para. 108.

⁸³ The World Medical Association is an organization for physicians of 97 countries. It consists of representatives of medical associations. The status of its documents in international law is highly questionable. For further information, see also M. Chang, “The World Medical Association”, *Max Planck Encyclopedia of Public International Law*, 2010 and <www.wma.net/en/10home/index.html>.

⁸⁴ Dörmann, see note 42, 232. Also referring to the WMA, see Moir, see note 19, 515.

Whether a procedure is in the patient's interest should thus also depend on whether the person has given his informed consent. Furthermore, even though not explicitly stated in article 8 (2)(b)(x) or the Elements of Crimes but hidden in a footnote,⁸⁵ the requirement of inconsistency of a medical procedure with generally accepted medical standards, a requirement for medical grave breaches pursuant to article 11 (4) AP I, also applies under the Rome Statute,

“Consent is not a defence to this crime. The crime prohibits any medical procedure which is not indicated by the state of health of the person concerned and which is not consistent with *generally accepted medical standards* which would be applied under similar medical circumstances to persons who are nationals of the party conducting the procedure and who are in no way deprived of liberty.” (emphasis added)⁸⁶

The consent of the person “treated” to the procedures can never be used as a defense.⁸⁷ It is, however, relevant to establish the legality of the procedure.

Both mutilations and experiments are criminalized when causing death or serious danger to the physical or mental health of a person.⁸⁸ Unlike article 11 AP I and 8 (2)(a)(ii), the Rome Statute here introduces a result requirement.⁸⁹ Whether the act caused death or seriously endangered the health of a person, should be determined on a case-by-case basis. An experiment not serving a therapeutic purpose should always be regarded as prohibited.⁹⁰ Lacking a specific *mens rea* require-

⁸⁵ Switzerland proposed an additional requirement of consistency with generally accepted medical standards, formulated as article 11 (1) AP I, to be added to the Elements of Crimes. The proposal was rejected. Proposal submitted by Costa Rica, Hungary, and Switzerland in the Preparatory Commission for the International Criminal Court, Working Group on Elements of Crimes, Doc. PCNICC/1999/WGEC/DP.8 of 19 July 1999, 2.

⁸⁶ Elements of Crimes, see note 32, 25. Because the reference to generally accepted medical standards regrettably appears in a footnote and only serves as an interpretational help for the consent-aspect, it was not given more explanation or interpretation. Bothe, see note 69, 414.

⁸⁷ Similar to article 11 (2) AP I. Elements of Crimes, see note 32, 25.

⁸⁸ Article 11 AP I referred to both health and integrity, see Sandoz et al., see note 17, para. 493 (b) which the drafters of the Rome Statute and Elements of Crimes excluded regarding mutilations; it is included regarding experiments. Elements of Crimes, see note 32, 25.

⁸⁹ Moir, see note 19, 512.

⁹⁰ Zimmermann, see note 82, para. 109.

ment, the relevant mental element for medical war crimes is “intent and knowledge”, pursuant to article 30 Rome Statute. This excludes recklessness and *dolus eventualis*.⁹¹ Considering article 11 (4) AP I refers to a “*wilful* act or omission” (emphasis added) which would include recklessness but exclude neglect,⁹² the question arises why this requirement was not instituted for medical war crimes under the Rome Statute. The prohibition of mutilations and experiments as codified in the Rome Statute without the requirement of willfulness lost some of the original meaning of medical war crimes as intended by the Additional Protocols.⁹³

Article 8 (2)(b)(x) criminalizes mutilations and experiments when carried out on persons “in the power of an adverse party” during an international armed conflict. This excludes nationals of a state not a party to the conflict, a perpetrator’s own nationals and the nationals of a co-belligerent who would, pursuant to article 11 (1) AP I, still be protected when “interned or otherwise deprived of liberty.”⁹⁴ It is also more restricted than article 11 (4) AP I which protects “any person who is in the power of a party other than the one on which he depends.”⁹⁵ The perpetrator has to have been aware of the protected status of the victim and of the armed conflict. The perpetrator of this crime can be a civilian, including a doctor or nurse.⁹⁶

It is commendable that the Rome Statute penalized two medical war crimes, mutilations and experiments, when committed in both international and non-international armed conflicts. However, due to some significant changes in the transposition of the crimes, the original concept of medical grave breaches pursuant to article 11 (4) AP I has regrettably been unnecessarily restricted. The wide scope of protection of article 11 AP I applicable to all medical procedures was abandoned.⁹⁷

⁹¹ A. Eser, “Mental Elements - Mistake of Fact and Mistake of Law”, in: Cassese et al., see note 69, 932.

⁹² Dörmann, see note 42, 233, 239.

⁹³ This danger was identified but not applied to this case by Eser, see note 91, 899 – 900.

⁹⁴ Zimmermann, see note 82, para. 105.

⁹⁵ Id., see note 82, para. 105. On the scope of protection of article 11 AP I, see Sandoz et al., see note 17, para. 468. Dörmann argues that the scope in article 8 (2)(b)(x) should be the same which is not supported by the text of the Rome Statute or by other commentators. Dörmann, see note 42, 231.

⁹⁶ Dörmann, see note 42, 37.

⁹⁷ This was also noted by Kress, see note 34, 137; Moir, see note 19, 511.

Although the restricted criminalization in article 8 Rome Statute “does not affect the protective scope of Article 11 AP I”,⁹⁸ because the Additional Protocols continue to apply independently, the limitation to mutilations and experiments is regrettable. The prohibition will probably lead to a limited number of prosecutions of physicians for medical war crimes.

IV. National Implementation: The German Example

In comparison and in order to analyze one national implementation of medical war crimes, § 8 of the German Völkerstrafgesetzbuch *VStGB* (Code of Crimes against International Law) of 2002 serves as an illustrative example of a more comprehensive criminalization of medical war crimes. If published earlier, it could have served as a model for the Rome Statute.

Medical war crimes are criminalized under the *VStGB* which is applicable next to the “regular” German Criminal Code.⁹⁹ With the *VStGB*, Germany adapted its legislation to the Rome Statute but further than that, also finally aligned its legislation with AP I¹⁰⁰ and integrated rules of (customary) international humanitarian law.¹⁰¹ Adhering to the principle of universal jurisdiction, the *VStGB* enables the prosecution of all enumerated acts even when committed abroad without a nexus to Germany.¹⁰² As an innovative feature, § 8 *VStGB* eliminates the distinction between international and non-international armed conflicts: all crimes against protected persons during either an international or a non-international armed conflict are punishable.¹⁰³ In order for a

⁹⁸ Bothe, see note 69, 413.

⁹⁹ Völkerstrafgesetzbuch (*VStGB*) of 26 June 2002 (BGBl. I, 2254).

¹⁰⁰ A. Zimmermann, “Implementing the Statute of the International Criminal Court: the German Example”, in: L.C. Vohrah et al., *Man’s Inhumanity to Man - Essays on International Law in Honour of Antonio Cassese*, 2003, 986 – 987.

¹⁰¹ G. Werle, “Einleitung Völkerstrafgesetzbuch”, in: W. Joecks/ K. Miebach, *Münchener Kommentar zum Strafgesetzbuch: Nebenstrafrecht III: Völkerstrafgesetzbuch*, 2009, 439.

¹⁰² § 1 *VStGB*. This development is also in line with German jurisprudence. K. Ambos, “§ 1: Anwendungsbereich”, in: Joecks/ Miebach, see note 101, 475.

¹⁰³ Protected persons are defined as such persons as designated in the Geneva Conventions and Additional Protocols, namely in international armed conflicts the wounded, sick, and shipwrecked, prisoners of war, and civilians;

crime to be prosecuted, there has to be a general nexus with the armed conflict.¹⁰⁴

All medical acts that risk the death of a protected person or severely endanger his health are prosecutable as war crimes.¹⁰⁵ The prescribed penalty for medical war crimes is a minimum of two years' imprisonment. If such a crime leads to the death of the protected person or severe damage to the person's health, the penalty is augmented by one year to a minimum of three years' imprisonment.¹⁰⁶ There is no statute of limitations on the crime.¹⁰⁷

Three sub-paragraphs of § 8 (1) *VStGB* specify which medical acts are considered being war crimes. The first sub-paragraph criminalizes involuntary experiments the patient has not explicitly consented to, or that are neither medically necessary nor in the interest of the patient. This includes medical, scientific and biological experiments, as long as they have a direct or indirect effect on the body.¹⁰⁸ Even though the formulation raises doubts whether a patient can consent to an experiment that is neither therapeutic nor in his interest but in the interest of someone else, the Bundestag's Explanatory Note clarified that experiments that are neither medically justified nor in the interest of the patient are prohibited even if the patient consented.¹⁰⁹

Transfer of tissue and organs, except the withdrawal of blood or skin for therapeutic purposes, is prohibited pursuant to the second sub-paragraph. According to the Explanatory Note, the sub-paragraph is best regarded as a category of the prohibition of inhuman treatment.¹¹⁰

in non-international armed conflicts the wounded, sick and shipwrecked, and persons not taking active part in hostilities and who are in the power of the adversary party; and in both adversaries who have put down their arms or who are unable to defend themselves. § 8 (6) *VStGB*.

¹⁰⁴ K. Ambos, "Vorbemerkungen § 8: Kriegsverbrechen", in: Joecks/ Miebach, see note 101, 638. See also ICTY *Prosecutor v. Dragoljub Kunarac, Radomir Kovač, and Zoran Vuković*, Trial Chamber Judgment (22 February 2001) para. 568.

¹⁰⁵ § 8 (1)(8) *VStGB*.

¹⁰⁶ § 8 (1) last sentence, respectively § 8 (4) *VStGB*.

¹⁰⁷ § 5 *VStGB*.

¹⁰⁸ A. Zimmermann/ R. Geiß, "§ 8 (2): Kriegsverbrechen gegen Personen", in: Joecks/ Miebach, see note 101, 690 – 691.

¹⁰⁹ Deutscher Bundestag, *Gesetzesbegründung eines Gesetzes zur Einführung des Völkerstrafgesetzbuches*, 14/8524, 13 March 2002, 27.

¹¹⁰ *Ibid.*, 28.

A withdrawal has to comply with the generally accepted medical standards and the person has to have voluntarily and explicitly consented to the withdrawal. The phrase “generally accepted medical standards” is not further elaborated on.¹¹¹ It can be inferred that these standards refer to those that are generally accepted in Germany.

Lastly and beyond the provisions of the Rome Statute, the third sub-paragraph criminalizes procedures that are medically not accepted if they are not medically required and the person has not given his voluntary and explicit consent. These cumulative requirements are based on article 11 (1) AP I.¹¹² Using unsuitable medication, giving an overdose of a certain medicine, or using surgery when medication is unavailable are named as examples in the Explanatory Note.¹¹³

By being prominently included in all three sub-paragraphs, the informed consent of the person being medically treated appears to be an essential requirement. A procedure carried out without the patient’s informed consent generally entails a medical war crime under the *VStGB*. Despite the emphasis on this principle of general medical ethics, the sub-paragraph that specifically addresses unwarranted medical procedures does not explicate that medical ethics or generally accepted medical standards are to be adhered to. This is especially striking considering that the overall wording remained close to the wording of article 11 AP I.

This cursory and brief examination of the criminalization of medical war crimes by Germany demonstrates that an explicit and comprehensive implementation of the prohibition of unwarranted medical procedures and the related grave breach as a war crime is possible. Germany’s comprehensive regulation of medical crimes emphasizes the importance of the consent of a patient. Procedures carried out without the consent of the person to be treated are generally considered unwarranted. One regrettable omission in the German Code is that it does not explicate whether a physician should adhere to medical ethics or medical standards.¹¹⁴ As a civil law country, Germany adopted a separate criminal

¹¹¹ Zimmermann/ Geiß, see note 108, 691.

¹¹² The Explanatory Note proclaims that its application in both non- and international armed conflicts is accepted in customary international humanitarian law.

¹¹³ Deutscher Bundestag, see note 109, 28.

¹¹⁴ In comparison, the Dutch International Crimes Act expects physicians to act in accordance with “generally accepted medical norms”. Article 5 (2)(b)

code in which it created separate international crimes. That countries which have ratified the Additional Protocols, have also ratified the relevant provision comes as no surprise. Still, the German *VStGB* provides an example of a very conscious, extensive and comprehensive implementation of article 11 AP I.

V. The Prosecution of Medical War Crimes

The development of a system of individual responsibility for war crimes was not a novelty when the Geneva Conventions were adopted in 1949. In general, the prosecution of individuals for acts of war that violate customary international law has a long history.¹¹⁵ It was only after World War II that states considered the question on a larger scale: what was to happen to the innumerable persons who had committed war crimes, including the significant number of physicians implicated in criminal activities?

In the aftermath of World War II, a number of physicians were prosecuted for medical acts that were considered war crimes or crimes against humanity. Human experimentation, involvement in “euthanasia”, and medical neglect were the subject of numerous trials following the discovery of the horrific (medical) realities of the concentration camps and other places or institutions in the German Reich before and during World War II. The Allies decided that “war criminals and those who have participated in planning or carrying out Nazi enterprises in-

Wet Internationale Misdrijven, 19 June 2003, available at <http://wetten.overheid.nl/BWBR0015252/geldigheidsdatum_09-10-2009>.

¹¹⁵ McCoubrey refers to early trials resembling war crimes trials as early as 1217. H. McCoubrey, “War Crimes Jurisdiction and a Permanent International Criminal Court: Advantages and Difficulties”, *Journal of Armed Conflict Law* 3 (1998), 9 et seq. (10 – 13). One of the first trials for war crimes before an international body was the case against Peter van Hagenbach in 1474 for terrorizing the town Breisach during a power battle between the Duke of Burgundy and the Archduke of Austria. The tribunal formed under the aegis of the Holy Roman Empire which tried the case could in retrospect be classified as international, as the Empire was disintegrating and thus the cities supplying arbitrators should count as independent entities. Including a discussion of the defense of superior orders, the trial was remarkably modern. McCoubrey, see note 44, 171.

volving or resulting in atrocities or war crimes shall be arrested and brought to judgment.”¹¹⁶

The Nuremberg Charter established individual criminal liability for war crimes in article 6 (b)¹¹⁷ where it enumerated acts “for which there shall be individual responsibility.”¹¹⁸ Several states also implemented special legislation to deal with war crimes; others used existing laws and regulations.¹¹⁹ Subsequently, the occupying authorities of the four zones of annihilated Germany further prosecuted war criminals based on article II (b) of Control Council Law No. 10 which reproduced article 6 (b) of the Nuremberg Charter.¹²⁰ Persons accused of war crimes under article II could either be prosecuted by the occupying authorities of the relevant zone, by the local authorities, if feasible, or extradited to another zone or even country requesting extradition and having a *prima facie* case against the person.¹²¹ This system was based on the principle of *aut dedere aut judicare*. German suspects having committed war

¹¹⁶ Para. II (5) of the Potsdam Agreement, Agreements of the Berlin (Potsdam) Conference, 17 July – 2 August 1945, Protocol of the Proceedings, press release, 24 March 1947, reprinted in: US Department of State, *Germany 1947 - 1949 The Story in Documents*, Office of Public Affairs, March 1950, at <http://avalon.law.yale.edu/20th_century/decade17.asp>.

¹¹⁷ See comparatively article 5 (b) of the Charter of the International Military Tribunal for the Far East (IMTFE), Special Proclamation of 19 January 1946 (as amended on 26 April 1946). Without further specifying which crimes are considered war crimes, article 5 (b) IMTFE Charter only refers to “violations of the laws or customs of war” in general.

¹¹⁸ The violations of the laws or customs of war enumerated in article 6 (b) include “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 [...]”. London Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis (London Agreement) and Charter of the International Military Tribunal, 8 August 1945, UNTS Vol. 82 No. 251.

¹¹⁹ Especially in countries where the principle of *nulla poena sine lege* is considered principal, it was difficult to prosecute persons without violating general principles of criminal law. Pictet, see note 46, 396.

¹²⁰ Control Council Law No. 10, Punishment of Persons Guilty of War Crimes, Crimes Against Peace and Against Humanity, 20 December 1945, in: *Official Gazette Control Council for Germany* 2 (1946), 50 – 55.

¹²¹ Arts III and IV, Control Council Law No. 10, see note 120.

crimes against Germans were tried by German authorities.¹²² Despite the success of these international trials, a disparity became apparent: “victory [proved] as a *de facto* absolution for violations of the *jus in bello*” on the part of the victors.¹²³

Although the international prosecution of individuals has received much attention, mostly due to the establishment of the ICTY, ICTR and the ICC, the national prosecution of war crimes is still considered the backbone of the system of accountability under Geneva and international criminal law.¹²⁴ Primarily, it is the duty of the national state of the perpetrator or victim, or on whose territory the crime was committed to prosecute grave breaches of the Geneva Conventions and other war crimes, if criminalized.¹²⁵ Only in the second place should a state extradite persons to another country or to an international tribunal. Due to state sovereignty, the prosecution of war criminals by the state itself remains the norm, even if the jurisdictions of the ICTY and the ICTR determine otherwise by claiming primacy over the limited number of crimes under their jurisdiction.¹²⁶ The Rome Statute is based on a different principle, namely that the ICC “shall be complementary to national criminal jurisdictions.”¹²⁷ The ICC does not claim primacy over national prosecutions. Neither does the Rome Statute expressly require state parties to implement its provisions, or calls on them, to institute universal jurisdiction. Yet, to be able to investigate, prosecute, and “exercise [...] jurisdiction over those responsible for international

¹²² “Such tribunal may, in the case of crimes committed by persons of German citizenship or nationality against other persons of German citizenship or nationality, or stateless persons, be a German Court, if authorized by the occupying authorities.” Article III (d), Control Council Law No. 10, see note 120.

¹²³ McCoubrey, see note 44, 173. For other reasons that may present obstacles to national prosecutions of international crimes, see J. Kleffner, *Complementarity in the Rome Statute and National Criminal Jurisdictions*, 2008, 48 – 54.

¹²⁴ Kleffner, see note 123, 9, 101.

¹²⁵ R. Wedgwood, “National Courts and the Prosecution of War Crimes”, in: G. Kirk McDonald/ O. Swaak-Goldman, *Substantive and Procedural Aspects of International Law - Commentary*, 2000, 394.

¹²⁶ Article 9 (2) ICTY Statute and article 8 (2) ICTR Statute.

¹²⁷ Preamble and article 1 Rome Statute.

crimes”, states are advised to implement the provisions in order to be able to prosecute international crimes.¹²⁸

National prosecutions of medical war crimes are sparse. The few prosecutions focusing on medical aspects of war crimes, rarely explicitly discussed the crimes as “medical war crimes”.¹²⁹ International case law is also, with the exception of World War II jurisprudence, sorely lacking.¹³⁰ Despite the increase in the number of prosecutions for international crimes since the late 20th century,¹³¹ little attention is paid to medical war crimes. This is the case despite article 11 (4) AP I, its implementation in some national legislations, and its partial codification in the Rome Statute. Politics seem to limit the scope of this broad principle.¹³²

Due to the lack of recent case law, an examination of international medical war crimes trials is almost exclusively limited to the available jurisprudence of the international war crimes trials after World War II. Only one example concerns a recent international tribunal, the medical neglect of Tutsi patients during the armed conflict in Rwanda as prosecuted before the ICTR. This article will thus scrutinize the best known trial of medical war crimes, the *Doctors’ Trial* that dealt with the criminal experiments by physicians in the German Reich, and also look at the only recent example of an international crime, the *Ntakirutimana Trial*, committed during an armed conflict with a significant medical aspect. The analysis highlights how these two courts addressed medical crimes. Their approach regarding such crimes can illuminate and further

¹²⁸ Pursuant to preambular para. 6 and article 17 Rome Statute, it only requires states to investigate and prosecute. In general on complementarity, see Kleffner, see note 123.

¹²⁹ For example, “euthanasia” was prosecuted by the Federal Republic of Germany under the regular Criminal Code, see the Judgment in the *Frankfurt Euthanasia Trial*, in: A.L. Rüter-Ehlermann/ C.F. Rüter, *Justiz und NS-Verbrechen - Sammlung deutscher Strafurteile wegen Nationalsozialistischer Tötungsverbrechen 1945 - 1966*, Vol. I, 1968, Lfd. Nr. 017, 303 - 379. The German Democratic Republic, on the other hand, prosecuted “euthanasia” as a crime against humanity, see the Judgment in the *Dresden Euthanasia Trial*, in: Rüter, see note 27, 495 - 511. For a thorough documentation of the trial, see J.S. Hohmann, *Der ‘Euthanasie’-Prozess Dresden 1947 - eine zeitgeschichtliche Dokumentation*, 1993.

¹³⁰ Dörmann, see note 71, 309.

¹³¹ Kleffner, see note 123, 34 - 38.

¹³² Wedgwood, see note 125, 396.

the interpretation and development of the concept of medical war crimes.

1. The *Doctors' Trial* of 1947

The case of the United States of America against *Karl Brandt* and 22 other accused,¹³³ known as the “*Doctors' Trial*” or “*Medical Case*”, was the first to be tried by the US occupying force at the Nuremberg Military Tribunal.¹³⁴ Of the 23 defendants, only three were not medical doctors, namely *Wolfram Sievers*, *Rudolf Brandt* and *Viktor Brack*.¹³⁵ The four Counts with which the defendants were charged were: (a.) common design or conspiracy, (b.) war crimes, (c.) crimes against humanity, and (d.) membership in a criminal organization. The charge under Count (2) held that,

“between September 1939 and April 1945 all of the defendants herein unlawfully, willfully and knowingly committed war crimes as defined in article II of Control Council Law No. 10, in that they were principals in, accessories to, ordered, abetted, took a consenting part in, and were connected with plans and enterprises involving medical experiments without the subject’s consent, upon civilians and members of armed forces of nations then at war with the Ger-

¹³³ Including *Dr. Ruff* and *Dr. Romburg* who were mentioned previously and one female indictee: *Herta Oberhauser*.

¹³⁴ The *Doctors' Trial*, see note 23. Criminal experiments by the Japanese armed forces on prisoners of war, also carried out during World War II, were prosecuted by a Soviet Military Tribunal in 1949. There is not much information available on this trial, see Military Tribunal of the Primorye Military Area, *Materials on the Trial of former Servicemen of the Japanese Army charged with manufacturing and employing Bacteriological Weapons*, 1950. Unfortunately the transcripts of the trial are not accessible. J.W. Powell et al., “Special Report: Japan’s Biological Weapons: 1930 – 1945”, *The Bulletin of the Atomic Scientists* 10 (1981), 43 et seq.

¹³⁵ 18 of the accused had been NSDAP party members and the majority had held an influential position within either the Wehrmacht or the SS. For details, see note 23, Vol. I, Opening Statement of the Prosecution by Brigadier General Telford Taylor, 9 December 1946, 29 – 36. A representative psychiatrist of the French Scientific Commission on War Crimes, Françoise Bayle, professionally assessed the state of mind of the accused. See F. Bayle, *Croix Gammée contre Caducée: les Expériences Humaines en Allemagne pendant la Deuxième Guerre Mondiale*, l’Office Militaire de Sécurité, 1950.

man Reich and who were in the custody of the German Reich in exercise of belligerent control, in the course of which experiments the defendants committed murders, brutalities, cruelties, tortures, atrocities and other inhuman acts.”

The criminal experiments were high altitude, freezing, malaria, mustard gas, sulfanilamide, bone, muscle and nerve regeneration, bone transplant, sea-water, epidemic jaundice, sterilization, typhus (and other vaccines), poison, and explosives experiments. Furthermore, *R. Brandt* and *Sievers* were specifically charged with the illegal endeavor of killing 112 Jewish persons for completing a skeleton collection for the Reich's University of Strasbourg. *Blome* and *R. Brandt* with the general murder and mistreatment of Polish nationals, and lastly *K. Brandt*, *Blome*, *Brack*, and *Hoven* for involvement in the “euthanasia” program.¹³⁶ All of these crimes were alleged to be in violation of arts 4, 5, 6, 7, and 46 of the Hague Regulations of 1907,¹³⁷ and of arts 2, 3, and 4 of the Geneva Convention relative to the Treatment of Prisoners of War of 1929, the laws and customs of war, general principles of criminal law as derived from the criminal laws of all civilized nations, national penal laws and article II of the Control Council Law No. 10.¹³⁸ Of the 23 accused,

¹³⁶ Marrus believes that an unbalanced amount of emphasis was placed on the experiments, whereas, while not denying the unimaginable cruelty and barbarity of them, the “euthanasia” and sterilization programs had led a much greater number of people to death and should have been given more attention during the trial. M.R. Marrus, “The Nuremberg Doctors’ Trial and the Limitations of Context”, in: P. Heberer/ J. Matthäus, *Atrocities on Trial - Historical Perspectives on the Politics of Prosecuting War Crimes*, 2008, 114 – 115.

¹³⁷ These Regulations in general concern prisoners of war and their treatment. Article 46 concerns the treatment of the population under the military authority over a hostile state. Convention (IV) respecting the Laws and Customs of War on Land and its Annex: Regulations concerning the Laws and Customs of War on Land. The Hague, 18 October 1907, *U.K.T.S.* 9 (1910), Cd. 5030.

¹³⁸ The *Doctors’ Trial*, Vol. I, Indictment, 11 – 16, see note 23. Comparable to United States Military Tribunal II, *United States of America v. Erhard Milch*, *Trials of War Criminals Vol. II, Judgment (16 April 1947) Indictment*, 362 – 363. The *Milch* case was tried almost simultaneously, beginning on 2 January 1947 – a month after the *Doctors’ Trial*. Its Judgment was handed down before that of the *Doctors’ Trial*.

seven, all members of the SS, were sentenced to death,¹³⁹ nine were sentenced to prison terms,¹⁴⁰ and seven were acquitted.¹⁴¹

In this case dealing almost exclusively with doctors and exclusively with medical war crimes, it was indispensable that the prosecution addressed medical ethics. According to *Telford Taylor's* opening statement,

“The general decline of German medical conduct and the poisoning of German medical ethics which the Nazis brought about laid the basis for the atrocious experiments of which the defendants are accused.”¹⁴²

Taylor claimed that the defendants had all violated the *Hippocratic Oath*, particularly the principle of *primum non nocere* (first do no harm).¹⁴³ Basic standards in the treatment of patients were violated by the physicians in charge of the experiments: the research subjects were never asked if they consented to the research, often forced into the medical wards,¹⁴⁴ and not informed as to what was being done to them. For example during the bone and muscle transplant experiments, the research subjects were repeatedly surgically operated on whereby pieces of bone or muscles were extracted. Most had not consented and all were unaware of the painful consequences and lasting scars of such an operation.¹⁴⁵ Post-operative care was only given if relevant for the experiments: if they survived the torturous experiments,¹⁴⁶ the research sub-

¹³⁹ *K. Brandt, Gebhardt, Mrugowsky, Brack, Sievers, R. Brandt, and Hoven* were convicted and hanged on 2 June 1948.

¹⁴⁰ *Handloser, Schröder, Genzken, Poppendick, Rose, Becker-Freyseng, Beiglböck, Oberheuser, and Fischer* were convicted and sentenced to prison terms.

¹⁴¹ *Blome, Rostock, Ruff, Romburg, Weltz, Schäfer, and Pokorny* – all not members of the SS – were acquitted.

¹⁴² *The Doctors' Trial*, Vol. I, Opening Statement of the Prosecution by Brigadier General Telford Taylor, 9 December 1946, see note 23, 61.

¹⁴³ *Taylor*: “All of them violated the Hippocratic commandments which they had solemnly sworn to uphold and abide by, including the fundamental principles never to do harm ‘primum non nocere’”. *Ibid.*, Vol. I, Opening Statement of the Prosecution by Brigadier General Telford Taylor, 9 December 1946, 68.

¹⁴⁴ *Ibid.*, Vol. I, Voluntary Participation of Experimental Subjects, 980 – 992.

¹⁴⁵ *Ibid.*, Vol. I, Testimony of witness, Ms. Karolewska, 412 – 413.

¹⁴⁶ Most experiments resulted in the death of the research subject, see for example, *ibid.*, Vol. I, Report of 10 October 1942 on Cooling Experiments on Human Beings, by *Holzlohner, Rascher and Fink*, 230 seq.

jects were returned to the barracks in the camps with untreated wounds. Most were unable to work or function properly afterwards which practically meant death in a concentration camp. Those that survived all this still carry the scars.

This all raised serious questions of the standards of medical ethics in Germany at that time. During the trials, the questions of medical ethics and whether an experiment using human subjects was ethically justifiable were raised regularly.¹⁴⁷ Several of the defendants referred to medical ethics in their pleas and whether the experiments had been in line with certain principles.¹⁴⁸ The precise principles were not explicated; neither by the prosecution nor by the Defense. In *Taylor's* opinion,

“[w]ere it necessary, one could make a long list of the respects in which the experiments which these defendants performed departed from every known standard of medical ethics. But the gulf between these atrocities and serious research in the healing art is so patent that such a tabulation would be cynical.”¹⁴⁹

The only principle that was subject of much debate was the principle of consent. With every experiment, during every examination, the question arose as to whether the research subjects had volunteered to be experimented upon.¹⁵⁰ Generally, it was assumed that none of the experiments had been conducted on voluntary research subjects who had consented to the experiments.¹⁵¹ By this, the tribunal demonstrated the importance of consent, if not yet called informed consent.

¹⁴⁷ *Taylor* concentrated more on the political nature of the crimes and less on the impalpable concept of medical ethics. Weindling, see note 12, 172.

¹⁴⁸ See the *Doctors' Trial*, Vol. II, Final Plea Defendant Gebhardt, 71 – 73 and Final Plea Defendant *Beiglböck*, 74 – 77, see note 23.

¹⁴⁹ By the Prosecution, see *ibid.*, Vol. I, Opening Statement of the Prosecution by Brigadier General *Telford Taylor*, 9 December 1946, 71. Otherwise, references can be found throughout the witness examinations.

¹⁵⁰ See testimonies by both witnesses and defendants. For example, *ibid.*, Vol. I, 180, 188, 385, 980 seq.

¹⁵¹ The judges of the trial established ten principles for ethically sound experiments on humans, the Nuremberg Code, *ibid.*, Judgment, Vol. II, 181 – 182. On the Nuremberg Code, see U. Schmidt, “The Nuremberg Doctors' Trial and the Nuremberg Code”, in: U. Schmidt/ A. Frewer, *History and Theory of Human Experimentation*, 2007.

Some critical notes concerning the trial are in order.¹⁵² First of all, a common criticism that cannot be overstated is that the trial did not try all those who should have been tried.¹⁵³ Of course this was partly due to the fact that certain suspects had either committed suicide (e.g. the chief physician of Auschwitz, Standortarzt *Dr. Wirths*, committed suicide in police custody in 1945),¹⁵⁴ passed away (e.g. Prof. *Carl Clauberg* died in police custody on 9 August 1957),¹⁵⁵ or could not be located (e.g. until the late 1980s, *Dr. Joseph Mengele's* whereabouts were unknown).¹⁵⁶ It is questionable whether those who were tried were thus representative of the crimes committed in the name of medicine by the Nazi apparatus.

A further criticism is that the medical expert witness of the prosecution, *Prof. Andrew Ivy*, allegedly had insufficient knowledge when questioned directly by the accused¹⁵⁷ and was criticized for bias.¹⁵⁸ A

¹⁵² See also H.H. Freyhofer, *The Nuremberg Medical Trial - The Holocaust and the Origin of the Nuremberg Medical Code*, 2004, 86 – 103.

¹⁵³ There were also national prosecutions regarding the experiments. An example is the trial of *Dr. Kurt Heissmeyer* (Rüter, see note 27, Lfd. Nr. 1057, 613 – 631). *Taylor* admitted that not all “co-conspirators” were on trial. The *Doctors' Trial*, Vol. I, 68, see note 23.

¹⁵⁴ H. Langbein, *Der Auschwitz-Prozess: eine Dokumentation*, 2nd edition, 1995, 581.

¹⁵⁵ R.J. Lifton, *The Nazi Doctors - Medical Killing and the Psychology of Genocide*, 1986, 277 – 278; C. Dirks, “Die Verbrechen der anderen” - *Auschwitz und der Auschwitz-Prozeß der DDR: Das Verfahren gegen den KZ-Arzt Dr. Horst Fischer*, 2006, 195. On *Clauberg*, see the *Doctors' Trial*, Vol. I, 699 – 701, see note 23. Also, see his research proposal to Reich Leader of the SS, *Heinrich Himmler*, where he compares the research on female Auschwitz inmates to that on rabbits, 724 – 727, *ibid.*

¹⁵⁶ An international investigation, instigated by the US Department of Justice Office of Special Investigations, followed a thread on *Joseph Mengele* to a couple in Sao Paolo in whose apartment his diaries and letters were found. Remains of a body found at a graveyard nearby were also identified as *Mengele*. He is believed to have died in 1979. For a detailed account of the events of this discovery, see Criminal Division, Department of Justice, *Report of the Office of Special Investigation (OSI) - Striving for Accountability in the Aftermath of the Holocaust*, December 2006, 390 – 405. Lifton came to the same conclusion based on other sources. Lifton, see note 155, 382.

¹⁵⁷ He was questioned by defendants *Ruff*, *Rose* and *Beiglböck* personally. They mostly directed their cross-examination at lethal experiments conducted in the United States and *Ivy's* expert knowledge. Transcript of the

further medical expert, next to *Ivy* and the German expert *Dr. Leibbrand*, would have increased the credibility of the proceedings. Lastly, the fact that several of the accused were recruited by the U.S. Military after the war,¹⁵⁹ was an impediment to the neutrality of the trial. The use of the results of the experiments by the U.S. military should have been broadly discussed and assessed by the U.S. Tribunal. A further often heard criticism was the *tu quoque* argument: the US army had also conducted human experiments without the consent of the research subjects.¹⁶⁰ These deficiencies tarnished the image of the tribunal. Nevertheless, because the trial was “concerned with permissible experiments on humans, and with wider questions as to what constituted ethical and non-ethical experiments”,¹⁶¹ it is the only clearly “medical” trial in history. In the aftermath of World War II and ever since, there has not been a single trial that dealt exclusively with medical war crimes.¹⁶²

2. The *Ntakirutimana Trial* of 2003

Before the ICTR, one physician was tried for his actions during the genocide in 1994.¹⁶³ *Dr. Gérard Ntakirutimana* was physician and

Doctors Trial, Direct Cross-Examination Defendant Ruff, 13 June 1947, 9285 – 9295; 14 June 1947, 9297 – 9315. Direct Cross-Examination Defendant Rose, 16 June 1947, 9364 – 9378. Direct Cross-Examination by Defendant *Beiglböck*, 16 June 1947, 9381 – 9404.

¹⁵⁸ Schmidt, see note 151, 98 – 99.

¹⁵⁹ *Blome* was hired by the US Army Medical Corps three years after the war, *Ruff* by the Aero-Medical Center of the US Air Forces in 1945. Freyhofer, see note 152, 87 and 92.

¹⁶⁰ The *Doctors' Trial*, Vol. I, 994 – 1002, Vol. II, 90 – 96, see note 23. Also, for example, Transcript of the Doctors Trial, Direct Cross Examination by *Dr. Sauter*, 14 June 1947, 9319 – 9320; Direct Cross Examination by Defendant Rose, 16 June 1947, 9368 – 9373.

¹⁶¹ Schmidt, see note 151, 82.

¹⁶² Other post World War II trials also addressed medical crimes, but hardly ever as war crimes. The *Euthanasia Trials* conducted in both the Federal Republic of Germany and the German Democratic Republic were medical trials in the sense that they addressed purely medical crimes, but the FRG addressed “euthanasia” as murder under the German *Strafgesetzbuch*, and the GDR addressed it as a crime against humanity. The *Frankfurt Euthanasia Trial*, see Rüter-Ehlermann/ Rüter, see note 129. The *Dresden Euthanasia Trial*, see Rüter, see note 27.

¹⁶³ *Ntakirutimana Trial Judgment*, see note 27.

medical director at Mugonero hospital within the Mugonero complex, in the Kibuye prefecture in Rwanda. Although the initial indictment of 20 October 2000 did not charge *Ntakirutimana* with any medical crimes,¹⁶⁴ the prosecution in its Pre Trial Brief charged *Ntakirutimana* under Count 5 with a crime against humanity, namely “other inhuman acts” pursuant to article 3 (i) ICTR Statute, by “closing the medical store, denying treatment to Tutsi patients, and cutting off utility supplies.”¹⁶⁵ As *Ntakirutimana* locked the medicine storage room and took the keys with him, the patients could also not be provided with medical care after his departure.¹⁶⁶ The prosecution alleged that *Ntakirutimana* by abandoning his hospital on 14 April 1994 while hundreds of wounded, mostly Tutsi patients were requiring treatment had denied them medical care.¹⁶⁷

The Trial Chamber decided that there was insufficient evidence to prove that *Ntakirutimana* had acted with discriminatory intent, an element of crimes against humanity under article 3 ICTR Statute.¹⁶⁸ It found that “[under] these circumstances a remark by [Ntakirutimana] to the effect that he lacked the necessary means to treat Tutsi arriving at the hospital with shrapnel wounds [...], or that he had no medication for Tutsi [...was] not in itself conclusive evidence of any discriminatory intent.”¹⁶⁹ Almost all patients were Tutsi at that point in time and medical supplies were generally scarce, so a discriminatory intent could not

¹⁶⁴ ICTR *Prosecutor v. Elizaphan Ntakirutimana, Gérard Ntakirutimana & Charles Sikubwabo*, Mugonero Indictment, 20 October 2000, paras 4.6 – 4.7.

¹⁶⁵ Prosecution’s Pre Trial Brief, Annex B. See *Ntakirutimana Trial Judgment*, see note 27, paras 137 – 153.

¹⁶⁶ *Ibid.*, paras 137 – 138.

¹⁶⁷ For another case addressing the question of the denial of medical care as a war crime or crime against humanity, see B.R. van Cassatie, *Trial of Fritz Georg Hermann Pilz* [“The Pilz Case”], *NederlJ* 1950, Judgment, 5 July 1950.

¹⁶⁸ *Ntakirutimana Trial Judgment*, see note 27, para. 817. Pursuant to article 3 ICTR Statute, a crime against humanity is committed “when committed as part of a widespread or systematic attack against any civilian population on national, political, ethnic, racial or religious grounds.” Cassese defines this special criminal intent as follows: “The intent must be to subject a person or group to discrimination, ill-treatment, or harassment, so as to bring about great suffering or injury to that person or group on religious, political or other grounds.” Cassese, see note 40, 82.

¹⁶⁹ *Ntakirutimana Trial Judgment*, see note 27, para. 151.

be inferred solely from these remarks. Yet the Trial Chamber determined that *Ntakirutimana* had abandoned his Tutsi patients when leaving the hospital on 14 April 1994 which the Trial Chamber noted “as part of the general context” of the case.¹⁷⁰ *Ntakirutimana* was acquitted of the charges of a crime against humanity for inhuman treatment by denial of medical care.¹⁷¹ He was found guilty of genocide and sentenced to 25 years’ imprisonment.¹⁷²

It is clear that the medical aspects of the crimes allegedly committed by *Ntakirutimana* during the armed conflict only play a subsidiary role in the trial. The dominating aspect was his acts as a génocidaire after he had left the hospital. Hence, it comes as no surprise that the denial of medical care as a crime against humanity was not given much attention. However, the fact that it was added to the charges indicates that the prosecution at least considered this to be a circumstance worth mentioning. Further, the Trial Chamber considered *Ntakirutimana*’s role as a physician in the events as an aggravating circumstance. As a doctor, he had been more educated than most of the people in the region. The Trial Chamber found it,

“particularly egregious that, as a medical doctor, he took lives instead of saving them. He was accordingly found to have abused the trust placed in him in committing the crimes of which he was found guilty.”¹⁷³

With this reasoning, the Trial Chamber implied that *Ntakirutimana*, as a physician, had to meet higher moral standards. The assumptions

¹⁷⁰ Ibid., para. 153.

¹⁷¹ Ibid., paras 878, 924.

¹⁷² His conviction for genocide was criticized in literature for lack of discriminatory intent. O. Olusanya, “Commentary to Judgment, *Prosecutor v. Elizaphan Ntakirutimana and Gérard Ntakirutimana*”, in: A. Klip/ G. Sluiter, *Annotated Leading Cases of International Criminal Tribunals*, 2008, 890 – 891.

¹⁷³ *Ntakirutimana Trial Judgment*, see note 27, para. 910. The Appeals Chamber did not discuss the acquittal of the inhumanity charges. It did, however, discuss *Ntakirutimana*’s appeal argument that the Trial Chamber had come to a conclusion on the denial of medical care in para. 153 based on an “impression” that was not proven beyond reasonable doubt. According to the Appeals Chamber, the Trial Chamber had indeed used an “improper standard of proof” but as there was sufficient other evidence, also by the accused himself, it judged the error on the part of the Trial Chamber as “harmless”. ICTR *Prosecutor v. Elizaphan and Gérard Ntakirutimana*, Appeals Chamber Judgment, 13 December 2004, paras 163 – 164.

the Trial Chamber made here would have benefited from a more elaborate explanation.

3. General Observations concerning Prosecution

Prosecutions for medical war crimes *per se* are rare.¹⁷⁴ With the horrific medical crimes committed in the course of World War II – the physicians’ involvement in the extermination machinery, their experiments and their role in the “euthanasia” process – crimes committed by physicians during armed conflict had for a short period come to the center of legal attention. The lapse of time between the wave of trials for medical crimes and the *Ntakirutimana Trial* demonstrates the lack of interest in such crimes in international law and politics.

What can be surmised is that certain medical actions are considered criminal, namely conducting unscientific and non-consensual experiments, killing protected persons in the name of “euthanasia” or science, and the denial of medical care to certain persons or groups of persons. These actions have in common that they are all carried out by physicians or medical personnel: the supposed experiments were carried out by physicians in the name of medicine and science, physicians injected patients in their institutions or hospitals with lethal substances or wrote dishonest death certificates, and physicians denied medical care that they could provide to those in need. All these actions are undeniably medical. Yet it should be made clear that in the case of the experiments and the “euthanasia” program, what contributed to the medical context of the crimes should be classified as “pseudo-medical” rather than having to do with the usual work of the medical profession. Pursuant to the generally recognized principles of beneficence and non-maleficence, physicians should work towards healing and alleviating suffering, not towards endangering the health of and killing patients.¹⁷⁵

¹⁷⁴ During the Cold War, all trials of international crimes were rare. Kleffner, see note 123, 35.

¹⁷⁵ Beneficence and non-maleficence are two generally accepted principles of medical ethics. See, for example, Beauchamp/ Childress, see note 18. One of the oldest principles of medical and biomedical ethics is that of non-maleficence. It is epitomized by the phrase *primum nil nocere* – first do no harm. This sentence does not stem from the *Hippocratic Oath*, but the principle can be inferred from the pledge to refrain “from what is to [the

It is regrettable that the tribunal in the *Doctors' Trial*, a trial clearly addressing medical crimes only, did not classify the crimes committed by physicians as “medical” war crimes. The judges would have had ample opportunity to discuss what distinguished these crimes from regular war crimes. A specification in a more focused discussion would have been insightful and beneficial for the development of the concept of medical war crimes. Understandably the focus on the medical aspects was lost in the attention paid to the overall atrocities that had been committed. Even though the prosecution addressed the medical ethics governing the behavior of these physicians, the tribunal in its judgment concentrated on the role of the physicians in the overall machinery, on the nationality of the victims, and their consent. The characteristics and ethics of physicians as such did not figure in the judgment.

In comparison, the ICTR in the *Ntakirutimana Trial*, though only succinctly addressing the charge of denial of medical care, had higher expectations of a physician to act morally and to adhere to higher ethical codes than regular defendants. It considered that *Ntakirutimana* should have acted differently “as a doctor” and especially should have set an example for others.¹⁷⁶ From this judgment, it can be surmised that doctors are at times held to higher standards.¹⁷⁷

From the judgment by the tribunal in the *Doctors' Trial*, the most relevant conclusion for medical war crimes is the importance of the consent of a person to medical procedures, especially experiments. The consent of a patient can never justify or excuse medical war crimes.¹⁷⁸ The informed and freely given consent of a patient or research subject is thus a prerequisite for ethical medical conduct. The emphasis on the consent of research subjects (or the lack thereof) can be seen as an indicator of the acceptance of the principle. It was echoed in the

ill's] harm or injustice”. Translation as used in S.H. Miles, *The Hippocratic Oath and the Ethics of Medicine*, 2004. The principle of beneficence, on the other hand, entails “a moral obligation to act for the benefit of others”. Beauchamp/ Childress, see note 18, 197.

¹⁷⁶ *Ntakirutimana Trial Judgment*, see note 27, para. 910.

¹⁷⁷ See also the judgment in the *Frankfurt Euthanasia Trial* where it states that: “Hätte der Angeklagte hohe sittliche Werte und einen starken Berufsethos in sich getragen, so hätte er erkennen müssen, dass das, was dort geschah, weder vom ärztlichen noch vom menschlich-sittlichen Standpunkt aus tragbar war”, see Rüter-Ehlermann/ Rüter, see note 129, 358.

¹⁷⁸ Consent of the research subjects was also used as a defense by most of the accused. It was, however, adamantly rejected by the tribunal. See the discussion of defenses below.

German *VStGB* and the Elements of Crimes to article 8 (2)(b)(x) Rome Statute. Additionally, the judgment in the *Doctors' Trial* established the so-called Nuremberg Code. The Nuremberg Code provides ten ethical principles that should be followed when conducting research on human subjects.¹⁷⁹

Even though medical war crimes are committed in all armed conflicts, the small number of prosecutions and the silence of courts on the specific medical aspects of such crimes leads to the discouraging conclusion that there is *de facto* impunity for medical war crimes. The report by the ICRC raises the suspicion that the example of *Ntakirutimana* is not the only modern example of physicians involved in acts that could amount to medical crimes. Nonetheless, although they should be universally prosecutable pursuant to the above described system, such crimes have so far rarely been prosecuted by international or national tribunals or courts.

VI. Possible Defenses to Medical War Crimes

Like most national systems, international criminal law recognizes two categories of circumstances excluding criminal liability: justifications and excuses.¹⁸⁰ A justification is a circumstance whereby an act that violates the law is considered lawful due to special circumstances. An excuse is a circumstance whereby a violation of the law is considered unlawful yet not punishable because the relevant *mens rea* is lacking.¹⁸¹ For a medical grave breach, the required *mens rea* is “willfulness”, as established in article 11 (4) AP I, or to have the requisite “intent and knowledge”, as established in article 30 Rome Statute. Thus it needs to be proven whether the physician’s criminal will was absent when com-

¹⁷⁹ The so-called Nuremberg Code can be found in the Judgment itself. The *Doctors' Trial*, Vol. II, 181 – 183, see note 23. The Judgment found that “in the medical experiments which have been proved, these ten principles were much more frequently honored in their breach than in their observance.”

¹⁸⁰ This distinction was abandoned in the Rome Statute, choosing “exclusion of criminal responsibility” instead. I. Bantekas, “Defences in International Criminal Law”, in: D. Mcgoldrick et al., *The Permanent International Criminal Court - Legal and Policy Issues*, 2004, 266.

¹⁸¹ A. Cassese, “Justifications and Excuses in International Criminal Law”, in: Cassese et al., see note 69, 951 – 952.

mitting a medical war crime or whether his actions, though unlawful, should not be punished.

Most defenses against war crimes are based on superior orders, mistake of fact and duress, or, for medical crimes, on the consent of the victim. Many physicians accused of medical war crimes committed under the Nazi regime, further based their defense on the fact that they had attempted to sabotage the work of the Nazis and had cooperated so that they could somehow improve the conditions of those persons in their care.¹⁸² This defense will not be discussed as it lacked a legal element and often, additionally, was not credible. An analysis of the legally relevant excuses and justifications will be carried out below.

1. Superior Orders

Even though nothing can or should diminish the inhumanity of the experiments and the guilt of those persons in charge of and conducting them, the defense of several of the physicians in the *Doctors' Trial* that they had been unable to disobey orders given by superiors cannot be ignored.¹⁸³ The defense was aimed at negating liability due to the impossibility to disobey orders by superiors.

The defense of "superior orders" has rarely been recognized in international criminal law.¹⁸⁴ After World War II, article 8 Nuremberg Charter and article II (4)(b) Control Council Law No. 10 denied this defense and, as a slight deviation from the principle of absolute liability, established superior orders as a mitigating circumstance.¹⁸⁵ Article 7 (4)

¹⁸² This defense only succeeded for *Lucas* in the Frankfurt Auschwitz Trial due to the credibility of his animosity. See Rüter-Ehlermann/ Rüter, see note 129, 620.

¹⁸³ For example, the *Doctors' Trial*, Vol. II, Final Statement of Defendant Fischer, 169 – 170, see note 23.

¹⁸⁴ A rare example is the Supreme Court of Leipzig, *Judgment in Case of Commander Karl Neumann* [*The Dover Castle Case*], Judgment, 4 June 1921, *AJIL* 16 (1922), 707 – 708. In the *Llandoverly Castle Case* the defense of superior orders was denied as the attack on the shipwrecked survivors was manifestly illegal. Supreme Court of Leipzig, *Judgment in Case of Lieutenants Dithmar and Boldt* [*The Llandoverly Castle Case*], Judgment, 16 July 1921, *AJIL* 16 (1922), 721 – 722.

¹⁸⁵ Article II (4)(b) Control Council Law No. 10, see note 120: "The fact that any person acted pursuant to the order of his Government or of a superior

ICTY Statute and article 6 (4) ICTR Statute followed this line, as does customary international law.¹⁸⁶ Article 33 Rome Statute re-introduced the defense of superior orders yet limited it according to the “manifest illegality principle.”¹⁸⁷ Superior orders can excuse war crimes when the perpetrator was under a legal obligation to obey the order, did not know the order was unlawful, and the order was not manifestly unlawful. An order is manifestly unlawful if “a layman with only a basic knowledge of international humanitarian law should have considered the action to be unlawful and to constitute a punishable crime.”¹⁸⁸ Thus only if ignorance is excusable, can liability be denied.¹⁸⁹ It remains to be seen whether the Rome Statute’s approach will affect customary international law.

For the defense to succeed, the physician has to have been in a superior-subordinate relationship with the person ordering the unlawful deed¹⁹⁰ and the order has to have resulted in a legal obligation. Yet an order to carry out an unwarranted medical procedure, a non-consensual experiment, or a mutilation is always manifestly unlawful.¹⁹¹ Not only would such “medical” procedures violate medical ethics, but this should alert physicians that unwarranted medical procedures are war crimes. Moreover, the defense can never succeed “where the one to whom the

does not free him from responsibility for a crime, but may be considered in mitigation.”

¹⁸⁶ P. Gaeta, “The Defence of Superior Orders: The Statute of the International Criminal Court versus Customary International Law”, *EJIL* 10 (1999), 172 et seq. Gaeta comes to the conclusion that customary international law in this respect has emerged, 186.

¹⁸⁷ This principle is a compromise between the recognition of the defense *per se* (the *respondeat superior* doctrine) and the absolute liability approach. A. Eser, “‘Defences’ in War Crimes Trials”, in: Y. Dinstein/ M. Tabory, *War Crimes in International Law*, 1996, 259.

¹⁸⁸ A. Zimmermann, “Superior Orders”, in: Cassese et al., see note 69, 970.

¹⁸⁹ United States Military Tribunal II-A, *United States of America v. Otto Obendorff, et al.* [“The *Einsatzgruppen* Trial”], *Trials of War Criminals* Vol. IV, Judgment (9 April 1948), 473.

¹⁹⁰ This person could be both military or civilian. Yet in the case of the latter, the civilian superior would have to have a certain degree of control over the physician. *Ibid.*, 480. See also *mutatis mutandi*, *Čelebići Trial Judgment*, para. 378.

¹⁹¹ C. Garraway, “Superior Orders and the International Criminal Court: Justice delivered or justice denied”, *Int’l Rev. of the Red Cross* 81 (1999), 785 et seq. (790).

order is given has free latitude of decision whether to accept the order or reject it.”¹⁹² The physicians in the cases discussed were generally able to disobey the orders without facing consequences that would have justified the crimes.¹⁹³ As the problem of superior orders is an undeniable problem for doctors within the military, article 16 AP I has taken up just this point: no person giving medical care can be ordered to act in violation of medical ethics and, possibly secondarily, the laws of war. Under international humanitarian law, physicians are thus at all times justified to disobey an illegal order to commit a medical war crime.¹⁹⁴ This means that the defense of superior orders would probably never succeed regarding medical war crimes; it could only act as a mitigating circumstance.¹⁹⁵

2. Mistake of Fact

A physician having committed a medical war crime out of an “honest and reasonable belief that there existed factual circumstances making his conduct lawful” could excuse his unlawful conduct based on the defense of a mistake of fact.¹⁹⁶ Though the Statutes of the ICTR and ICTY do not recognize this defense, article 32 (1) Rome Statute reintroduced the exclusion of criminal responsibility due to a mistake of fact if the mental element of a crime is negated.¹⁹⁷ For a physician working in an armed conflict to rely on a mistake of fact defense, he would have to be able to prove that he held the honest and reasonable

¹⁹² The *Doctors’ Trial*, Vol. II, Judgment, 227, see note 23.

¹⁹³ In the *Doctors’ Trial*, the defense of superior orders was rejected. *Ibid.*, Vol. II, Judgment, 227; 263.

¹⁹⁴ If despite this a physician feared that not carrying out an order would threaten his life, he should resort to the defense of duress, as discussed below.

¹⁹⁵ K. Ambos, “Zur strafbefreienden Wirkung des ‘Handelns auf Befehl’”, *Juristische Rundschau* 52 (1998), 221 et seq. (225).

¹⁹⁶ Cassese, see note 40, 251. The defense of mistake of law aims at a misconception regarding a legal rule or concept. It does not apply here. Eser, see note 187, 267. It was also denied in most trials addressing medical crimes, for example, the *Doctors’ Trial*, see O. Triffterer, “Article 32: Mistake of Fact or Mistake of Law”, in: Triffterer, see note 71, 897.

¹⁹⁷ For a critical evaluation of the Rome Statute’s defense regime, especially regarding the defense of mistake of fact in article 32 Rome Statute, see Eser, see note 91, 934 – 946.

belief that his actions at the time of the offense were lawful. This lack of willfulness – the required *mens rea* for medical war crimes – would negate the criminal *mens rea*.¹⁹⁸ The U.S. Court Martial in *William L. Calley* succinctly restated this principle: “the mistaken belief must be of such a nature that the conduct would have been lawful had the facts actually been as they were believed to be.”¹⁹⁹ An example would be the belief that the medical procedure was the standard procedure at the time and the physician was unaware of the detrimental effects on the patient.

In the aftermath of the German Reich, many physicians used the excuse in combination with the defense of superior orders. They argued that the acts they were charged with had been lawful under the law applicable at that time, such as Hitler’s “euthanasia-order”²⁰⁰ which they, at that point in time, believed to be lawful.²⁰¹ The Landgericht Frankfurt extensively discussed the possible defenses for the actions of the personnel and came to the conclusion, regarding the defense based on Hitler’s “euthanasia order”, that “[e]in Gesetz mit so elementar unsittlichem Inhalt ist immer und unter allen Umständen wegen dieses Inhalts rechtsungültig.”²⁰²

¹⁹⁸ Schabas, see note 68, 113. On willfulness as the mental element for medical war crimes, see Dörmann, see note 42, 233, 239.

¹⁹⁹ U.S. Army Court of Military Review, *United States v. William L. Calley*, Opinion and Action on Petition for New Trial, 16 February 1973, *Court-Martial Report* 46 (1973), 1131 (1179).

²⁰⁰ Though dated 1 September 1939, the order is believed to have been signed by Hitler in October 1939. E. Klee, “*Euthanasie*” im NS-Staat, 1983, 100 – 101 <<http://www.ns-archiv.de/medizin/euthanasie/faksimile/>>.

²⁰¹ For example, in the *Frankfurt Euthanasia Trial*, see Rüter-Ehlermann/Rüter, see note 129, 347. And in the *Dresden Euthanasia Trial*, see Rüter, see note 27, 501, 507.

²⁰² This statement is taken from the Judgment in another “euthanasia” case by the Landgericht Frankfurt, Rüter-Ehlermann/ Rüter, see note 129, Lfd. Nr. 014, 254. In the *Frankfurt Euthanasia Trial*, the Court relied on concepts emanating from natural law to explain the inherently unlawful nature of certain laws. Rüter-Ehlermann/ Rüter, see note 129, Lfd. Nr. 017, 348. This, naturally, echoes the Radbruch Formula which entailed that if “der Widerspruch des positiven Gesetzes zur Gerechtigkeit ein so unerträgliches Maß erreicht” the respective law as “unrichtiges Recht” would have to give way to justice. G. Radbruch, “Gesetzliches Unrecht und übergesetzliches Recht”, *Süddeutsche Juristen-Zeitung* 1 (1946), 105 et seq.

A further defense based on mistake of fact was that the medical and scientific experiments had been a substitute for the punishment of convicts.²⁰³ Physicians in the *Doctors' Trial* argued that convicted criminals were spared punishment if they agreed to participate in "medical" experiments²⁰⁴ or that the research subjects were "condemned to death and in any event marked for legal execution."²⁰⁵ The argument was rightfully rejected in the judgment.²⁰⁶ Firstly, the research subjects were not criminals and even if they had been, no person would ever deserve being treated as the research subjects were. Here, the *mens rea* could not be denied and there could not have been an honest and mistaken belief in the lawfulness of such actions. To honestly consider unwarranted medical procedures and experiments, that every sane person would consider inhuman, to be lawful, would never succeed as a mistake of fact defense with regard to medical war crimes.

3. Necessity and Duress

The defenses of necessity and duress are closely connected, and often confused with each other or with other defenses.²⁰⁷ Both rely on the fact that the defendant had "no viable moral choice"²⁰⁸ to act because of compelling overall circumstances (necessity) or compulsion emanating from another person (duress). Duress, requiring the threat of severe and irreparable harm to life and limb, is narrower than necessity.²⁰⁹ In the

²⁰³ This defense relates to the defense of consent, see below.

²⁰⁴ For example as argued by *Ruff, Romberg and Weltz*. *The Doctors' Trial*, Judgment, Vol. II, 273 – 274, see note 23.

²⁰⁵ As argued, among others, by *Gebhardt* to excuse the sulfanilamide experiments, *ibid.*, Vol. II, 224; 227.

²⁰⁶ *Ibid.*, Vol. II, 44 – 49. Nill-Theobald wrongly claims that *Romburg, Ruff* and *Weltz* were acquitted based on the mistaken belief that their research subjects were convicted criminals. (C. Nill-Theobald, "Defence" *bei Kriegsverbrechen am Beispiel Deutschlands und der USA*, 1998, 342). The reason for acquittal was, however, insufficient proof. *The Doctors' Trial*, Judgment, Vol. II, 275 – 276, see note 23. Equally, see the *Milch Trial*, see note 138, 837.

²⁰⁷ A. Eser, "Article 31: Grounds for excluding Criminal Responsibility", in: Triffterer, see note 71, 884, para. 49.

²⁰⁸ Schabas, see note 68, 113.

²⁰⁹ ICTY *Prosecutor v. Dražen Erdemović*, Appeals Chamber Judgment, 7 October 1997, Dissenting Opinion Judge Cassese, para. 50.

current international criminal doctrine, duress as a defense to war crimes is highly contested.²¹⁰ It is agreed that customary law is lacking,²¹¹ but the consequences drawn from this conclusion for the defense of duress, especially cases involving the death of the victim(s), can be quite different.²¹² Pursuant to article 31 (1)(d) Rome Statute necessity and duress, conflated into a single defense, are admissible defenses before the ICC. A successful defense has to meet three criteria: (a.) an imminent threat, (b.) a necessary and reasonable reaction,²¹³ and (c.) a subjective “lesser-evil balancing.”²¹⁴ In order to justify an action, the threat must have been “imminent, real and inevitable.”²¹⁵

A related question is that of a defense based on superior orders combined with duress: a superior order can cause a circumstance under which the perpetrator was unable to make a moral choice. Disobedience to a military order incurs consequences in most military criminal legislations.²¹⁶ For the defense to succeed the stricter duress prerequisites have to be met.²¹⁷

²¹⁰ The ICTY Appeals Chamber did not allow the defense of duress to be used as a complete defense against a charge of murder as a war crime. *Ibid.*, Joint Separate Opinion of Judges McDonald and Vorah, regarded as the majority opinion, para. 75. Critical appraisals of the Judgment can be found in Dissenting Opinions of Judges Stephen (para. 66) and Cassese (para. 18); in literature J.C. Nemitz/ S. Wirth, “Legal Aspects of the Appeals Decision in the Erdemović-case: the Plea of Guilty and Duress in International Humanitarian Law”, *Humanitäres Völkerrecht* 11 (1998), 43 et seq.; S.C. Newman, “Duress as a Defense to War Crimes and Crimes against Humanity - Prosecutor v. Dražen Erdemović”, *Mil. L. Rev.* 166 (2000), 158 et seq. (164).

²¹¹ *Erdemović Appeals Judgment*, Judges Vorah and McDonald, para. 55; Judge Stephen, para. 24 and Judge Cassese, para. 40.

²¹² This ambivalence was demonstrated by the ICTY *Erdemović* Judgment, see note 210. According to Dinstein’s view on the *Erdemović* Judgment, “there is no excuse for the deprivation of the victim’s life only because the accused felt he had to act in order to save his own life.” Y. Dinstein, “Defences”, in: McDonald/ Swaak-Goldman, see note 125, 375.

²¹³ The proportionality requirement was thus eased. Eser, see note 207, 886 – 887, para. 59.

²¹⁴ For a useful analysis, consult K. Ambos, “Other Grounds for excluding Criminal Responsibility”, in: Cassese et al., see note 69, 1035 et seq.

²¹⁵ The *Einsatzgruppen Trial*, 480. *In casu*, the duress defense was tied into the defense of superior orders.

²¹⁶ For example, arts 89, 127, 130 of the Dutch Military Criminal Code (*Wet Militair Strafrecht*) unless the order concerned an “unlawful act” (article

The defense of duress would only lead to an acquittal if the situation that caused a physician to commit a medical war crime fulfilled the criteria above. The physician accused of a medical grave breach would have to prove that his life was threatened by another, he had not voluntarily placed himself in the situation of duress, and had complied to avert (greater) danger. For example, he did not mean to harm the patient but was forced due to compulsion by another person or due to an imminent threat.²¹⁸ Looking at possible medical war crimes, involvement in torture or ill-treatment, unwarranted medical treatments and experiments, and the denial of medical care, it is not very probable that a physician could argue that he could not have refused to carry them out and that his life would have been in immediate danger. These are procedures that require preparation and time – time that a physician could use to re-think his actions or to object. Only when his life was directly threatened in the very moment of treatment, for example by a gun pointed at the physician, would the defense of duress be plausible. The post World War II courts addressing medical war crimes denied the defense of duress because none of the doctors were ever actually punished (for example by internment in a concentration camp or execution) for refusing to participate in the (medical) war crimes.²¹⁹

Several physicians in the post World War II trials reverted to a defense based on the “necessity of the state.” Because Germany was losing many soldiers involved in “a life and death struggle” in the field, the situation called for drastic measures. The effects of certain weapons had to be studied and this required experimentation on human subjects. The individual interests of the “convicted inmates” were evaluated as inferior to the public interest of the nation.²²⁰ International criminal law

131). Equally, for Germany consult article 11 Code for Soldiers (Soldatengesetz), article 144 of the German Military Manual and § 5 Wehrstrafgesetz (Military Law).

²¹⁷ P. Rowe, “Duress as a Defence to War Crimes after Erdemović: A Laboratory for a Permanent Court?”, *Yearbook of International Humanitarian Law* 1 (1998), 210 et seq. (216).

²¹⁸ Schabas, see note 68, 113.

²¹⁹ Concerning the *Frankfurt Auschwitz Trial*, I. Sagel-Grande et al., *Justiz und NS-Verbrechen - Sammlung deutscher Strafurteile wegen Nationalsozialistischer Tötungsverbrechen 1945 - 1966*, 1979, Lfd. Nr. 595, 617 – 618; Concerning the *Frankfurt Euthanasia Trial*, Rüter-Ehlermann/ Rüter, see note 129, 354.

²²⁰ The *Doctors' Trial*, Vol. II, see note 23, 11, 29.

then and now does not recognize the defense of state necessity.²²¹ Necessity is a threat “to life and limb emanating from objective circumstances”²²² which is not the case when the state is threatened.

4. Consent of the Patient

A defense that was used by several physicians in the trials after World War II was that of consent. They argued that because the research subject or patient (or possibly his family) had consented to the “medical” procedures or experiments, the physician should not be found guilty of carrying them out. All courts and tribunals rightfully rejected this defense.²²³ Acceptance of it would have created a dangerous precedent, not to mention the difficulty of establishing whether a person can ever consent to unwarranted medical procedures and at what point consent is to be considered voluntary and informed.²²⁴ This conclusion is in line with article 11 AP I and article 8 (2)(b)(x) Rome Statute. Article 11 (2) AP I determines that the prohibited procedures are still not justified when the person to be subjected to the procedure has consented. This principle which applies to “all medical acts which are not performed in

²²¹ Eser, see note 187, 262. However, the argument is still raised to justify medical involvement in “interrogational torture”, especially when faced with terrorist threats. For example, by M.L. Gross, *Bioethics and Armed Conflict: Moral Dilemmas of Medicine and War*, 2006.

²²² Cassese, see note 40, 243.

²²³ The *Milch Trial*, Judgment, see note 138, 776.

²²⁴ Eser, see note 187, 266 – 267. Here, the international case law and literature on consent to sexual crimes can be helpful. That coercive circumstances negate consent was established in ICTR *Prosecutor v. Jean-Paul Akayesu*, Trial Chamber Judgment of 2 September 1998, para. 688 and included in the Elements of Crimes to article 8 (2)(b)(xxii) Rome Statute according to which genuine consent cannot be given when the act was “committed by force, or by threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power”. See the analysis by Dörmann, see note 42, 325. It could be argued, as is the case with the crime of rape, that “[t]he manifestly coercive circumstances that exist in all armed conflict situations establish a presumption of non-consent and negate the need for the prosecution to establish a lack of consent as an element of the crime.” *Final Report of the Special Rapporteur of the Working Group on Contemporary Forms of Slavery. Systematic Rape, Sexual Slavery and Slavery-like Practices during Armed Conflict*, Doc. E/CN.4/Sub.2/1998/13 of 22 June 1998, para. 25

the interests of the person undergoing the treatment” was expressly included to “prevent any possibility of justification on such grounds.”²²⁵ The same is true for the Rome Statute. The Elements of Crimes concisely state that “[c]onsent is not a defence [sic] to this crime.”²²⁶

Due to the fact that actions prosecuted as medical war crimes are mostly inherently inhuman and manifestly unlawful, valid and justified defenses for medical war crimes are rare. It is imaginable that a physician charged with a medical war crime claims that his actions, though seemingly unlawful, were medically sound and necessary. The physician would have to prove that he considered the procedure ethically, medically and legally sound. This would be a mistake of fact. So far, such a defense has not been raised in the cases discussed and is also highly unlikely: offenses that meet the criteria for medical war crimes consist of behavior that would classify as manifestly unlawful and would probably equally violate medical ethics. In combination with the explicit grant of disobedience in article 16 AP I, it is unlikely that a traditional defense will ever succeed concerning medical war crimes.

VII. Conclusion

Medical war crimes constitute a distinct category besides regular international crimes and even besides war crimes. Never defined as such by courts or tribunals, it can nonetheless be inferred from the sparse case law and certain implementations in international and national criminal legislation that war crimes by physicians committed in a medical context represent a separate category. These crimes, prosecuted as crimes against humanity when committed against physicians’ own people, consist of willful acts by physicians that seriously endanger the medical health or integrity of a person of the adversary who is deprived of his liberty and are committed by physicians when carrying out their medical duties in an armed conflict.

Arguably, such crimes are always in violation of medical ethics and, *vice versa*, a violation of medical ethics may also be an indicator for such a crime. Often, the lack of consent of the person concerned is an indicator as to the lack of justification for a procedure. Nevertheless, consent

²²⁵ And “to prevent pressure being improperly exerted on the persons concerned here to obtain their consent”. Sandoz et al., see note 17, para. 484.

²²⁶ Elements of Crimes, see note 32, 25.

can also never be used as an excuse for an unwarranted medical procedure.

So far, the concept of medical international crimes was used and developed by the courts in the aftermath of World War II when the atrocities committed by physicians in the name of science and medicine, the killing of life “unworthy of living”, or torturous, non-consensual and involuntary experiments, came to light. Hence, physicians were also specifically prosecuted for these heinous crimes. It would have been insightful had the Nuremberg Military Tribunal explicated what makes these crimes different from other crimes because medical crimes are indeed different from other crimes: the accused are held to higher standards than regular people and often ethical codes, such as the ancient *Hippocratic Oath*, or principles, such as the principle of autonomy, play a role. The essential elements of medical crimes should thus be developed to see exactly what role medical ethics play in such crimes, whether courts can more clearly define when a medical procedure is criminal and when it is justified, and what role the consent of the patient can, does or should play.

These are only some of the questions that should be answered and developed to ensure that medical crimes are adequately addressed.

Certainly, this article does not propose to introduce medical war crimes as a separate or new category of crimes. As envisaged by AP I, medical crimes should be prosecuted as war crimes. Yet the article does propose to take the concept and especially the perpetrators seriously. Even though the Rome Statute has regrettably only criminalized unwarranted mutilations and experiments, this was fortunately done for both international and non-international armed conflicts. Still, the Rome Statute could have provided a basis for prosecutions for all unwarranted medical procedures as conducted by physicians on persons deprived of their liberty during an armed conflict. This would then also have provided a basis for the prosecution of physicians involved in the ill-treatment of detainees during interrogations. Some of the acts allegedly committed by physicians would meet the requirements of medical war crimes: namely the medical supervision of ill-treatment²²⁷ or the medical examination to assess fitness for interrogation.²²⁸

²²⁷ The ICRC Report, see note 4, 21 – 23.

²²⁸ This does not include the usual psychological assessment of detained persons by psychiatrists or psychologists.

Other acts would be mere violations of medical ethics, such as the signing of death certificates for false reasons or not reporting violations of international humanitarian law or human rights law.²²⁹

Deplorable as such acts may be, they would not meet the requirements of medical war crimes because they hardly seriously endanger the health or integrity of a person.²³⁰ Surely, those crimes could be prosecuted as regular war crimes under the provisions prohibiting inhuman treatment. However, the conclusion of this article must be that if prosecuted, these crimes should be prosecuted as medical war crimes. Physicians who willfully commit war crimes while carrying out their medical work, wearing their medical attire, and seemingly adhering to their medical ethics, including the principle of beneficence and non-maleficence, should not be granted impunity.

²²⁹ This is alleged by Physicians for Human Rights. Physicians for Human Rights claims that until there is a thorough, impartial investigation into the alleged torture and ill-treatment, “the ethical integrity of medical and other healing professions remains compromised”. See Physicians for Human Rights, *Neglect of Medical Evidence of Torture in Guantánamo Bay: A Case Series*, April 2011, 4.

²³⁰ Although, by not reporting violations, a physician may perpetuate the abuse and thus endanger the health of the persons subjected to such treatment. Whether this would meet the criteria for a medical war crime would depend on the exact circumstances.