

The Case for Decoupling Unlawful Experiments from the Armed Conflict Nexus

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Abstract

Under the Rome Statute for the International Criminal Court unlawful medical experiments are only criminalised as war crimes. They are not explicitly included under the rubric of crimes against humanity. This is despite there being both indictments and convictions at Nuremberg for the offences both as war crimes and as crimes against humanity. Furthermore, in the Rome Statute crimes against humanity no longer require a nexus with an armed conflict whereas war crimes must be linked to an armed conflict. Given that there is no necessary link between unlawful medical experiments and armed conflict, and it is consequently undesirable to presume that no unlawful medical experiments could occur absent an armed conflict, this would appear to be a notable omission that requires remedial consideration especially given the unique and specific offensiveness of imposing harm on any unwilling individual for purposes of a claimed benefit to humanity as a whole.

Keywords

biological experiments – concentration camps – crimes against humanity – medical or scientific experiments – the medical case – war crimes – control council law no. 10 – Rome Statute for the international criminal court.

1 Introduction

This chapter makes the *case* or the argument for decoupling medical experiments – currently qualified under international law as war crimes – from the armed conflict nexus by invoking *the case*, in the sense of *the* authoritative

legal precedent, of the *Medical Trial* also known as the *Doctors Trial*.¹ Two surprises however arose in the course of investigating *why* unlawful experiments now have a nexus to armed conflict, which meant that the investigation's preliminary approach had to be abandoned and completely recast in light of the actual findings. Firstly, the unexpected discovery of the extent of the medical profession's complicity in the crimes of Nazi Germany given their, far from unique, adoption of racial and political eugenics and euthanasia.² This revealed the vagueness of the *Medical Trial's ratio decidendi* in relying on 'consent' to justify established practices in United States penitentiaries that were exposed by the defence and treated dismissively in the judgment.³ Furthermore, while the exemplary role of the International Committee of the Red Cross (ICRC) in the drafting negotiations ensured unlawful medical experiments were codified reflecting the Geneva Conventions, there was no – and still is no – comparable codification under crimes against humanity nor is there an applicable convention as yet.⁴ The second unexpected surprise, which occurred quite by accident, was the discovery that the verb 'try' links medical trials, legal trials and political trials; a link which yields three distinct but related meanings of the word experiment in a way that is reliant on the literary trope of the pun:⁵

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- 1 Nuremberg Military Tribunals Under Control Council Law No. 10, *United States v. Karl Brandt, et al.* (Case No.1) 'The Medical Case' in *Trials of War Criminals Before the Nuremberg Military Tribunals Under Control Council Law No. 10* Volumes I and II Nuremberg, October 1946-April 1949, p. 3.
 - 2 See especially Giorgio Agamben, *Homo Sacer: Sovereign Power and Bare Life* (Stanford University Press, Stanford, 1998), p. 158.
 - 3 See 'The Medical Case', *supra* note 1. Vol. II pp.95–121 and R N Proctor, 'Nazi Doctors, Racial Medicine, and Human Experimentation' in George J. Annas and Michael A. Grodin (eds) *The Nazi Doctors and the Nuremberg Code: Human Rights in Human Experimentation* (Oxford University Press, New York, 1992), pp. 17–31.
 - 4 United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court Rome, 15 June – 17 July 1998, *Official Records Volume II Summary records of the plenary meetings and of the meetings of the Committee of the Whole* http://legal.un.org/icc/rome/proceedings/E/Rome%20Proceedings_v2_e.pdf, p. 225, accessed 26 June 2019. The International Law Commission is currently engaged in drafting a convention on crimes against humanity. It does not mention experiments. See International Law Commission Seventy-first Session Geneva, 29 April-7 June and 8 July-9 August 2019, *Crimes against humanity Texts and titles of the draft preamble, the draft articles and the draft annex provisionally adopted by the Drafting Committee on second reading* (A/CN.4/L.935), p. 2. <http://legal.un.org/docs/?symbol=A/CN.4/L.935> http://legal.un.org/ilc/guide/7_7.shtml, accessed 26 June 2019.
 - 5 In Redfern's words, 'to pun is to treat homonyms as synonyms'. See Walter D. Redfern, *Puns* (Blackwell, Oxford, 1985), p. 17.

1. Medical trials experimenting on prisoners;
2. The concentration camps as a political experiment in totalitarianism; and
3. The Nuremberg trials as an experiment in international criminal justice.

This is thus an instance of a similar looking and/or sounding name or word used to connote different things (a homonym) as if that word contained the same or both senses (as a synonym) of each separate word. Put differently, the medical experiments or trials were scientific experiments, conducted within a political experiment and then subjected to a legal experiment whose legacy is now seriously in jeopardy. The deep irony here is that the common biological humanity of the experimental subjects with the experimenters was necessary for the experiment's usefulness but that commonality was effaced by the racial and political de-humanization of the subjects in order to make the experiments possible and palatable. The victims were biologically human but considered as sub-human through racial and political justifications without which the experiments would not have occurred.

The Rome Statute refers to 'humanity' in only two contexts. The first is in the preamble speaking of 'unimaginable atrocities that deeply shock the conscience of humanity'. The second is always within the context of crimes against humanity in articles 5 and 7. The preambular one referencing 'conscience' is in relation to the breach of standards of behaviour whereas the other two relate to listed criminal acts against human beings which breach the required standards. These may be further distinguished as the quality of being humane versus human beings collectively as victims. Although he was never tried, Dr Sigmund Rascher's (also spelt Roscher) name is everywhere in the *Medical Case* and with good reason. The experiments were his brainchild and he would have been tried had he not already met his death, ironically enough in a concentration camp.⁶ More problematically, those originally proposed medical experiments (which only requested 'that two or three *professional criminals* can be made available for these experiments')⁷ would not be triable under the Rome Statute of the International Criminal Court (ICC) as it currently stands, precisely because they lacked the nexus to an armed conflict. Fortunately in these circumstances however, even the Rome Statute itself in article 10 reminds us that nothing in it 'shall be interpreted as limiting or prejudicing in any way existing or developing rules of international law for purposes other than this Statute' which would include the classification of unlawful medical experiments as a crime against humanity.

6 'The Medical Case', *supra* note 1, Vol. 1 p. 38. 7 Ibid p. 92. Emphasis added.

In plain English, trials and experiments overlap in sense and meaning. Not only does an 'experiment' refer to a 'trial' but it also denotes trying anything, or putting something to proof or a test. Its horizon of meaning includes a tentative procedure, or an unproven method or an uncertain course of action embarked upon to confirm whether (or not) it will suit a specified purpose. It is thus an action, or indeed an operation, that is undertaken strictly to discover something unknown or to test a hypothesis or even to establish or perhaps illustrate something already known.

Likewise, 'trial' refers to an 'experiment' as well as to an action, investigation, method or treatment which is adopted to ascertain a result by means of experiential knowledge. Of course, it also refers to the examination and determination of a cause by a judicial tribunal generally or, with respect to criminal law specifically, to the determination of guilt or innocence (strictly speaking innocence is never in issue in a criminal trial because of the rebuttable presumption of innocence) of an accused person by the court.

The location of human experimentation in the overlapping subject areas of international human rights law (IHRL), international humanitarian law (IHL) and international criminal law (ICL) makes that abundantly clear. The scientific freedom to conduct experiments is enshrined in the right to science and culture under article 15 of the International Covenant on Economic, Social and Cultural Rights (ICESCR). This is because not only do the State Parties to the ICESCR recognize everyone's right 'to benefit from scientific progress and its applications' but they also 'undertake to respect the freedom indispensable for scientific research'. Moreover Article 7 of the International Covenant on Civil and Political Rights (ICCPR) states that 'no one shall be subjected without his free consent to medical or scientific experimentation'.

This chapter focuses on ICL and IHL criminalization and prohibition of aspects of biological, medical or scientific experiments in order to demarcate the extent to which ICL and IHL together impinge on otherwise unbridled scientific freedom. This chapter argues that although unlawful experiments are linked to armed conflict in the Rome Statute, that same link is both unnecessary and undesirable. This argument finds some support in the prohibition's antecedents themselves: in *The Medical Case*, unlawful medical experiments were qualified as war crimes *and* as crimes against humanity.⁸ The first part of this chapter explores the link as set out in the Rome Statute's war crimes provisions while the second part demonstrates the lack of necessity and indeed undesirability of this link by examining the development of the prohibition

⁸ *The Medical Case*, *supra* note 1, Vol. II p 174.

elsewhere in ICL. The conclusion recommends changes to the relevant law in light of these findings.

2 The link between Unlawful Medical Experiments and Armed Conflict in the Rome Statute

There is no mention of experiments in the International Law Commission's Draft Code of Crimes against the Peace and Security, a key precursor to the Rome Statute.⁹ Neither is there a single mention of 'experiments' in the official records of the summaries of both the plenary meetings as well as the committee meetings of the United Nations diplomatic conference which led to the establishment of the ICC.¹⁰ The documentary history of experiments in those negotiations is limited to the Draft Statute itself and to texts proposed by participants including the ICRC and the United States.¹¹

Experiments are only mentioned thrice in the Rome Statute, once as 'biological experiments' and twice as 'medical or scientific experiments'. Moreover, each of these occasions is within the rubric of war crimes under Article 8. Consequently, these references are always and only in relation to IHL's conceptualizations, concerns, structure, idiom and approaches to such an extent that experiments do not feature elsewhere nor in any other context in the statute. Even their division into three types remains very faithful to IHL's disciplinary demarcation between first the law applicable to *international* armed conflicts – further divided into the so-called 'Geneva' law governing 'the protection of the victims of war and 'Hague' law governing the conduct of hostilities in war – and second the law applicable to *non-international*

9 International Law Commission, *Draft Code of Crimes against the Peace and Security of Mankind with Commentaries 1996*, Text adopted by the International Law Commission at its forty-eighth session, in 1996, and submitted to the General Assembly as a part of the Commission's report covering the work of that session (at para. 50). The report, which also contains commentaries on the draft articles, appears in *Yearbook of the International Law Commission*, 1996, vol. 11, Part Two. It solely covers war crimes, see pp. 54–55.

10 United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court Rome, 15 June – 17 July 1998, *Official Records Volume II Summary records of the plenary meetings and of the meetings of the Committee of the Whole*. See http://legal.un.org/icc/rome/proceedings/E/Rome%20Proceedings_v2_e.pdf, accessed 26 June 2019.

11 United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court Rome, 15 June – 17 July 1998 *Official Records Volume III Reports and other documents*, p. 223. See http://legal.un.org/icc/rome/proceedings/E/Rome%20Proceedings_v3_e.pdf, accessed 26 June 2019.

AQ2: The closing single quotation mark is missing in the sentence "the protection of the victims of..."; Please provide the same.

armed conflicts. That taxonomy is neither dependent on the nature of the experiments nor indeed has anything to do with the crime as such but only with the experiment's classification in relation to whichever conflict it may be connected to.

AQ3 Antonio Cassese notes however that: '[n]ot all crimes committed during an armed conflict constitute war crimes. It is widely held in case law and legal literature that, in order to qualify as a war crime, criminal conduct must be 'closely related to the hostilities'.¹² Furthermore, '[t]his relationship between armed conflict and conduct, termed 'nexus' (or 'link'), serves to distinguish between war crimes, on the one side, and 'ordinary' crimes committed during – but unrelated to – an armed conflict, on the other'.¹³ Guénaël Mettraux is of the view that: the nexus requirement serves to first distinguish 'war crimes from purely domestic crimes' and second 'to exclude from the realm of the laws of war purely random or isolated criminal occurrences which do not constitute war crimes'.¹⁴ Harmen van der Wilt also agrees that '[i]n order to qualify as a war crime, an offence must have a nexus with an armed conflict. This contextual element serves to distinguish war crimes from both ordinary crimes and other international crimes such as crimes against humanity and genocide'.¹⁵ The weight of scholarly opinion thus does not support having a link between crimes against humanity and armed conflict. Neither does the law. Rather, the core purpose of the nexus is solely connected to war crimes per se in terms of distinguishing them from domestic crimes with no armed conflict nexus which are consequently to be dealt with under domestic jurisdiction as opposed to distinguishing war crimes from crimes against humanity as such. Restricting prosecutions for unlawful medical experiments only to wartime contexts and completely excluding acts in peacetime is thus untenable and unsupported both in doctrine and in theory.

Following IHL taxonomy, in the Rome Statute, the first two mentions of experiments are related to international armed conflicts and the third to non-international armed conflicts. To start with the first mention, Article 8 (2) (a)

12 Antonio Cassese, 'The Nexus Requirement for War crimes', 10 (5) *Journal of International Criminal Justice* (2012) 1395–1417.

13 *Ibid.*

14 Guénaël Mettraux, 'Nexus with Armed Conflict', in Antonio Cassese et al. (eds), *Oxford Companion to International Criminal Justice* (Oxford University Press, Oxford, 2009), p. 435.

15 Harmen van der Wilt, 'War Crimes and the Requirement of a Nexus with an Armed Conflict', 10 (5) *Journal of International Criminal Justice* (2012) 1113–1128.

(ii) of the Rome Statute codifies 'biological experiments' as criminal and explicitly includes them as a subset of 'torture or inhuman treatment', similarly to how they were already prohibited under the four Geneva Conventions of 1949:

2. For the purpose of this Statute, 'war crimes' means:

(a) Grave breaches of the Geneva Conventions of 12 August 1949, namely, any of the following acts against persons or property protected under the provisions of the relevant Geneva Convention:

...

(ii) Torture or inhuman treatment, including *biological experiments*,¹⁶

The language used here is virtually identical to an earlier similar provision, namely, Article 2 of the Statute of the International Criminal Tribunal for the former Yugoslavia (ICTY). It needs to be further noted here that in the Rome Statute, crimes against humanity include torture separately under Article 7 (1) (f) as well as inhumane treatment under Article 7 (1) (k) but not experiments.

The second mention of experiments is in Article 8 (2) (b) (x) of the Rome Statute which codifies 'medical or scientific experiments' as criminal under 'other ['other' here means other than under the four Geneva Conventions of 1949] serious violations of the laws and customs applicable in international armed conflict':

(b) Other serious violations of the laws and customs applicable in international armed conflict, within the established framework of international law, namely, any of the following acts:

(x) Subjecting persons who are in the power of an adverse party to physical mutilation or to *medical or scientific experiments* of any kind which are neither justified by the medical, dental or hospital treatment of the person concerned nor carried out in his or her interest, and which cause death to or seriously endanger the health of such person or persons;¹⁷

The language used here is reminiscent of Article 3 of the ICTY Statute, although the ICTY Statute did not actually reference experiments probably because the

16 Emphasis added.

17 Emphasis added.

drafters of the Statute did not view that as particularly relevant to the Balkan conflicts of the 1990s.

The third mention – and the only one to do with non-international armed conflicts i.e. ‘armed conflicts not of an international character’ – is in Article 8 (2) (e) (xi) of the Rome Statute which codifies ‘medical or scientific experiments’ as criminal ‘within the established framework of international law’:

(e) Other serious violations of the laws and customs applicable in armed conflicts not of an international character, within the established framework of international law, namely, any of the following acts:

...

(xi) Subjecting persons who are in the power of another party to the conflict to physical mutilation or to *medical or scientific experiments* of any kind which are neither justified by the medical, dental or hospital treatment of the person concerned nor carried out in his or her interest, and which cause death to or seriously endanger the health of such person or persons;¹⁸

Consequently, what distinguishes these ‘experiments’ in the Rome Statute is not so much the nature or the forms of conduct that are criminalized but rather their precise relationship to an armed conflict. As a consequence, their current criminalization is strongly influenced by where they were previously codified in IHL. Article 8 (2) (a) (ii) utilizes the formulation ‘biological experiments’¹⁹ while Article 8 (2) (b) (x) refers to ‘medical or scientific experiments’.²⁰ They both rely on classic international armed conflict (that is between States), with the latter focussing on the protection of victims of war, the so-called ‘Geneva law’, whereas the former focusses on the conduct of hostilities – the so-called Hague Law – as codified in the First Additional Protocol to the Geneva Conventions (P I).²¹

18 Emphasis added.

19 All of these violations are mentioned as ‘grave breaches’ in the: *Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field of 12 August 1949* (GC I), Arts 12 and 50; *Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea of 12 August 1949* (GC II), Arts 12 and 51; *Geneva Convention relative to the Treatment of Prisoners of War of 12 August 1949* (GC III), Art.130; *Geneva Convention relative to the Protection of Civilian Persons in time of War of 12 August 1949* (GC IV), Art.147.

20 GC III, Art.13 and GC IV, Art.32. None of these violations are mentioned as ‘grave breaches’.

21 *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts of 8 June 1977* (P I), Art. 11 (2) (b).

Article 8 (2) (e) (xi) also uses the formulation ‘medical or scientific experiments’ although not with respect to classic international armed conflict but rather in relation to ‘non-international armed conflicts’. It references the Second Additional Protocol to the Geneva Conventions (P II) in its supplementation of GC I, II, III and IV and P I, all of which deal with international armed conflicts. However, because ‘experiments’ appears nowhere in P II, the Rome Statute here goes beyond the IHL treaties by criminalizing unlawful experiments in non-international armed conflicts.²² There is therefore no better explanation for ICL distinguishing between ‘biological experiments’ and ‘medical or scientific experiments’ other than that is what IHL does.

The First and Second Geneva Conventions prohibit ‘biological experiments’,²³ while the Third and Fourth Conventions prohibit ‘medical or scientific experiments’.²⁴ According to the ICRC’s *Commentary on the Third Geneva Convention on Prisoners of War*, the Convention’s authors wanted to prohibit medical or scientific experiments with reference ‘only to experiments not justified by the medical treatment of the prisoner concerned’.²⁵ It was not meant to ‘prevent doctors from using treatment for medical reasons with the sole object of improving the patient’s condition’ and therefore left it ‘permissible to use new medicaments and methods invented by science, provided that they are used only for therapeutic purposes’.²⁶ The basic intention was to ensure that ‘prisoners must not in any circumstances be used as “guinea-pigs” for medical or scientific experiments’.²⁷ What is more ‘[t]he intention was to abolish for ever the criminal practices inflicted on thousands of persons during the Second World War’(wwII). As we shall see below however, the trials following wwII punished experiments *both* as war crimes and as crimes against humanity.

According to the ICRC’s *Commentary on the Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field* ‘It was intended, by prohibiting the subjection of wounded and sick to biological experiments, to put an end for all time to criminal practices of which certain

22 *Protocol Additional to The Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts, of 8 June 1977* (P II), Art. 1.

23 GC I and II, Art. 12.

24 GC III, Art. 13 and GC IV, Art. 32.

25 *Commentary: III Geneva Convention relative to the Treatment of Prisoners of War*. Geneva, 12 August 1949 (1960), Article 13, <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Comment.xsp?action=openDocument&documentId=E34CAB7D3C60B986C12563CD00425C11>, accessed 26 June 2019.

26 *Ibid.*

27 *Ibid.*

prisoners have been the victims, and also to prevent wounded or sick in captivity from being used as “guinea-pigs” for medical experiments.’²⁸

They further added that:

the provision refers only to “biological experiments”. Its effect is not to prevent the doctors in charge of wounded and sick from trying new therapeutic methods which are justified on medical grounds and are dictated solely by a desire to improve the patient’s condition. Doctors must be free to resort to the new remedies which science offers, provided always that such remedies have first been satisfactorily proved to be innocuous and that they are administered for purely therapeutic purposes.²⁹

The reference to ‘[d]octors’ and by direct implication scientists, is as we shall see below, telling of the nature of the crime itself as is the contention that ‘[t]his interpretation is in complete accordance with the corresponding provisions of the three other Geneva Conventions – in particular Article 13 of the Third Convention’.³⁰

The *Commentary* points out that:

Neither the Geneva Conventions nor the Additional Protocols define the concept of ‘biological experiment’. However, in its ordinary meaning, the term ‘biological experiment’ refers to conduct the primary purpose of which is to study the effects, at that time unknown, of a product or a situation (e.g. extreme cold or altitude) on the human body.³¹

The *Commentary* adds that ‘wounded or sick or detained persons cannot validly give consent to a particular biological experiment’ although ‘[t]he prohibition

28 *Commentary: Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*. Geneva, 12 August 1949 (1952), Article 12, <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Comment.xsp?action=openDocument&documentId=0117642452D3955AC12563CD004207EE>, accessed 26 June 2019.

29 *Ibid.*, Article 12, <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Comment.xsp?key=hors%20de%20combat&action=openDocument&documentId=0117642452D3955AC12563CD004207EE>, accessed 10 September 2019.

30 *Ibid.*

31 *Commentary: Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea*. Geneva, 12 August 1949. Geneva, 12 August 1949 (2017), Article 12, <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Comment.xsp?action=openDocument&documentId=8BE9FEA9E6F5A570C1258115003BDB83>, accessed 1 July 2019.

of biological experiments should not, however, be understood as outlawing therapeutic or clinical research' neither 'does it prevent doctors in charge of wounded and sick persons from trying new therapeutic methods which are justified on medical grounds and are dictated solely by a desire to improve a patient's condition'.³² Crucially though, '[p]atients are entitled to freely consent to drug trials aimed at improving their health, provided they are offered in the same manner and under the same conditions as to regular citizens' and 'a biological experiment is outlawed even if it does not cause death or seriously endanger the health of the victim'.³³

The *Commentary* also states that:

The Geneva Conventions do not contain a definition of biological experiments. Article 12 of the First and Second Conventions prohibits 'biological experiments', whereas Article 13 of the Third Convention and Article 32 of the Fourth Convention prohibit 'medical or scientific experiments'. The common provisions enumerating grave breaches in the four Conventions list 'biological experiments'. It is understood, however, that there is considerable overlap between these concepts'.³⁴

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According to the most recent 2016 *Commentary* on GC I '[t]he Diplomatic Conference explicitly prohibited biological experiments 'with a view to preventing a recurrence of the cruel experiments which had been made in concentration camps during the last war''.³⁵ The *Commentary* cites the *Medical Case* in support. That 'judgment outlined 10 basic principles to be observed while performing medical or biological experiments, in order to satisfy moral, ethical and legal principles'³⁶ (although the court solely relied on legal

32 *Ibid.*

33 *Ibid.*

34 *Commentary: Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*. Geneva, 12 August 1949 (2016), Article 50, <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Comment.xsp?action=openDocument&documentId=21B052420B219A72C1257F7D00587FC3>, accessed 26 June 2019.

35 *Ibid.*

36 These principles were: 1. The voluntary consent of the human subject is absolutely essential. 2. The experiment should be such as to yield fruitful results for the good of society, unprocurable by other methods or means of study, and not random and unnecessary in nature. 3. The experiment should be so designed and based on the results of animal experimentation and a knowledge of the natural history of the disease or other problem under study that the anticipated results will justify the performance of the experiment. 4. The experiment should be so conducted as to avoid all unnecessary physical and mental suffering and injury. 5. No experiment should be conducted where there is an

principles when it came to the assessment of guilt in effect discounting moral and ethical as well as, it must be said, scientific principles of which more below). The *Commentary* helpfully traverses the *Medical* trial and State practice,³⁷ which it supplemented with the ICC Elements of Crimes and notes that [t]he grave breach of biological experiments requires the cumulative presence

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1. The perpetrator subjected one or more protected persons to a particular biological experiment;
2. The experiment seriously endangered the physical or mental health or integrity of such persons; and
3. The experiment was neither justified by the medical, dental or hospital treatment of, nor carried out in, such person's or persons' interest.³⁸

priori reason to believe that death or disabling injury will occur; except, perhaps, in those experiments where the experimental physicians also serve as subjects. 6. The degree of risk to be taken should never exceed that determined by the humanitarian importance of the problem to be solved by the experiment. 7. Proper preparations should be made and adequate facilities provided to protect the experimental subject against even remote possibilities of injury, disability, or death. 8. The experiment should be conducted only by scientifically qualified persons. The highest degree of skill and care should be required through all stages of the experiment of those who conduct or engage in the experiment. 9. During the course of the experiment the human subject should be at liberty to bring the experiment to an end if he has reached the physical or mental state where continuation of the experiment seems to him to be impossible. 10. During the course of the experiment the scientist in charge must be prepared to terminate the experiment at any stage, if he has probably cause to believe, in the exercise of the good faith, superior skill and careful judgment required of him that a continuation of the experiment is likely to result in injury, disability, or death to the experimental subject. *'The Medical Case'*, *supra* note 1, Vol. 11 pp. 181–182. In a recent analysis of these principles Xavier Aurey, 'The Nuremberg Doctors' Trial: Looking Back 70 Years later', 17 (6) p.1054 *International Criminal Law Review* (2017) makes two telling and related points, first that the court moved away from delineating between either true or false science which as a consequence avoided addressing the more or less unavoidable exploitation of an individual for the good of others in the context of clinical trials and human experimentation.

37 See especially the commentary on 'Rule 92 Mutilation and Medical, Scientific or Biological Experiments' in Henckaerts, Jean-Marie and Doswald-Beck, Louise, *Customary International Humanitarian Law, Volume I: Rules*, ICRC/Cambridge University Press, 2005, available at https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule92 accessed 1 July 2019.

38 *Commentary: Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*. Geneva, 12 August 1949 (2016), Article 50, <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Comment.xsp?action=openDocument&documentId=21B052420B219A72C1257F7D00587FC3>, accessed 26 June 2019.

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The jurisdiction of the ICC over unlawful experiments is therefore determined by the origin of the prohibitions in IHL. This aspect is a reversal, as we shall see below, of the Nuremberg trial processes (where the origin of the offence was driven by the jurisdiction which that Tribunal could exercise). This reversal of the relationship between jurisdiction over the crime driving the origin of the crime (in Nuremberg) to the origin of the crime driving the jurisdiction of the crime (in the Rome Statute) is a key finding of the present inquiry. Given that the *Commentary* cites the *Medical Case*, that decision merits closer attention and scrutiny.

3 The Lack of Necessity and Indeed Undesirability of Linking Unlawful Medical Experiments to Armed Conflict

Neither the Nuremberg IMT Charter nor the Tokyo IMTFE Charter explicitly mentioned unlawful medical experiments.³⁹ The first two trials of war criminals before the IMT Under Control Council Law No. 10 however provided two cases that addressed unlawful experiments as crimes. *United States v. Karl Brandt et al.* (Case No. 1)⁴⁰ known as the *Medical Case*, and *United States v. Erhard Milch* (Case No. 2), known as the *Milch case*.⁴¹ There were no convictions for unlawful experiments in the *Milch case* however and therefore this analysis focusses on the *Medical Case*. That trial became known as such 'because 20 of the 23 defendants were doctors, and the charges related principally to medical experimentation on human beings'.⁴² The three other accused had either administrative or managerial roles over the doctors, which was the basis upon which they were charged and convicted.⁴³

With regard to the origin of these prohibitions as being founded on the sort of jurisdiction that the court could employ, the court noted that counts two and three of the indictment – war crimes and crimes against humanity respectively – were:

39 *Charter of the International Military Tribunal – Annex to the Agreement for the prosecution and punishment of the major war criminals of the European Axis* (1945) (IMT Charter) and the *International Military Tribunal for the Far East Charter* (1945) (IMTFE Charter).

40 *'The Medical Case'*, *supra* note 1.

41 Nuremberg Military Tribunals Under Control Council Law No. 10, *United States v. Erhard Milch, et al.* (Case No. 1) *'The Milch Case'* in *Trials of War Criminals Before the Nuremberg Military Tribunals Under Control Council Law No. 10* Volume II Nuremberg, October 1946–April 1949, pp. 353–896.

42 *'The Medical Case'*, *supra* note 1, Vol. 1, pp. IV and 8–10.

43 *Ibid.*

identical in content, except for the fact that in count two the acts which are made the basis for the charges are alleged to have been committed on “civilians and members of the armed forces [of nations] then at war with the German Reich ... in the exercise of belligerent control”, whereas in count three the criminal acts are alleged to have been committed against “German civilians and nationals of other countries”.⁴⁴

Although they did bear that distinction in mind, the judges otherwise treated both counts as one and discussed them together. With regard to Brandt specifically, the judges found that “[t]o the extent that these criminal acts did not constitute war crimes they constituted crimes against humanity”.⁴⁵

In the course of the trial, 15 different types of medical experiments were examined: High-altitude Experiments, Freezing Experiments, Malaria Experiments, Lost (Mustard) Gas Experiments, Sulfanilamide Experiments, Bone, Muscle and Nerve Regeneration, and Bone Transplantation Experiments, Sea-water Experiments, Epidemic Jaundice Experiments, Typhus and Other Vaccine Experiments, Experiments with Poison, Incendiary Bomb Experiments, Phlegmon Experiments, Polygal Experiments, Gas Oedema (Phenol) Experiments and Experiments for Mass Sterilization.⁴⁶ 16 of the defendants, including all the non-doctor administrators, were convicted for their role in the unlawful experiments.⁴⁷

In titling the unlawful experiments as ‘crimes committed in the guise of scientific research’ the opening statement of the US Prosecutor Brigadier General Telford Taylor sought to heavily discount the scientific basis or value of those experiments as well as to contextualise their deliberate cruelty to people ‘regarded as inferior’ although not even he could say they had absolutely no scientific value.⁴⁸

Mankind has not heretofore felt the need of a word to denominate the science of how to kill prisoners most rapidly and subjugated people in large numbers. This case and these defendants have created this gruesome question for the lexicographer. For the moment we will christen this macabre science “thanatology,” the science of producing death. The thanatological knowledge, derived in part from these experiments,

44 *The Medical Case*, *supra* note 1, Vol. 11, p. 174.

45 *Ibid.*, p 198.

46 *Ibid.*, Vol 1., pp. 11–16.

47 *Ibid.*, Vol. 11, pp. 189–300.

48 *Ibid.*, Vol. 1 pp. 37–38.

supplied the techniques for genocide, a policy of the Third Reich, exemplified in the “euthanasia” program and in the wide-spread slaughter of Jews, gypsies, Poles, and Russians. This policy of mass extermination could not have been so effectively carried out without the active participation of German medical scientists.

Moreover, the *Oxford English Dictionary* gives an alternative etymology of thanatology as ‘the scientific study of death’ appearing as far back as in 1842 in an American Medical Lexicon.

During the case, not only did the defence compare the experiments to experiments carried out by the allies but the defence argued that the medical experiments alleged to be criminal were useful in furthering medical science and in some instances ‘there was no other alternative for the development of medical science except to conduct experiments on human beings’.⁴⁹ The prosecution countered ‘that voluntary participation by the subject of experimentation was a prerequisite of legal experiments’, ‘that the experiments turned out to be entirely useless for medical science and human progress, and that in some cases it was doubtful if considerations of medical science played any controlling role in the decision to conduct the experiments’.⁵⁰

The Tribunal made telling and key observations in a key extract from the judgment which distinguished what may be called the ‘legal gaze’ focussed on the individual in terms of protection and repression, from the scientific gaze focussed on discovery of new knowledge and from the medical gaze focussed on therapeutic approaches. In so doing, the Tribunal gave forth to a bio-medico-legal gaze. Without that bio-medico-legal gaze the legal profession would have little purchase on human experimentation absent a trial. The utilization of ‘consent’ in effect made the abstract liberal *cum* autonomous subject the only lawful experimental subject and neatly distinguished medical experiments in a democracy from Nazi practices, even if both cases involved subjects whose freedom had already been severely curtailed. In the extracts from the *Medical Case* below, the specific teleological-consequentialist arguments raised by the defence which were in the form of utilitarian defences were considered and rejected by a judicially imposed deontological approach, which the Tribunal simply assumed had universal agreement. This assumption was readily but unselfconsciously made both although and because it assigned no valence to the experimental scientific value of the accused’s’ acts ‘for the good

49 *Ibid.*, Vol. 11, p. 61.

50 *Ibid.*

of society' based on biological similarity between the subjects and those who would benefit one way or the other from the experiments at all.⁵¹ Instead, it focussed on the legally assumed inherent worth of each individual subject as a human being 'the self-contained, individual, responsible subject'.⁵²

The Tribunal began by outlining what would be 'permissible medical experiments'.⁵³ The Tribunal found that '[t]he great weight of the evidence before us is to the effect that certain types of medical experiments on human beings, when kept within reasonably well-defined bounds, conform to the ethics of the medical profession generally'.⁵⁴ The Tribunal noted the Defence's act-utilitarian argument that '[t]he protagonists of the practice of human experimentation justify their views on the basis that such experiments yield results for the good of society that are unprocurable by other methods or means of study'.⁵⁵ They opposed that approach by the Defence with the imperative 'that certain basic principles must be observed in order to satisfy moral, ethical and legal concepts'.⁵⁶ The first and by far most fully articulated of these was that '[t]he voluntary consent of the human subject is absolutely essential'.⁵⁷ This imposed a 'personal' non-delegable 'duty and responsibility for ascertaining the quality of the consent' resting 'upon each individual who initiates, directs or engages in the experiment'.⁵⁸ Not all but only 'unnecessary physical and mental suffering and injury' were prohibited.⁵⁹ Moreover, the Tribunal only concerned itself 'with those requirements which are purely legal in nature- or which at least are so clearly related to matters legal that they assist us in determining criminal culpability and punishment'.⁶⁰ In so doing it found that:

51 Michael Davis describes this as 'when everyone's interests count equally' (in the present context all human beings count as a subset of humanity as a whole). See Michael Davis, 'Should International Law Permit State-Sanctioned Assassination of Non-State Enemies?', 1 (27) *Public Affairs Quarterly*, (2013) 111–136, p. 127. William Frankena outlines various versions of utilitarianism including, among others, act-utilitarianism and rule-utilitarianism. See William K. Frankena, *Ethics* (2nd ed., Prentice Hall, Upper Saddle River, NJ 1973), pp 34–43.

52 Richard Joyce, 'Anarchist international law(yers)? Mapping power and responsibility in international law', 5 (3) *London Review of International Law* (2017) 397–424, p. 400.

53 'The Medical Case', *supra* note 1, Vol. 11, p. 181.

54 *Ibid.*

55 *Ibid.*

56 *Ibid.*

57 *Ibid.*

58 *Ibid.*, p. 182.

59 *Ibid.*

60 *Ibid.*, p. 183.

Obviously all of these experiments involving brutalities, tortures, disabling injury, and death were performed in complete disregard of international conventions, the laws and customs of war, the general principles of criminal law as derived from the criminal laws of all civilized nations, and Control Council Law No. 10. Manifestly human experiments under such conditions are contrary to “the principles of the law of nations as they result from the usages established among civilized peoples, from the laws of humanity, and from the dictates of public conscience.”⁶¹

Control Council Law No. 10⁶² was critical in bringing to bear its specific gaze to these scientific experiments and in that way pass political judgment over them. The Italian philosopher Giorgio Agamben addresses the medical experimentation in concentration and extermination camps in at least two places and makes the point that not only did medical experiments occur in those camps but that those camps in themselves were in all probability a political experiment.⁶³ Although the ICRC’s 2016 *Commentary* notes the relevance of the *International Ethical Guidelines For Epidemiological Studies*,⁶⁴ and the *International Ethical Guidelines for Biomedical Research Involving Human Subjects*,⁶⁵ none of these instruments mention criminal culpability at all. Not even the *World Medical Association Declaration of Helsinki Ethical Principles for Medical Research Involving Human Subjects* does.⁶⁶ This is why leaving out unlawful experiments absent a state of conflict is both unnecessary and undesirable in light of the *Medical Case*. Unnecessary because even though crimes against

61 ‘*The Medical Case*’, *supra* note 1, Vol. 11, p. 183.

62 Control Council Law No. 10, Punishment of Persons Guilty of War Crimes, Crimes Against Peace and Against Humanity, 20 December 1945, *Official Gazette of the Control Council for Germany*, No. 3, Berlin, 31 January 1946.

63 See especially Giorgio Agamben, *The Open: Man and Animal* (Stanford University Press, Stanford, 2003), p. 22 and *Homo Sacer: Sovereign Power and Bare Life* (Stanford University Press, Stanford, 1998), pp. 154 – 159.

64 Council for International Organizations of Medical Sciences (CIOMS) in collaboration with the World Health Organization (WHO), *International Ethical Guidelines for Epidemiological Studies* (2009), https://cioms.ch/wp-content/uploads/2017/01/International_Ethical_Guidelines_LR.pdf, accessed 26 June 2019.

65 Council for International Organizations of Medical Sciences (CIOMS) in collaboration with the World Health Organization (WHO), *International Ethical Guidelines for Health-related Research Involving Humans* (2016), <https://cioms.ch/wp-content/uploads/2017/01/WEB-CIOMS-EthicalGuidelines.pdf>, accessed 26 June 2019.

66 World Medical Association, *World Medical Association Declaration of Helsinki Ethical Principles for Medical Research Involving Human Subjects*, (1964), <https://www.who.int/bulletin/archives/79%284%29373.pdf>, accessed 26 June 2019.

humanity were linked to armed conflict in the law of Nuremberg for reasons of the exercise of jurisdiction, they are not subject to the same stipulation in the Rome Statute. Undesirable because, human experimentation occurring in peacetime would be completely outside the purview of the ICC except insofar as those alleged acts can be classified elsewhere as a crime against humanity. In a sense this is the result of the *Medical Trial's* failure as identified by Xavier Aurey 'to address one of the most difficult issues in clinical trials and human experimentation: the almost unavoidable context of exploitation of any situation where a person is used as an object for the good of others'.⁶⁷

4 Conclusion

This chapter began by observing the notable and unnecessary omission of unlawful medical experiments from crimes against humanity in the Rome Statute despite there being both indictments and convictions at Nuremberg for the same offence both as a war crime and as a crime against humanity. It then went on to demonstrate that this omission forged a novel link (which is neither supported by the weight of academic opinion nor the law) between unlawful medical experiments and armed conflict. This is undesirable because even if acts which constitute unlawful human experimentation could possibly fall under torture or other inhumane acts such an inclusion would not give due weight and consideration to the specific nature of the offence: namely the treating of humans as objects for the potential future good of others. This omission *should*, in the opinion of the author, be most readily remedied either in the Proposed Convention on the Prevention and Punishment of Crimes against Humanity or by an amendment of the Rome Statute, or preferably both.⁶⁸ Otherwise the *Medical Case*, which was without precedent, would no longer retain precedential value and would have to be judged a failed legal experiment, which would be a tragic lost opportunity to prevent and redress future tragedies.

67 Aurey, *supra* note 36, p. 1054.

68 See *supra* note 4.